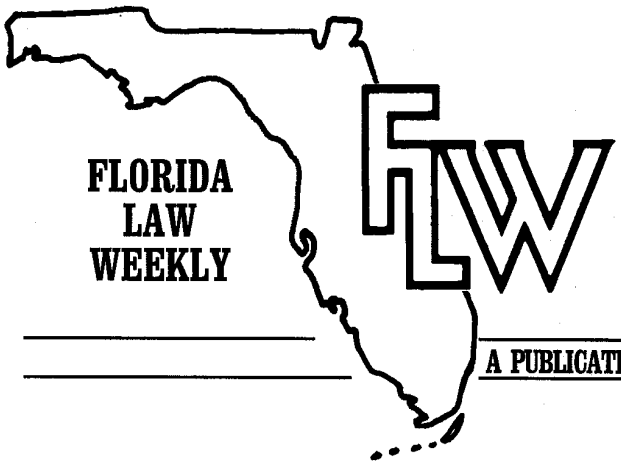
Volume 29, Number 5, September 30, 2021



FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 267-372

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.

- **CRIMINAL LAW—CARRYING CONCEALED FIREARM WITHOUT A PERMIT—EXCEPTIONS. Carrying a concealed weapon without a permit in the yard outside a multi-family dwelling is not encompassed by the statute making the unlicensed carrying of a concealed firearm in a person's yard lawful.** *STATE v. WOODARD. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed June 10, 2021. Full Text at Circuit Courts-Original Section, page 302a.*

- **ATTORNEY'S FEES—OFFER OF JUDGMENT—AMOUNT OF AWARD. A circuit court judge determined that, while a court applying the offer of judgment statute does not have the discretion to award no fees, the court does have broad discretion in determining the amount of the fee award. In the case at issue, an Indian Tribe sought approximately $900,000 in fees and costs after an appellate court held that the plaintiffs' claims against the Tribe for malicious prosecution were completely barred on sovereign immunity grounds. The circuit court reduced the award to $30,000, finding that it would be a miscarriage of justice to reward the Tribe for using the courts to bring a malicious prosecution and thereafter hiding behind sovereign immunity when sued for the damage caused by that conduct.** *LEWIS TEIN, P.L. v. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed June 17, 2021. Full Text at Circuit Courts-Original Section, page 305a.*

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CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
MISCELLANEOUS	Other proceedings.

Subject Matter Index and Tables

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

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

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Bold denotes decision by circuit court in its appellate capacity.

INSURANCE (continued)

INSURANCE (continued)

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TABLE OF STATUTES CONSTRUED

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

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REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

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Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Hardship license—Cancellation—At record review hearing challenging cancellation of hardship license, burden was on licensee to present evidence to show cancellation was unjustified, and Department of Highway Safety and Motor Vehicles was not required to place any documents into evidence—Hearing officer did not err in affirming cancellation of licensee's hardship license for failure to follow case management plan of special supervision services program where licensee did not offer or identify any relevant documents for hearing officer's review, and SSSP documents introduced by hearing officer required affirmance of cancellation

JIMMY BRISCO DULLS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Clay County. Case No. 10-2019-CA-1077, Division F. July 10, 2020. Amended Petition for Writ of Certiorari arising from the decision of the State of Florida Department of Highway Safety and Motor Vehicles sustaining an administrative cancelation of Petitioner's Florida driver's license. Counsel: David M. Robbins and Susan Z. Cohen, Epstein & Robbins, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

OPINION

(STEVEN B. WHITTINGTON, J.) Petitioner, Jimmy Brisco Dulls, ("Petitioner") commenced this action by timely filing a petition on September 23, 2019, seeking certiorari review of a decision by Respondent, State of Florida, Department of Highway Safety and Motor Vehicles ("Department"), which had canceled Petitioner's driver's license on August 16, 2019, with an effective date of September 5, 2019. Petitioner amended his petition on March 6, 2020, following entry of a final order (on January 27, 2020) from the Department affirming the cancellation. This Court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution, and Rule 9.030(c)(3), Fla. R. App. P.

I. Factual Background and Procedural History

Petitioner's driver's license is permanently revoked after he accumulated too many DUI convictions. Despite this revocation, Petitioner was permitted to drive for business purposes only provided he enroll and participate in the Special Supervision Services Program ("SSSP"). The Department has the authority to issue a business-purpose license to a person whose license has been permanently revoked pursuant to Section 322.271(5), Fla. Stat. Petitioner participated in the SSSP operated by the Northeast Florida Safety Council ("NEFSC"). The rules governing the operation of SSSP's were promulgated by the Department and are located in the Florida Administrative Code.

On August 8, 2019, Petitioner was removed from the SSSP for failing to follow the case management plan. As required by statute, the NEFSC notified the Department of Petitioner's removal from the program and the Department canceled Petitioner's license, as it is required to do by statute: "If the petitioner does not comply with the required supervision, the program shall report the failure to the department, and the department shall cancel such person's driving privilege." Section 322.271 (5)(c), Fla. Stat. Petitioner filed his initial petition for writ of certiorari with the Court shortly after receiving notice of the cancellation.

Rule 15A-10.031, F.A.C., sets out the appeal process for a driver whose license has been canceled due to removal from an SSSP. Consistent with that rule, Petitioner appealed the NEFSC's decision to a second SSSP, the North Central Florida Safety Council ("NCFSC"). After reviewing the NEFSC's records, the NCFSC notified Petitioner by letter, dated November 1, 2019, that his appeal was denied. The NCFSC letter further advised Petitioner he had a right to appeal by filing a writ of certiorari in circuit court. Instead of filing such a writ, Petitioner instead requested an administrative review hearing with the Department pursuant to Rule 15A-1.0195, F.A.C. The administrative review hearing was held on December 30, 2019, and the hearing officer issued a Final Order affirming the cancellation on January 27, 2020. Petitioner amended his petition on March 6, 2020, and seeks certiorari review of the January 27, 2020, final order.

II. Standard of Review

On certiorari review of administrative action, this Court's duty is to determine whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent, substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). This Court's duty is not to reweigh evidence or to substitute its judgment for the findings of the hearing officer below. *Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. Of Appeals,* 541 So.2d 106, 108 (Fla. 1989).

III. Application of Standard of Review to Petitioner's Claims

Resolution of this case turns on determining the scope of responsibility of the hearing officer at the administrative review hearing, and in determining what, if any, burden the Department carried at the hearing in deciding whether to affirm or reverse the cancellation. This determination can be accomplished by reviewing Rule 15A-1.0195, F.A.C. The rule provides in full:

> Any person whose driving privilege has been cancelled, suspended, or revoked, may petition the Department for an administrative review to present evidence showing why their driving privilege should not have been cancelled, suspended or revoked. Application for such review shall be made by personal letter specifying the action for which the review is requested, and the documents in the possession of the Department which the licensee requests to review.

The plain reading of the rule establishes that it was the Petitioner, not the Department, who had the burden of presenting evidence to show why his driver's license cancellation was in error. Further, it was Petitioner, not the Department, who had the responsibility to identify the documents in possession of the Department that Petitioner wanted reviewed. It does not appear, upon a review of the transcript of the hearing that was included in Petitioner's Amended Appendix Index, that Petitioner identified any documents in the Department's possession for the hearing officer to review. In fact, Petitioner objected to the documents entered by the hearing officer, documents which included the report from the NEFSC detailing the reasons why it recommended cancellation for not following the case plan, and the letter from NCFSC to Petitioner advising him that his appeal was denied. The only documents offered by Petitioner were some internet printouts concerning Listerine, documents that had never been in the Department's possession or reviewed by either of the SSSPs, and therefore were irrelevant to the task of the hearing officer at the review hearing.

With this understanding of the hearing officer's scope of responsibility in mind, this Court now must determine whether the hearing officer provided Petitioner procedural due process, whether the hearing officer's order departed from the essential requirements of the law, and whether the findings made by the hearing officer were supported by competent, substantial evidence. The Court finds that all of the above requirements were met. Petitioner requested an administrative review hearing and one was scheduled and held. At the hearing, the hearing officer offered Petitioner an opportunity to present documents that would show his license had been canceled in error, and only the Listerine documents were offered. Based on the plain meaning of the pertinent rule cited above, the Department was

not required to submit any documents into evidence. Nevertheless, the documents the hearing officer did introduce were not merely competent and substantial evidence that supported the hearing officer's ultimate findings, but were evidence that *required* the affirmance of the cancellation as provided in section 322.271(5)(c), Fla. Stat. Therefore, the amended petition must be denied.

The Court would note that the hearing officer's scope of responsibility would have been much different had the second SSSP disagreed with the first SSSP. In that situation, Rule 15A-10.031(2)(d), F.A.C., provides that the final decision concerning the cancellation of Petitioner's driving privilege would be made by the Department. The second SSSP would have then been required to submit all documentation to the Bureau of Administrative Review office so that a full reinstatement hearing could be conducted. Rule 15A-10.031(3)(e), F.A.C.

This Court was presented with a case significantly similar to the instant case in *Midgett v. Department of Highway Safety and Motor Vehicles,* 16 Fla. L. Weekly Supp. 795b (Fla. 4th Cir. Ct. April 20, 2009). The Court has reviewed *Midgett* and finds it was correctly decided. As to the case law relied upon by Petitioner, the Department thoroughly discussed those cases in its responsive pleadings, and the Court concurs with the Department's analysis that most of those cases are either factually or legally distinguishable. Two cases relied on by Petitioner: *Jacob v. Department of Highway Safety and Motor Vehicles,* 15 Fla. L. Weekly Supp. 649a (Fla. 7th Cir. Ct. February 29, 2008) and *Warren v. Department of Highway Safety and Motor Vehicles,* 21 Fla. L. Weekly Supp. 377a (Fla. 1st Jud. Cir. Ct. January 29, 2013), are factually similar to this case but both reached a different result. *Jacob* and *Warren* are not binding on the Court, and the Court disagrees with both opinions to the extent that either stand for the proposition that the Department has a burden to produce evidence at an administrative review hearing held pursuant to Rule 15A-1.0195, F.A.C.

Finally, the issue of whether competent and substantial evidence supported either SSSP's decision to remove Petitioner from the program, that issue is not before the Court and was not the relief requested by Petitioner in his amended petition. The Court did allow the Department to include in its appendix, over Petitioner's objection, the documents purportedly relied upon by the NCFSC when it conducted its review. However, since that issue is not before the Court, the Court declines to address it.

In view of the above, it is

ORDERED:

1. Petitioner's Amended Petition for Writ of Certiorari filed on March 6, 2020, is **DENIED**.

2. The stay of the cancellation of Petitioner's driver's license, entered by the Court on November 4, 2019, is lifted.

* * *

Landlord-tenant—Eviction—Appeals—Timeliness—Tolling of period—Claims that trial court erred in entering final judgment of eviction for failing to pay rent into court registry without holding evidentiary hearing on counterclaim alleging that rent-to-own agreement gave tenant legal title to property and erred in denying motion to dismiss eviction complaint based on fraud on court cannot be addressed on appeal where notice of appeal was not filed within 30 days of rendition of judgment—Motion to vacate judgment did not toll time for filing appeal—Tenant's brief reference to fraud on court in oral argument at hearing on motion to vacate final judgment did not constitute motion to reconsider ruling on motion to dismiss due to fraud on court—No merit to claim that final judgment was void for failure to join as a party tenant's brother, who allegedly was "in title of the property"—Brother was not indispensable party since there was no title or ownership issue pending before court when final judgment was issued and, even if brother had title interest in property, eviction of tenant for nonpayment of rent had no effect on brother's interest

DIANE LOMBARDI, Appellant, v. RONALD V. HOWARTH, Appellee. 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 18-AP-56. L.T. Case No. 18-CC-00473. UCN Case No. 512018AP000056APAXWS. December 28, 2020. On remand from Second District Court of Appeal. Appeal from Pasco County Court, Honorable Paul Firmani, Judge. Counsel: Nickolas C. Ekonomides, Nickolas C. Ekonomides, P.A.,Clearwater, for Appellant. Edward C. Castagna, Jr., Castagna Law Firm, P.A., Clearwater, for Appellee.

ORDER AND OPINION ON REMAND

[Original opinion at 28 Fla. L. Weekly Supp. 182b]

On remand from the Second District Court of Appeal, we reconsider Appellant's appeal from the trial court's final judgment of eviction and order denying her motion to vacate. This Court now concludes that Appellant is not entitled to relief and affirms the trial court's orders.

STATEMENT OF THE CASE AND FACTS

Trial Court Proceedings

Appellee filed an action for residential eviction against Appellant for non-payment of rent. Appellant did not pay rent into the court registry and did not file a motion to determine rent. Appellant moved to dismiss the complaint alleging fraud upon the trial court and failure to state a cause of action and filed four counterclaims. Her counterclaims sought damages in excess of $15,000. In her third counterclaim, Appellant argued that she had entered into a rent-to-own agreement for the property in question and that her rent payments were actually installment payments. She argued that Appellee was "attempting to evict" her "from a property to which she may hold legal title." *Paragraph 27, Counterclaim III.*

The trial court denied Appellant's motion to dismiss the complaint and granted Appellee's motion to dismiss Appellant's counterclaims. The trial court's order granted Appellant 20 days to file an answer and affirmative defenses and 10 days to file amended counterclaims. However, Appellant did neither prior to the issuance of the final judgment.

The trial court later issued a default judgment against Appellant for failing to pay rent into the court registry as required by section 83.60, Florida Statutes (2017). The trial court rendered a final judgment of eviction on July 6, 2018, and a writ of possession on July 9, 2018. On July 17, 2018, Appellant filed a motion under Florida Rule of Civil Procedure 1.540(b)(4) entitled "Verified Emergency Motion of Defendant, Diane Lombardi, to Vacate Final Eviction Judgment, Dissolve Writ, Reopen Case, and Dismiss the Eviction Action, and Memorandum of Law" (motion to vacate).

The motion raised the following arguments relevant to this appeal: that the parties entered into a rent-to-own agreement on the property and that Appellee failed to join his brother, Keith Howarth, as an indispensable party. Appellant did not raise a claim of fraud upon the trial court in the written motion to vacate. The motion to vacate was heard on August 3, 2018. It was not until Appellant's closing argument before the trial court that she again referenced the previously denied fraud upon the trial court claim. On August 14, 2020, the trial court rendered an order denying the motion to vacate.[1]

Circuit Appellate Court Proceedings

On September 7, 2018, Appellant filed a notice of appeal. During the proceedings before this Court, Appellee moved to dismiss the appeal. With regard to the final judgment of eviction, the motion argued that the notice of appeal was untimely. This Court denied the motion and proceeded to rule on the appeal.

In an amended opinion, this Court held, in relevant part, that Appellant's counterclaims divested the county court of subject-matter jurisdiction. The opinion reversed the default judgment and final

judgment of eviction and remanded the case to the county court to issue an order transferring the case to the circuit trial court.

Appellee's Petition for Writ of Certiorari to the Second District Court of Appeal

Appellee then filed a petition for writ of certiorari with the Second District Court of Appeal. The Second District issued an opinion quashing this Court's opinion and held that because Appellant filed a motion to vacate under Florida Rule of Civil Procedure 1.540(b)(4), the time to file a notice of appeal from the final judgment was not tolled. Therefore, the notice of appeal was timely as to the trial court's order denying the motion to vacate, but untimely as to the final judgment of eviction.

The Second District further held that this Court erred by finding that Appellant's counterclaims divested the county court of subject-matter jurisdiction because she did not deposit a service charge at the time the counterclaims were filed as required by Florida Rule of Civil Procedure 1.170(j). The Second District remanded the case back to this Court.

STANDARD OF REVIEW

Generally, an order ruling on a motion under rule 1.540(b) is reviewed for abuse of discretion. *State Farm Mut. Auto. Ins. Co. v. Statsick*, 231 So. 3d 528, 531 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1585a] (*citing Belk v. McKaveney*, 903 So. 2d 337, 337 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1465a]). However, an order ruling on whether an order or judgment is void under rule 1.540(b)(4) is reviewed *de novo* where the trial court's conclusion presents a pure question of law. *Statsick*, 231 So. 3d at 531.

LAW AND ANALYSIS

Appellant raises four issues in her Initial Brief: (1) that the trial court erred by issuing a final judgment of eviction without first conducting an evidentiary hearing, (2) that the trial court erred by denying Appellant's motion to vacate because the facts revealed that Appellee committed fraud upon the trial court, (3) that the trial court erred by denying the motion to vacate because Appellee failed to join an indispensable party, and (4) that Appellant's notice of appeal was timely-filed as to the final judgment of eviction because her motion to vacate also functioned as a motion for rehearing which tolled the rendition date of the final judgment.

1. Final Judgment of Eviction

Appellant argues that the trial court erred by issuing a final judgment of eviction for failing to pay rent into the court registry without first holding an evidentiary hearing because Appellant had raised a question regarding title to the property. Because Appellant's notice of appeal was untimely as to the final judgment of eviction, this Court cannot address the merits of this argument.

A notice of appeal must be filed within 30-days of the rendition date of a final order. Fla. R. App. P. 9.110(b). Where a notice of appeal is not timely-filed, an appellate court lacks jurisdiction to review the order. *Peltz v. Dist. Court of Appeal*, 605 So. 2d 865, 866 (Fla. 1992).

While a motion for rehearing under Florida Rule of Civil Procedure 1.530 tolls the date of rendition of an order, a motion for relief from judgment under Florida Rule of Civil Procedure 1.540 does not. *See* Fla. R. App. P. 9.020(h)(1)(B); *Potucek v. Smeja*, 419 So. 2d 1192, 419 So. 2d 1192, 1193-94 (Fla. 2d DCA 1982).

In this case, Appellant's motion to vacate was a motion for relief from judgment under rule 1.540(b)(4). Therefore, it did not toll the rendition date of the trial court's final judgment of eviction. The trial court rendered its final judgment on July 6, 2018. However, Appellant did not file a notice of appeal until September 7, 2018. Accordingly, the notice of appeal was untimely as to the final judgment of eviction and this Court does not have jurisdiction to review the order.

2. Motion to Vacate—Fraud Upon the Trial Court

Appellant next argues that the trial court erred by denying her motion to vacate because Appellee committed fraud upon the trial court with regard to whether Appellant had title to the property in question. Appellant asserts that she raised the fraud issue before the trial court during the hearing on her motion to vacate. She argues that fraud upon the court renders a final judgment void.

The trial court record reflects that prior to the issuance of the final judgment of eviction, Appellant raised the fraud upon the court issue in her motion to dismiss Appellee's complaint. However, that motion was denied in an order issued on May 8, 2018. Because Appellant's motion to dismiss alleging fraud upon the trial court was denied prior to the final judgment of eviction and Appellant's notice of appeal was untimely with regard to the final judgment of eviction, this Court is without jurisdiction to address Appellant's claim of fraud upon the trial court.

To the extent Appellant argues that her brief reference to fraud upon the trial court during her closing argument at the hearing on her motion to vacate constituted a motion to reconsider the trial court's previous ruling on her pre-final judgment motion to dismiss for fraud upon the court, such claim must fail. First, a trial court loses its inherent authority to reconsider non-final orders once a final order is issued. *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380, 381 (Fla. 2d DCA 1989). In this case, fraud upon the court was not re-raised until the hearing on her motion to vacate which occurred after the final judgment was issued. Furthermore, no new facts in support of fraud upon the trial court were asserted.

Second, Appellant's claim of fraud upon the trial court was not raised in her written motion to vacate and therefore not properly before the trial court during the hearing on her motion to vacate. A trial court violates a non-moving party's due process rights when it considers issues and matters not raised in a written motion and not noticed for hearing. *Assimakopoulos v. Assimakopoulus-Panuthos,* 228 So. 3d 709, 715 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2232c]. To the extent it may be argued that Appellant's brief reference to fraud upon the trial court during her closing argument in the motion hearing was sufficient to constitute re-raising the issue, fraud upon the trial court was not raised in her written motion and was not noticed for the hearing. Therefore, the trial court did not err by not granting the motion to vacate on that basis.

And because Appellant waited until the last minute to raise the issue in a conclusory sentence just prior to the trial court ruling on the motion to vacate, Appellee did not have the opportunity to object to Appellant re-raising the fraud upon the trial court issue or make and argument against it. *See Smith v. Mogelvang*, 432 So. 2d 119, 122 (Fla. 2d DCA 1983) (describing the test to determine whether an issue has been tried by implied consent).

3. Motion to Vacate—Failure to Join and Indispensable Party

Within the same section of her Initial Brief as her fraud upon the trial court argument, Appellant argues that the trial court erred because the final judgment was void due to Appellee's failure to join an indispensable party. In her motion to vacate before the trial court, Appellant argued that Appellee failed to join his brother, Keith Howarth, as an indispensable party because this case involved a question of title to the property and Keith Howarth "is in title of the property and has not been joined as a necessary party." *Motion to Vacate, page 2.*

Failure to join an indispensable party renders a judgment void. *See FL Homes 1 LLC v. Kokolis*, 271 So. 3d 6, 10 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1299a]; *Biden v. Lord*, 147 So. 3d 632, 637 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1980a] (addressing whether the Delaware Attorney General was an indispensable party in a trust

modification proceeding and writing that "the fact that the Delaware Attorney General does not now argue that the 1993 judgment is void demonstrates that it is not impossible to completely adjudicate a modification of the Trust without the presence of the Delaware Attorney General"). Therefore, failure to join an indispensable party can be raised in a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b)(4) (providing that a party may be relieved from a judgment, decree, or order that is void). An indispensable party is "one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible." *Allman v. Wolfe*, 592 So. 2d 1261, 1263 (Fla. 2d DCA 1992) (quoting *Grammar v. Roman*, 174 So. 2d 443, 445 (Fla. 2d DCA 1965)).

Contrary to Appellant's assertion, Keith Howarth was not an indispensable party in this case. The complaint alleged that Appellant and Appellee had entered into a residential lease agreement as tenant and landlord, respectively. Because Appellant neither filed an answer and affirmative defenses nor amended her dismissed counterclaims prior to the issuance of the final judgment of eviction, there was no title or ownership issue pending before the trial court when the final judgment was issued. Assuming *arguendo* that both Appellee and Keith Howarth had a title interest in the property in question, Appellant's eviction as a tenant for nonpayment of rent had no effect on Keith Howarth's title interest. Therefore, he was not an indispensable party.

4. Timeliness of Notice of Appeal

Appellant finally argues that her notice of appeal was timely-filed after the final judgment of eviction because her motion to vacate also functioned as a timely-filed motion for rehearing, thereby tolling the rendition date of the final judgment. In its opinion quashing this Court's prior opinion, the Second District Court of Appeal held that Appellant's motion to vacate was a Rule 1.540(b)(4) motion. Accordingly, this Court now holds that the notice of appeal was not timely-filed as to the final judgment of eviction for the reasons detailed in Section 1 of this opinion.

CONCLUSION

Because Appellant's motion to vacate did not toll the rendition date of the final judgment of eviction, Appellant's notice of appeal was untimely as to the final judgment of eviction and this Court is without jurisdiction to review the final judgment or any orders issued prior to the final judgment. Because Keith Howarth was not an indispensable party to Appellee's residential eviction complaint, the trial court's order denying Appellant's motion to vacate is affirmed.

It is therefore ORDERED and ADJUDGED that the orders of the trial court are hereby AFFIRMED. (SHAWN CRANE, LAURALEE WESTINE, and KIMBERLY CAMPBELL, JJ.)

[1]Appellant also filed a motion to vacate the default judgment and permit the late filing of an answer, affirmative defenses, and counterclaims. But Appellant never set that motion for hearing and never obtained a written order from the trial court ruling on the motion.

* * *

Municipal corporations—Development orders—Appeals—Voluntary civic association of homeowners challenges city resolutions approving mandatory homeowners association's plans for new sign feature at main entrance of development encroaching on private property and reapproving existing gate post encroachment on public right-of-way at bridge entrance to development—City commission hearings and adoption of resolution are quasi-judicial actions reviewable by petition for writ of certiorari—Standing—Where petitioner was not given opportunity to argue or present evidence on its standing during hearings on resolutions but did make it clear on record that it represents owners of property abutting both main entrance and bridge entrance features, petitioner is deemed to have standing—Petitioner was not denied due process by exclusion from conflict resolution meeting between city and mandatory HOA concerning board of architects' denial of sign design application where petitioner was not party to that dispute—Further, any potential denial of due process was cured when petitioner was provided opportunity to attend and participate in second conflict resolution meeting—No merit to argument that city abandoned or vacated public right-of-way in 1975 when it granted encroachments into right-of-way so that developer could build main entrance features, such that land became property of developer and subsequently became property of abutting landowners when those lots were sold, where there is no record evidence proving that city abandoned or vacated public right-of-way—No merit to argument that entrance signs constitute improper use of public right-of-way for private purposes—Signs served public purpose of directing travelers as well as private purpose of promoting neighborhood identity and civic pride—Argument that provision of city charter required that resolution allowing placement of sign on public right-of-way be approved by four-fifths majority vote of city commission is unavailing where provision at issue was nullified by Municipal Home Rule Powers Act—Petitioner's attempt to challenge bridge entrance features that were initially approved in 2002, 2003 and 2013 is barred by laches—Decision approving resolutions was supported by competent substantial evidence—Petition is denied

COCOPLUM CIVIC ASSOCIATION, INC., Petitioner, v. CITY OF CORAL GABLES and COCOPLUM HOMEOWNERS ASSOCIATION, INC., d/b/a ISLANDS OF COCOPLUM, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2019-109 AP 01. June 30, 2021. On Petition for Writ of Certiorari. Counsel: Charles C. Kline, Jason Ryan Domark, and Reid Kline, Cozen O'Connor, for Petitioner. Frances Guasch de la Guardia and Anna Marie Gamez, Holland & Knight; and Miriam Soler Ramos, City Attorney, City of Coral Gables, for Respondent, City of Coral Gables. Phillip M. Hudson, III, Hilda Piloto, and Miguel Diaz de la Portilla, Saul Ewing Arnstein & Lehr LLP, for Respondent, Cocoplum Homeowners Association, Inc.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) This matter is before the court on a Petition for Writ of Certiorari (the "Petition") timely[1] filed by the Cocoplum Civic Association, Inc. (the "Association") on April 11, 2019 requesting that City of Coral Gables Resolutions Nos. 2019-83[2] and 2019-94 be rescinded.[3]. The Petition seeks to review and reverse certain decisions which are ultra vires and which also amount to the taking of private property without due process or just compensation in violation of the Florida and U. S . Constitutions.

HISTORY AND PROCEDURAL BACKGROUND

The original Cocoplum development ("Cocoplum") and the Islands of Cocoplum are two residential developments located in the City of Coral Gables ("City"). The Islands of Cocoplum is located southeast of and separated from Cocoplum by a waterway known as Lago Monaco. To access the Islands of Cocoplum, homeowners must drive through the Main Entrance, go east on Cocoplum Road and then pass over one of the waterways separating Cocoplum from the Islands of Cocoplum. Two associations represent homeowner interests: Cocoplum homeowners are represented by the Association; homeowners in the Islands of Cocoplum are represented by the Cocoplum Homeowner's Association, Inc. ("HOA").[4] The issues presented in this case concern the divergence of those interests.

Crew, Pope & Carter Corporation, the original developer of Cocoplum ("Developer"), owned 480 acres of land located in the City known as the Cocoplum Tract.[5] After the Developer completed the Cocoplum development in 1975, the Developer entered into an agreement with the City on October 19, 1976 to erect an information booth and to build entrance walls at the Main Entrance to the Coco-

plum Tract on land within the public right-of-way. This agreement provided for a sign reading "Cocoplum Information" to be located at the information booth and two signs reading "COCOPLUM", one to be located on each entrance wall. It further provided for the operation of the information booth by the Developer for five years. At the termination of the five years, the Developer with the consent of the City was allowed to turn over control of the information booth and walls to an association of homeowners.

In 1980, the Arvida Development Company acquired development rights for the undeveloped portions of Cocoplum. The land acquired by Arvida is the area now known as the Islands of Cocoplum.

Over the years, the HOA has memorialized maintenance agreements with the City.[6] In 2002, the HOA applied to the City for permission to encroach into the right-of-way in order to erect informational signs at four locations in Cocoplum, including at the Bridge Entrance. This request was granted and memorialized in Resolution 30389 A.[7] The HOA executed a Declaration of Restrictive Covenants regarding same in May, 2003. For ten years, there were no objections to the Bridge Entrance features. On January 22, 2013, the City Commission approved Resolution No. 2013-06, which in part authorized encroachments into the public right-of-way for the purpose of replacing the original wooden signs at the Bridge Entrance with stone signs.

In April of 2018, the HOA applied to the City for the modification of the architectural design and signage at the Bridge Entrance. The Association objected to the architectural design and the BOA rejected the HOA's request. On January 10, 2019, the HOA presented a revised design request to the BOA adding faux gates at the Bridge Entrance and Main Entrance and opting to retain usage of "COCOPLUM" on signage, except for the southernmost entrance which would feature "ISLANDS OF COCOPLUM" with a crest above the words. The BOA rejected both requests. On January 18, 2019, the HOA appealed the BOA's denial of both requests.

On February 6, 2019, a Conflict Resolution Meeting was convened.[8] The HOA was a participant while the Association was not.[9] On February 11, 2019, the HOA and City entered into a Settlement Agreement regarding the BOA denial concerning the Main Entrance features, which approved certain updated attached plans "subject to the City Commission approving the required encroachment agreement(s)." The Settlement Agreement was approved by a BOA special master on February 11, 2019. On February 14, 2019, the Association notified the City Attorney of its appeal of the Settlement Agreement and other actions.[10]

On March 12, 2019, pending a hearing before the City Commission on the appeal of the Settlement Agreement regarding the BOA denial, the City held a hearing on the proposed encroachments located at the Bridge Entrance and new signage at the Main Entrances. Following that hearing, the City issued Resolution 2019-83 (the "Encroachment Resolution"), which approved a new sign located at the south side of the Main Entrance, consisting of two stone monuments, one reading "COCOPLUM" and the other reading "ISLANDS OF COCOPLUM." Resolution 2019-83 also re-approved the existing gate post encroachment at the Bridge Entrance as originally approved in Resolution 2013-06, with an approved alternative design of a monument sign with wing walls and pavers at a different location from the current Bridge Entrance, provided the existing gate posts were removed.

On March 14, 2019, the HOA withdrew its request to improve the features at the Bridge Entrance, leaving pending only the hearing before the City Commission on the appeal of the Settlement Agreement regarding the BOA denial of the HOA's request for two stone monuments with the wording "COCOPLUM" on one and "ISLANDS OF COCOPLUM" on the other at the Main Entrance.

On March 21, 2019, the City Attorney provided a legal opinion addressing the BOA appeal and recommended that the City Commission hear the appeal as part of a quasi-judicial de novo hearing. The City Attorney's opinion acknowledged that the Association did not have the opportunity to participate in a quasi-judicial de novo public hearing before the BOA special master and that the City Commission should make the hearing a quasi-judicial one. Notwithstanding, the City Attorney opined that the scope of the BOA appeal be limited to design review and aesthetic considerations only.

On March 22, 2019, the Association submitted a request for the City to reconsider Resolution 2019-83. On March 25, 2019, a second Conflict Resolution Meeting was held with the Association, the HOA and the City in attendance. No resolution was reached.

On March 26, 2019, the City held a quasi-judicial hearing to address the Association's appeal of the Settlement Agreement. As directed by the City Attorney, the scope of that hearing was limited to the design and the aesthetic appeal of the new signs. The City did not allow discussion regarding the legality of the encroachments. Resolution 2019-94 ("BOA Settlement Resolution") was passed and adopted at this hearing. It upheld the design agreed to in the Settlement Agreement for the BOA appeal and ratified the February 12, 2019 Special Master's decision regarding the entrance features at the Main Entrance.

STANDARD OF REVIEW

City Code Section 3-607A provides that:

> An action to review any decision of the City Commission under these regulations may be taken by any person or persons, jointly or separately, aggrieved by such decision by presenting to the Circuit Court a petition for issuance of a Writ of Certiorari, duly certified, setting forth that such decision is illegal, in whole or in part, certifying the grounds of the illegality, provided same is done in the manner and within the time provided by Florida Rules of Appellate Procedure.

Certiorari review by the circuit court requires a determination as to whether: (1) procedural due process was accorded, (2) the essential requirements of the law were observed; and (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

The Respondents argue that the Encroachment Resolution is not reviewable by certiorari because it involves legislative action and that this court can only review the BOA Settlement Resolution on the Association's Petition. *See Hirt v. Polk County Bd. of County Com'rs,* 578 So. 2d 415, 416 (Fla. 2d DCA 1991) ("Certiorari is the proper method to review the quasi-judicial actions of a [county board], whereas injunctive and declaratory suits are the proper way to attack a Board's legislative actions.").

The City (citing only to Resolution 2019-83) and HOA simply allege in their response briefs that the March 12, 2019 hearing was legislative, with no analysis as to how the City's decision, which permitted, *inter alia,* a new sign located at the Main Entrance and re-approved the existing gate post encroachment at the Bridge Entrance, is legislative instead of quasi-judicial. As set forth by the Florida Supreme Court in *Board of Cnty. Com'rs of Brevard Cnty. v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993):

> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. *Coral Reef Nurseries, Inc. v. Babcock Co.,* 410 So. 2d 648 (Fla. 3d DCA 1982). Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy." (citation omitted). . . . But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

(citing *West Flagler Amusement Co. v. State Racing Commission,* 122 Fla. 222, 225, 165 So. 64, 65 (1935) (emphasis in original).

Quasi-judicial decisions have the following four characteristics: (1) quasi-judicial action results in the application of a general rule of policy, whereas legislative action formulates policy; (2) a quasi-judicial decision has an impact on a limited number of persons or property owners and on identifiable parties and interests, while a legislative action is open-ended and affects a broad class of individuals or situations; (3) a quasi-judicial decision is contingent on facts arrived at from distinct alternatives presented at a hearing, while a legislative action requires no basis in fact finding at a hearing; and (4) a "quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions," while a legislative act prescribes what the rule or requirement shall be with respect to future acts. *D.R. Horton, Inc. v. Peyton,* 959 So. 2d 390, 398-99 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1496c] (citing *Snyder, supra.,* 627 So. 2d at 474).

The Encroachment Resolution does not set policy for the entire City of Coral Gables, but is limited to the neighborhood located behind the Cocoplum Main Entrance signs. The court notes that the Encroachment Resolution was entered after a public hearing where the City Commission heard testimony from various community residents regarding encroachments at two specific locations therein. Moreover, the re-approval of the existing encroachment at the Bridge Entrance clearly applies to a determination of "rights . . . in relation to past transactions" indicative of quasi-judicial action. Applying the foregoing characteristics, the court concludes that the March 12, 2019 hearing and Encroachment Resolution are quasi-judicial in nature and thus reviewable by this court on the Petition.

DISCUSSION

STANDING

Both the City and the HOA assert that the Association lacks standing to bring this challenge. Respondents argue that while the Petition asserts that encroachments at the Main Entrance were erected on property belonging to the owner of Lot 1, Block 5 of Cocoplum, there is no allegation that this homeowner is a member of the Association or that the homeowner is challenging the modification of the Main Entrance features.

"Standing is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson,* 952 So. 2d 498, 505 (Fla. 2006) [31 Fla. L. Weekly S763a]. In its broadest sense, standing is no more than having, or representing one who has, "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Kumar Corp. v. Nopal Lines, Ltd.,* 462 So. 2d 1178, 1182 (Fla. 3d DCA 1985) (citing *Sierra Club v. Morton,* 405 U.S. 727, 731, 92 S. Ct. 1361, 1364, 31 L.Ed.2d 636, 641 (1972)).

The March 12, 2019 City Commission hearing was deemed to be legislative by the City and the March 26, 2019 hearing only addressed design issues so that the Association had no opportunity to address its standing, nor was standing raised as an issue at those hearings. The Association's counsel stated at the March 26, 2019 quasi-judicial Commission hearing over objection that the hearing was only to address design issues:

> We represent not only the homeowner's association, we specifically represent the homeowners on both sides of the bridge, the one that goes from Cocoplum Section One to Section Two on Cocoplum Road, both those owners, and we represent the owners of the property at the entrance to the circle immediately adjacent to the sides [sic] [signs].

The Petition also includes the affidavit of Hector Fortun, President of the Association, who owns property next to the Bridge Entrance. The Association's Reply brief states that Fortun, who is represented by the Association, appeared and objected at the March 12, 2019 Commission hearing to the encroachments. The Association also cites to a power of attorney to Hector Fortun from Edward F. Sanchez who is the owner of the property on the Southwest side of Cocoplum Road.

The Association attempted to address Respondents' argument in this proceeding that Plaintiff lacks standing by seeking leave to amend its Petition to include more specific information as to its standing. This court provisionally granted the Motion for Leave to Amend with its ultimate ruling reserved until after the hearing on the merits of the Petition.[11]

The HOA claims that they did not waive the argument regarding standing by asserting it below at the March 12, 2019 City Commission Meeting when its attorney argued:

> Now, you've heard from the objectors, this civic association—which, by the way, again, they represent themselves admit that they don't represent 150 people in—150 homes in Phase I. We don't know how many they represent. Maybe they represent the 10 people or so who are here in the room, maybe it's 12, maybe it's 15. *But it's a voluntary association that does not speak for the entirety of Phase I or the 150 owners in Phase I.* (emphasis added).

While this statement is sufficient for the HOA to avoid a waiver of the standing argument, the standing argument was not squarely made below by the HOA or addressed at all by the City.

Regardless, Florida Rule of Appellate Procedure 9.040(d) provides that:

> At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.

As acknowledged in *Cook v. City of Winter Haven Police Dept:*

> As a general policy, all parties should be given a full and fair opportunity to have their disputes settled on the merits. This policy is evident in our rules of appellate procedure with regard to supplementing the record and may reasonably and logically be extended to amending petitions to add or supplement appendices. See Fla. R. App. P. 9.200(f)(2). . . Furthermore, amendments to petitions for writ of certiorari are generally allowed to include additional substantive argument when the interests of justice require. Fla. R. App. P. 9.040(d) ("At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits."); *see also N. Beach Ass'n of St. Lucie County, Inc. v. St. Lucie County,* 706 So. 2d 62, 63 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D392b]. If amendments which include substantive changes are permissible, certainly a party should be able to amend a petition to comply with procedural rules requiring an appendix and appropriate references thereto.

837 So. 2d 492, 494 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D210a].

The City announced that it was conducting the March 12, 2019 Commission hearing as a legislative hearing, while the March 26, 2019 Commission hearing on the appeal of the Settlement Agreement was a quasi-judicial hearing pertaining solely to design approval of entrance features.[12] As such, the Association was not provided an opportunity to argue or present evidence on the standing issue below. Notwithstanding, the Association did make clear on the record below its representation of the abutting property owners at both the Bridge Entrance and Main Entrance locations. Admittedly, there was overlap between the two hearings when the entrance features concerning the Main and Bridge Entrance features were addressed. Considering the general policy on amendment and the above analysis, the court is permitting an amendment of the Petition as to the Association's supplemental statement on standing and the Association is deemed to

have standing to address the issues raised in the Petition.

PROCEDURAL DUE PROCESS

"Generally, due process requirements are met in a quasi-judicial proceeding 'if the parties are provided notice of the hearing and an opportunity to be heard.' " *A & S Entertainment, LLC v. Florida Department of Revenue,* 282 So. 3d 905, 909 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2341b] (citations omitted). "The proceeding must be 'essentially fair.' " *Id.* However, "[t]he extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved." *Carillon v. Seminole County,* 45 So. 2d 7, 9-10 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1467a]. "In 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." *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

The Association argues that an abutting landowner to the Cocoplum Bridge Entrance did not receive notice of the 2013 Resolution which authorized the construction of the gate posts in the median of Cocoplum Road, and that this alleged lack of notice alone voids the 2013 Resolution.[13] However, the Association was provided with notice of the redesign of the entrance features and of the hearing on the approval of the redesign. It was also represented by counsel at three hearings: the BOA hearing, Encroachment Resolution Hearing, and Settlement Agreement hearing.

The Association further contends that it was not present at the conflict resolution meeting held on February 6, 2019. The City's conflict resolution meeting is an alternative procedure to avoid a hearing before a special magistrate. In this instance, the only conflict to be resolved at the first conflict resolution meeting was the HOA's disagreement and appeal of the BOA's denial of its design application. The Association was not a party to this alternative dispute resolution process. Regardless, any potential denial of due process was cured when the Association was provided with an opportunity to attend and did attend and participate in a second conflict resolution meeting on March 26, 2019. Accordingly, the Association was accorded procedural due process.

ESSENTIAL REQUIREMENTS OF THE LAW

The Association's challenge to the encroachments at both the Main Entrance and Bridge Entrance presupposes that any encroachment granted by a government entity in a public right-of-way necessarily vacates or abandons a portion of the public right-of-way as a matter of law so that title reverts to the abutting private property owner. The Association relies on the principle that "[a]cceptance of a common law dedication does not pass the fee in land. The interest acquired by the municipality is generally held to be in the nature of an easement, with the public having a right of use and nothing more." *Hollywood, Inc. v. Zinkil,* 403 So. 2d 528, 537 (Fla. 4th DCA 1981) (citation omitted). The Association correctly asserts that the dedication of the roadways to the City for public right-of-way purposes did not transfer title of the property to the City. *See City of Coral Gables v. Old Cutler Bay Homeowners Corp.,* 529 So. 2d 1188, 1189-1190 (Fla. 3d DCA 1988). When a developer submits a plat to record, the same being properly accepted by the relevant municipality, the purchasers of lots sold in reference to the plat receive title to their lots out to the center of the dedicated roads, subject only to an easement of right-of-way purposes in favor of the public. *Walker v. Pollack,* 74 So. 2d 886 (Fla. 1954); *Smith v. Horn,* 70 So 435 (1915).

The Developer was required to request an encroachment before it could build improvements in the dedicated right-of-way at the Main Entrance. By approving Resolution 20850, the City allowed the Developer to encroach into the right-of-way for the purpose of erecting an information booth (now the Guard House) in the center of Cocoplum Road just southeast of the Cartagena Plaza, and the two walls with signs on each side of the Main Entrance to Cocoplum Road. Petitioner admits that the encroachments into the public right-of-way in 1975 and 1976 to construct the Guard House and Main Entrance features were lawful under City ordinances that permit the adjacent property owner (the Developer at that time owned the entire Cocoplum Tract) to request an encroachment into the public right-of-way.

The Association argues, however, that in granting the encroachments, the City essentially vacated the right-of-way easement so that the Developer could build the Main Entrance features free of the public easement. The Association further argues that from that moment on, the Developer became the owner of the fee in the land at the Main Entrance to Cocoplum and that once the lots adjacent to the Cocoplum entrance were sold, the abutting fee owners held title to the lots out to the center of the road.[14] Following this analysis, the Association specifically claims that the Main Entrance wall including the new "Islands of Cocoplum" sign is located on property belonging to Lot 1, Block 5 of Cocoplum.

The Association provides no legal authority for the proposition that granting an encroachment in the public right-of-way, as a matter of law, necessarily results in the public right-of-way being vacated or abandoned. The law supports a contrary conclusion. A common law dedication is not extinguished unless and until "it is lawfully surrendered and relinquished." *Pelican Creek Homeowners, LLC v. Pulverenti*, 243 So. 3d 467, 471 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D279a]. Furthermore, abandonment of an easement is a question of intent and the burden of proof is on the person asserting abandonment. *Leibowitz v. City of Miami Beach,* 592 So. 2d 1213, 1214 (Fla. 3d DCA 1992 (citing *Dade County v. City of North Miami Beach,* 69 So.2d 780, 783 (Fla. 1953)). "The person asserting abandonment must demonstrate that there was a "clear affirmative intent to abandon" the easement. *Id.* (citing *Woodlawn Park Cemetery Co. v. City of Miami,* 104 So. 2d 851, 853 (Fla. 3d DCA 1958)). The Association fails to meet this burden. Here there is no record of abandonment or vacation of the public right-of-way.[15] Because there is no record evidence proving that the City abandoned or vacated the public right-of-way, there is no support for the Association's claimed reversion of ownership to the adjoining landowners.

Furthermore, the record before this court shows only that the Main Entrance wall and Bridge Entrance features are located in the public right-of-way. There is no boundary survey or other evidence in the record supporting the Association's assertion that had those right-of-way easements been vacated or abandoned by the City as a matter of law, the encroachments are located on land that would revert to the private property owner abutting the Bridge Entrance or the owner of Lot 1, Block 5 abutting the Main Entrance.

Moreover, the HOA points out that the City is upgrading an existing encroachment. The Association fails to show how changing the wording on the existing Main Entrance wall—an encroachment which undisputedly has existed since 2002—somehow invalidates the encroachment, creates a new encroachment or changes the public use of the encroachment.

The Association also argues that the City cannot allow the use of public property for a private purpose in the absence of a specific grant of such power in the municipal charter. *See Edwards v. Town of Lantana*, 77 So. 2d 245 (Fla. 1955). In *Edwards v. Town of Lantana,* the city allowed a corporation to erect ornamental markers at two street corners. *Id* at 245. The Florida Supreme Court concluded that there was no provision in the Town charter that granted the Town the power to use public property for a private purpose authorizing the contract between the town and appellants with respect to the ornaments. *Id.* at 246. As such, the *Edwards* Court found that the act would be *ultra vices* because the Town had no inherent power to grant a

privilege to use its streets.

The Supreme Court decision in *Edwards* was later clarified in *City of Miami v. Bus Benches, Company,* 174 So. 2d 50 (Fla. 3d DCA 1965), wherein the Third District Court of Appeal explained that:

> . . . in the absence of express legislative authority, a city has no power to grant a private individual a privilege to use any portion of its streets or sidewalks for a special private purpose,' is correct as far as it goes, but, in the instant case, the permits are for benches which, in addition to the advertising thereon, provide a public service for the people of the municipality, to-wit: benches for them to sit on while awaiting busses.

Id. at 52. In the instant case, the City Attorney explained that the signage update served dual public purposes as "a directional sign to assist travelers in locating the community and second to promote neighborhood identity and civic pride." Such purposes are akin to that in *Bus Benches.* Accordingly, neither the Main Entrance feature nor the Bridge Entrance feature is an improper use of the public right-of-way for a private purpose.

Four-Fifths Majority Vote Not Required

The Association also argues that the Resolution allowing the placement of "Islands of Cocoplum" on a wall in the Main Entrance required a four-fifths majority vote pursuant to Section 81 of the City Charter. Section 81 states in part:

> No ordinance granting, renewing or leasing the right to use the streets, alleys, public grounds or buildings of the City of Coral Gables to any private person, persons, firm or corporation shall become law or effective in any way unless the same be passed by a vote of four-fifths of all members of the Commission. . .

This argument is unavailing because Section 81 was nullified by the Municipal Home Rules Power Act, Section 166.021(4), Florida Statutes (2011). Section 166.021(4) provides, with limited exceptions, that any provisions within a city charter adopted prior to July 1, 1973 that placed limitations upon a municipality's home rule powers were nullified and repealed. The Association admits that the second part of Section 81 that prohibits a lease of City property for more than thirty years was a limitation of power that was nullified by section 166.021(4). However, it claims that the second part requiring a four-fifths vote to allow the use of a City property is not a limitation upon the City's home rule powers. Regardless, Section 81 is no longer in the City Charter and is no longer in effect. Accordingly, there is no legal requirement that a four-fifths vote was required to allow the re-design encroachments.

Permit Not Fraudulently-Procured

As to the encroachment at the Bridge Entrance, the Association argues that the HOA executed and the City recorded, a covenant reciting that the HOA is the owner in fee simple of the "Center Median of Cocoplum Road south east of the intersection at Los Pinos Boulevard" at the Bridge Entrance. The Association claims that because the HOA was not the owner, the permit was procured by fraud and it was void *ab initio.* However, the recitation that the HOA was the owner was on a City standardized form for general encroachment and restrictive covenant agreements. The permit merely sought to update existing wooden signage on land that has been designated as a public right-of-way for the past 40 years. The form was completed after receiving the 2013 approval by the City. Accordingly, the standardized form was not the basis for the encroachment. Thus, Resolutions 2019-83 and 2013-06 were not based upon an *ultra vires* fraudulent act.

Laches

Respondents argue that the Association is belatedly attempting to challenge Bridge Entrance features that were initially approved in 2002, 2003, and 2013 and that in addition to being untimely[16], the Petitioner's challenge is also barred by the doctrine of laches.[17] We agree.

The Association's belated objections to the Bridge Entrance features that were initially approved in 2002, 2003, and 2013 are untimely and barred by laches because none of those prior actions were *ultra vires* and subject to review.

COMPETENT SUBSTANTIAL EVIDENCE

Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Duval Utility Co. v. Florida Public Service Commission,* 380 So. 2d 1028, 1031 (Fla. 1980). The record before the City Commission included copies of the various plats for Cocoplum Section One (Cocoplum) and Cocoplum Section Two (the Islands of Cocoplum); 1926 Biscayne Bay Plat; 1952 Miami Corporation Plat; aerial maps; surveys; design plans; the 1975 and 1976 Guard House Agreements; relevant covenants; the Maintenance Agreement; the Settlement Agreement for the BOA Appeal (including the initial and revised plans for the entrance features); prior Resolutions, etc. Additionally, the Commission considered correspondence setting forth the Association's objections to the Main Entrance and Bridge Entrance features.

This court may not reweigh the evidence or substitute its judgment for that of the lower tribunal. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The Florida Supreme Court in *Dusseau* held that "[a]s long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. Although the Petition argued only that there was a lack of procedural due process and that the essential requirements of the law were not observed below, we find that there was competent substantial evidence supporting the decisions approving the Resolutions.

CONCLUSION

The Association was accorded procedural due process, the essential requirements of the law were observed and the decisions approving Resolution Nos. 2019-83 and 2019-94 were supported by competent substantial evidence.

For the foregoing reasons, the Petition is DENIED. (TRAWICK, WALSH, and SANTOVENIA, JJ., Concur.)

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[1]Florida Rule of Appellate Procedure 9.100(c) provides in part that a petition for writ of certiorari shall be filed within thirty days of rendition of the order to be reviewed. Resolution 2019-83 was passed and adopted on March 12, 2019. Resolution 2019-94 was passed and adopted on March 26, 2019. The Petition for Writ of Certiorari was filed on April 11, 2019. Accordingly, the Petition was timely filed as to both Resolutions.

[2]Resolution No. 2019-83 authorized new signage at the Cartagena Circle Entrance (the "Main Entrance") to the Cocoplum Tract. It also re-approved the encroachment granted in Resolution 2013-06, which authorized encroachments into the public right-of-way within the Cocoplum subdivision for the purpose of replacing existing wooden signs with stone signs at the intersection of Cocoplum Road and Los Pinos Boulevard at the Prado Boulevard entrance (the "Bridge Entrance"). The Resolution approved in the alternative encroachment of a monument sign, wing walls and pavers at the base of the Cocoplum Road Bridge. The design was subject to approval as part of the City of Coral Gables Board of Architects ("BOA") appeals process.

[3]Resolution No. 2019-94 upheld the approval of a design agreed to in the Settlement Agreement resulting from an appeal of BOA action regarding the Main Entrance features in the City's right-of-way.

[4]HOA membership is mandatory, while membership in the Association is optional.

[5]In 1926, prior to the planning and development of Cocoplum, the Biscayne Corporation dedicated a right-of-way easement in the public roadways to the City. A 1952 plat dedicated the land at the Main Entrance to the City.

[6]In 1981, the City executed a maintenance agreement with the HOA to operate and maintain the Main Entrance, its signage and landscaping. In 1991, the City Commission extended this maintenance to include authorization for the HOA to install and operate traffic control devices at the Main Entrance.

[7]Notably, that Resolution, at Section 1.2., reserves to the City "the right to remove,

add, maintain or have the Cocoplum Homeowners Association's [sic] remove any of the improvements within the right-of-way, and at the Homeowners Association's expense."

[8]This procedure is authorized pursuant to Section 2-303(D) of the City of Coral Gables Zoning Code.

[9]The Association argues that it was not given notice of this Conflict Resolution Meeting while the City argues that the Association was not an aggrieved party pursuant to the conflict resolution procedure. The BOA Rules of Procedure define an aggrieved party as "the applicant, the City Manager, or any property owner with a special injury."

[10]The Association disputed the Settlement Agreement on three grounds: (1) due process violations based on the lack of notice to the Association of the Conflict Resolution; (2) non-compliance with the BOA Rules of Procedure governing Conflict Resolution Meetings requiring a quasi-judicial de novo hearing; and (3) the absence of standing based on sufficient title to Cocoplum real property necessary to support an encroachment request.

[11]The court instructed the parties to be prepared at oral argument to address the following legal issue:

> When a party seeks certiorari review . . . of a decision of an administrative body acting in a quasi-judicial capacity, the trial court is bound by the facts and evidence presented to the administrative body, and the issue of standing is waived if it was not raised before the administrative body." *York v. Athens Coll. of Ministry, Inc.,* 348 Ga.App. 58, 821 S.E.2d 120, 123 (2018) (citation omitted); *see also Krivanek v. Take Back Tampa Political Comm.,* 625 So. 2d 840 (Fla. 1993) (finding the failure to raise standing generally results in waiver); 3 Fla. Jur. 2d Appellate Review § 501 (2019) ("[T]he reviewing court's consideration in certiorari cases is to be confined strictly and solely to the record of the proceedings by the agency or board on which the questioned order is based.").

Alger v. United States, 300 So. 2d 274, 279 n.3 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D3001a].

[12]The City took this position notwithstanding that the Settlement Agreement being appealed was "subject to the City Commission approving the required encroachment agreement(s)."

[13]The Petition cites the testimony of Larry Suchman at the March 12, 2019 Commission hearing who was representing his mother who lives at 185 Cocoplum Road, alleging lack of notice.

[14]"The title in fee simple to the vacated road beds or rights-of-way to the center thereof would remain, unburdened or unencumbered, in the abutting fee owners. . . "1978 Fla. Op. Att'y Gen. 289 (1978).

[15]As correctly argued by the City, changing the signage at the Main Entrance to include "Islands of Cocoplum" and approving replacement signage at the Bridge Entrance does not change the existing use.

[16]Section 95.11(2)(b), Fla. Sta. requires claims founded upon written instruments to be commenced within 5 years. Many of the encroachment agreements between the City and HOA date back to 1981. As such, the Association's claims regarding these agreements are time-barred based on the court's conclusion that the agreements are not *void ab initio*.

[17]Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It is an equitable defense, and its applicability depends upon the circumstances of each case. Delay alone in asserting a right does not constitute laches, and the burden is on the party who asserts the doctrine of laches to prove prejudice." *Ticktin v. Kearin,* 807 So. 2d 659, 663 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2554a].

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Where only challenge to lawfulness of arrest raised before hearing officer concerned operability of vehicle, issue of sufficiency of evidence of impairment for arrest was not preserved for appellate review—Hearing officer did not err in finding that licensee's failure to respond when requested to submit to breath test constituted refusal where, although licensee speaks Albanian, there is no evidence that he spoke Albanian to deputy, advised deputy of any language barrier, or expressed any confusion about implied consent warnings, and licensee acknowledged that he understood Miranda rights read in English—No merit to argument that documents regarding refusal of breath test are internally inconsistent and cannot constitute competent substantial evidence of his refusal—Petition for writ of certiorari is denied

GJERGJI XHEMALI, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2021-CA-1512 NC. June 29, 2021. Counsel: Andrea Flynn Mogensen, Sarasota, for Petitioner. Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANDREA MCHUGH, J.) Gjergji Xhemali, Petitioner, seeks certiorari review of an order upholding the suspension of his driver's license following his refusal to submit to a breath alcohol test. The Court has jurisdiction. § 322.2615(13), Fla. Stat.

Facts

The hearing officer heard testimony from Petitioner and a friend who was purchasing gas for his vehicle. The hearing officer also considered the traffic citations, the arresting officer's Driving Under the Influence (DUI) packet, and photos and receipts submitted by Petitioner. Following the hearing, the hearing officer found the following facts were established by a preponderance of the evidence. Petitioner was found in the driver's seat of a disabled vehicle on the interstate with the keys in the ignition. The vehicle was out of gas and Petitioner was waiting for a friend. Petitioner was arrested for obstruction after he refused to provide identification and he was transported to the jail, where a traffic deputy arrived for further investigation. The deputy observed Petitioner and the following indicators of impairment: a strong odor of alcohol from the breath, bloodshot watery eyes, and a sway when standing. When the deputy read Petitioner his Miranda rights, Petitioner stated he understood but would not speak until he had a lawyer present. The deputy advised he was beginning a criminal driving under the influence (DUI) investigation and asked Petitioner to perform field sobriety exercises. When Petitioner did not respond, the deputy advised that silence would be treated as refusal. When Petitioner continued to remain silent, the deputy arrested him for DUI. The deputy read the implied consent warning and asked Petitioner to submit a breath alcohol sample; Petitioner did not answer.

At the conclusion of the evidentiary portion of the hearing, Petitioner's counsel raised two arguments: (1) Petitioner's vehicle was inoperable and did not meet the statutory criteria for DUI; and (2) Petitioner was unable to understand the warnings about refusal of a breath test. Pursuant to § 322.2615(7)(b), Fla. Stat., the hearing officer concluded that the deputy had probable cause for a DUI arrest, that Petitioner refused to submit to a breath test at the request of the deputy, and the deputy informed him that refusal would result in suspension of his driving privileges. This appeal followed.

Legal Standards

On first-tier certiorari review, the Court's review is limited to determining: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). The Court must review the record to determine whether it supported the findings below; it may not reweigh the evidence. *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a]. In this appeal, Petitioner claims the hearing officer departed from the essential requirements of the law and the decision is not supported by competent substantial evidence.

Analysis

Petitioner first claims there was insufficient evidence to show he was intoxicated to the extent his normal faculties were impaired, making his arrest unlawful. Under Florida's implied consent law, § 316.1932(1)(a)1 .a., Fla. Stat., a request for a breath test must be incidental to a lawful arrest. *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1167 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a]. Probable cause is Probable cause to arrest for DUI can be based on a variety of factors including the odor of

alcohol from the person's breath, reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, and admissions. *Dep't of Highway Safety & Motor Vehicles v. Rose,* 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

At no time during the hearing below did Petitioner preserve any issue relating to the sufficiency of the evidence related to his level of impairment. His only challenge to probable cause for the DUI arrest was based on the operating condition of the vehicle, not the evidence of his impairment. *See Dep't of Highway Safety & Motor Vehicles v. Marshall,* 848 So. 2d 482, 485 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b] (counsel did not argue driving pattern was insufficient to create reasonable suspicion of impairment). Because Petitioner did not raise this argument before the hearing officer, it has been waived. *Dep't of Highway Safety & Motor Vehicles v. Lankford,* 956 So. 2d 527, 527-28 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a]; *Scritchfield v. Dep't of Highway Safety & Motor Vehicles,* 648 So. 2d 1246, 1247-48 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D233e]. Petitioner's attempts to distinguish these cases and his position that the issue was not waived because the hearing officer was generally charged with making a probable cause determination are unpersuasive.

Petitioner next claims the hearing officer's determination that Petitioner refused to submit to a breath test departed from the essential requirements of the law because the refusal was not willful and knowingly made. Refusal of a breath test need not be express and may be satisfied by refusing to submit valid samples. *Dep't of Highway Safety & Motor Vehicles v. Cherry,* 91 So. 3d 849, 855 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a]; Rule 11D-8.002(12), F.A.C. Validity of a suspect's refusal is also viewed through his or her understanding of the consequences of that choice. *State v. Estrada,* 20 Fla. L. Weekly Supp. 812a (Fla. 12th Cir. Ct. May 15, 2013) (citing *Menna v. State,* 846 So. 2d 502 (Fla. 2003) [28 Fla. L. Weekly S340a]). In *Estrada,* the defendant refused to submit to a breath test but stated in Spanish that he did not understand when read the implied consent warnings. *Id.* The court suppressed evidence of the refusal, finding that the failure to read the warnings in Spanish amounted to a failure to advise the defendant of the consequences of refusal. *Id.*

The evidence before the hearing officer showed Petitioner repeatedly refused to do anything requested by the deputy and yelled throughout the encounter. Although the record shows Petitioner spoke Albanian using an interpreter during the hearing and English is not his first language, there was no evidence he spoke Albanian to the deputy, advised of any language barrier, or expressed any confusion about the implied consent warnings read to him. Indeed, Petitioner acknowledged his understanding of his Miranda rights when advised of them in English. On this record, the hearing officer did not depart from the essential requirements of the law in finding Petitioner refused to submit to a breath test.

Finally, Petitioner argues the hearing officer's finding that he refused the breath test is not supported by competent substantial evidence. This claim relies on alleged internal inconsistencies in the DUI arrest report submitted at the hearing which are not actually inconsistent. The checkboxes on the report reflect Petitioner replied in the negative when asked to submit to a breath test, while the narrative portion reflects he twice refused to answer this question. Petitioner's argument ignores the narrative explanation that he was advised silence would be treated as a refusal and the checkboxes on the report offer only "Yes" and "No" responses. Taken together, this evidence is not internally inconsistent and provides competent substantial evidence to support the hearing officer's finding.

Finding no merit in Petitioner's challenges to the hearing officer's order, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Commercial license—Suspension—Refusal to submit to breath and urine test—Invalidation of suspension of licensee's commercial license under section 322.64 because licensee was not driving commercial vehicle at time of arrest did not preclude hearing officer from affirming suspension of licensee's regular driving privilege under section 322.2615 for refusing to submit to breath and urine test—Petition for writ of certiorari is denied

BENITO BERRIOS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-8270, Division J. June 23, 2021. Counsel: Keeley R. Karatinos, Mander Law Group, Dade City, for Petitioner. Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(REX M. BARBAS, J.) This case is before the court on Benito Berrios's Petition for Writ of Certiorari filed October 21, 2020. The petition, which seeks review of the Department's September 21, 2020, final order, is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner contends that the hearing officer departed from the essential requirements of law when he applied the requirements in section 322.2615, Florida Statutes, rather than those in 322.64 to uphold the suspension of Petitioner's driving privilege. Because the hearing officer set aside the disqualification of Petitioner's driving privilege under section 322.64 (commercial driver's license, or CDL), and because a refusal by a CDL holder does not preclude the suspension of a person's driving privilege under section 322.2615, the Department's suspension of Petitioner's driving privilege under section 322.2615 will be upheld and the petition denied.

JURISDICTION

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. § 322.31, Fla. Stat. Therefore, this court has jurisdiction to review the decision upholding the suspension of Petitioner's driving privilege.

FACTS

Petitioner does not dispute the lawfulness of the arrest. Petitioner was stopped after law enforcement observed his pickup truck cross the fog line and drive into the grass, then over correct and swerve into the opposite lane. Petitioner did this about three times before he was stopped. The law enforcement officer who initiated the stop observed physical signs of intoxication. In addition, he observed an empty can of beer on the passenger floor and a bottle of Crown Royal Vanilla in the passenger seat. After refusing to perform field sobriety exercises, Petitioner was arrested on suspicion of driving under the influence. Petitioner subsequently refused both a breath and urine test. At the time of his arrest, Petitioner held a Class A Commercial Driver's License (CDL) and had a previous DUI conviction. Because he refused a breath and urine test, his CDL privilege was disqualified and his regular driving privilege was administratively suspended in accordance with sections 322.64 and 322.2615, Florida Statutes, respectively. Petitioner requested a formal review of both actions, and an evidentiary hearing before a hearing officer was held September 10, 2020. The hearing officer issued a decision September 21, 2020, sustaining the suspension of Petitioner's driving privilege and setting aside the disqualification of his CDL.

STANDARD OF REVIEW

When a person's driving privileges are suspended as the result of

refusing to submit to a test to determine his or her blood alcohol level, the administrative hearing officer is to determine whether the following elements have been established by a preponderance of the evidence: 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. *See* §322.2615(7)(b)1-3, Fla. Stat.

When a person's CDL is disqualified for refusing to submit to a breath, and, in this case, a urine test, the hearing officer must determine the same elements as set forth above. The difference is that the CDL holder must have been driving or in actual physical control of a *commercial* motor vehicle at the time. §322.64(7)(b), Fla. Stat. In addition, the CDL holder must be told that he or she would be disqualified from operating a commercial motor vehicle for one year, or, if previously disqualified under the statute, permanently. §322.64(7)(b)(3).

This court reviews an administrative decision to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). It is the hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. *Dep't of Highway Safety & Motor Vehicles v. Allen,* 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

DISCUSSION

Petitioner's only argument in this proceeding is that the decision to uphold the suspension of Petitioner's driving privilege departs from the essential requirements of law because it applies the requirements in section 322.2615, Florida Statutes, which pertains to the regular driving privilege, rather than those in 322.64, which governs CDLs. This argument is without merit. The order upholding the suspension found evidentiary support for the conclusion that there was probable cause to find that Petitioner was operating a motor vehicle in this state while under the influence of alcohol. Moreover, Petitioner was read implied consent and refused requests for either a breath or urine test. What is admittedly lacking in the record is any evidence that Petitioner was 1) operating a *commercial* motor vehicle and 2) that he was warned of the possible disqualification of his CDL privilege in accordance with section 322.64. The hearing officer's invalidation of the initial CDL disqualification concedes the lack of evidence on this point. Even if Petitioner were operating a commercial vehicle such that his CDL privilege could disqualified, section 322.24(15) is clear that it would not preclude suspension under section 322.2615. But it does not follow that because his CDL privilege remains unaffected that he is somehow immunized against suspension of his regular driving privilege.

Petition DENIED.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Breath test results—No merit to argument that hearing officer erred in admitting breath test results because breath test affidavit was not accompanied by Intoxilyzer inspection report—Section 316.1934(5), which provides that breath test affidavit is admissible without further authentication and is presumptive proof of valid test, requires only that date of most recent maintenance be included in affidavit and does not require inclusion of inspection report—Burden was on licensee, not Department of Highway Safety and Motor Vehicles, to prove any inadequacy in required inspections—Petition for writ of certiorari is denied

DEVIN A. TOCCO, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-8481, Division E. April 28, 2021. Rehearing and Certification Denied July 15, 2021. Counsel: Keeley R. Karatinos, Mander Law Group, P.A., Dade City, for Petitioner. Christine S. Utt, General Counsel, and Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANNE-LEIGH G. MOE, J.) This case is before the court on Devin A. Tocco's Petition for Writ of Certiorari filed October 28, 2020. The petition, which seeks review of the Department's September 28, 2020, final order, is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner contends that, where the inspection report did not accompany the breath test affidavit submitted in accordance with section 316.1934(5), Florida Statutes, breath test results should not have been admitted. As a result, Petitioner contends the record lacks competent, substantial evidence that he operated a motor vehicle while under the influence of alcohol. Because the documents submitted on behalf of the Department complied with state law, and nothing precluded Petitioner from obtaining the inspection report and challenging the validity of the state's compliance with testing procedures, the Department's suspension of Petitioner's driving privilege will be upheld and the petition denied.

JURISDICTION

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. Therefore, this court has jurisdiction to review the decision upholding the suspension of Petitioner's driving privilege.

STANDARD OF REVIEW

When, as here, a person's driving privileges are suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, the administrative hearing officer is to determine whether the following elements have been established by a preponderance of the evidence: 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; and 2. whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 g/210L or higher as provided in s. 316.193. *See* §322.2615(7)(a)1-2, Fla. Stat.

This court's review of an administrative decision upholding the suspension is not de novo. §322.2615(13), Fla. Stat. Rather, this court must determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). "It is neither the function nor the prerogative of a circuit court to reweigh evidence and make findings when it undertakes a review of a decision of an administrative forum." *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989). It is the hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts

in the evidence, and make findings of fact. *Id*.

FACTS AND PROCEDURAL HISTORY

On August 14, 2020, a Florida Highway Patrol trooper stopped Petitioner, who was driving recklessly. The existence of probable cause for the stop and to arrest on suspicion of DUI are not at issue in this proceeding. Based on observations and evidence gathered at the scene, Petitioner was arrested for driving under the influence and taken to the Hernando County Jail, where he was read the implied consent law and asked to provide a breath sample. He agreed to and took the test. The level at which a driver is presumed to be impaired is .08 g/210L. Petitioner's results were .183 and .189 g/210L, respectively.

On September 17, 2020, an administrative hearing was held to review the suspension of Petitioner's driving privilege. Petitioner argued that the test results should be invalidated, and the suspension lifted, because the inspection report related to the instrument used to test Petitioner's breath was not included in the record. The hearing officer considered the argument and determined the documentary evidence submitted met the minimum statutory requirements. Thereafter, on September 28, 2020, the hearing officer rendered his written order upholding the suspension of Petitioner's driving privilege.

DISCUSSION

Petitioner's only argument in this proceeding is that the Department departed from the essential requirements of law when it admitted, over counsel's objection, the breath test *affidavit,* which indicated the date of the most recent inspection, but was not accompanied by the most recent agency or department inspection *report* in the record.

Section 322.2615 addresses the conduct of administrative review of driver's license suspensions.

> (2)(a) Except as provided in paragraph (1)(a), the law enforcement officer shall forward to the department, within 5 days after issuing the notice of suspension, the driver license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; *the results of any breath or blood test* or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; and the notice of suspension. The failure of the officer to submit materials within the 5-day period specified in this subsection and in subsection (1) does not affect the department's ability to consider any evidence submitted at or prior to the hearing.
>
> ***
>
> (7) In a formal review hearing under subsection (6) or an informal review hearing under subsection (4), the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:
>
> (a) If the license was suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher:
>
> 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in s. 316.193.

The materials listed in section 322.2615(2)(a) were provided to the Department before the hearing and were considered by the hearing officer. Petitioner objected to the admission of the breath test results because the document reflecting the results was not accompanied by an inspection report. Petitioner maintains that without the report, the test results are not admissible. After considering the issue, the hearing officer denied the objection, admitted the breath test results and sustained the suspension.

Petitioner argued below, and again in his petition, that section 316.1934(5) requires that the affidavit meet the requirements of subsections (a) through (e) before the affidavit is admitted into evidence. Section 316.1934(5), which addresses presumption of impairment, says:

> (5) An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, *is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses*:
>
> (a) The type of test administered and the procedures followed;
>
> (b) The time of the collection of the blood or breath sample analyzed;
>
> (c) The numerical results of the test indicating the alcohol content of the blood or breath;
>
> (d) The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; and
>
> (e) If the test was administered by means of a breath testing instrument, the *date* of performance of the most recent required maintenance on such instrument.

(Emphasis added.)

As required by section 316.1934(5)(a-e), the affidavit submitted by Tpr. Gartner indicates a) the type of test administered measures the alcohol level of the breath and that Petitioner was observed for at least 20 minutes before administration of the test to ensure that he did not take anything by mouth or regurgitate, b) that the first sample was collected 11:03 p.m. and the second at 11:06 p.m., c) that the results of the test were .183 and .189, respectively, d) the identity of the breath test operator and the fact that he held a valid breath test operator permit issued by the Florida Department of Law Enforcement, and e) that most recent required maintenance on the instrument used was performed July 27, 2020, 18 days before administration of the subject tests. The affidavit also identifies the instrument used by make, model, serial number, and its location at the Hernando County Sheriff's Office. Comparing this information with the information the statute requires, it is clear the affidavit, which is on a form FDLE provides, complies with the law.

Although Petitioner argues strenuously that the foregoing does not assure the integrity of the tests in the absence of the inspection reports, the statute provides that the foregoing is presumptive proof of a valid test. §316.1934(5), Fla. Stat. The statute does not require or even mention inclusion of the inspection report, only that the date of the last required inspection be provided. Inspections are conducted annually by FDLE. Section 11D-8.004, Fla. Admin. Code. Inspections are conducted monthly by an agency inspector. Section 11D-8.006(1), Fla. Admin. Code. Petitioner is correct, however, that case law does mention inspection reports. Petitioner relies predominately on *Dep't of Highway Safety & Motor Vehicles v. Falcone,* 983 So. 2d 755 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1504a], *Dep't of Highway Safety & Motor Vehicles v. Mowry*, 794 So. 2d 657 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1773a], and *State v. Buttolph,* 969 So. 2d 1209 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2919a].

Falcone does not support Petitioner's argument that an inspection report must accompany the affidavit to validate the breath test results. In *Falcone,* an inspection report did accompany the affidavit, but

Falcone does not hold that the absence of an agency inspection report precludes the Department from solely relying upon a breath alcohol test affidavit. Regarding the affidavit, *Falcone* says if the requirements of section 316.1934(5) (a) through (e) are met, the test results are admissible, and the burden shifts to the driver to prove otherwise. *Falcone,* 983 So. 2d at 756, *citing Dep't of Highway Safety & Motor Vehicles v. Alliston,* 813 So.2d 141, 144 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D610a] (noting an affidavit meeting the requirements of section 316.1934(5) is admissible without further authentication and is presumptive proof of the results obtained. . .however, once the breath test results are admitted into evidence, the record contains competent, substantial evidence of impairment, and the burden shifts to the driver).

Dep't of Highway Safety & Motor Vehicles v. Mowry, 794 So. 2d 657, 658 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1773a], also concludes that it is the driver's burden to prove noncompliance with regulations affecting breath testing instruments in the administrative context. As in *Falcone,* the opinion referred to an inspection report that had been included in the record, but it did not mandate the reports' inclusion. *Mowry* does not support Petitioner's argument.

State v. Buttolph, 969 So. 2d at 1211, says that proof of annual inspection of breath testing instrument is necessary only when the *annual* test, rather than the monthly one, was the most recent test under section 316.1934(5). If the most recent required maintenance was monthly maintenance, the state is not required to prove both the monthly and annual inspection. *Id.* Here, it appears that the monthly inspection was the more recent one. But it must be noted that *Buttolph* involved a criminal prosecution of DUI, not an administrative license suspension. As the Department pointed out, the burden of proof in the administrative proceeding is more relaxed than it would be in a criminal trial. Moreover, in the administrative context, the burden is on the driver, not the state. Accordingly, *Buttolph* does not support Petitioner's argument.

In light of the foregoing, the decision of the hearing officer was correct that the affidavit complied with state law, and that it was Petitioner's, not the Department's, burden to prove any inadequacy with regard to required inspections.

Petition DENIED.

ORDER DENYING REHEARING AND CERTIFICATION

Petitioner's motion for rehearing and request for certification are DENIED. *State v. Irizarry,* 698 So. 2d 912 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D2075a] (breath test result affidavit was admissible in evidence without the state having to provide independent proof of the proper maintenance of the Intoxilyzer); *Dept. of Highway Safety and Motor Vehicles v. Mowry,* 794 So. 2d 657, 659 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1773a] (burden is on Petitioner to come forward with evidence of noncompliance; placement of burden on Petitioner does not offend notions of due process.)

* * *

ANDREW BIVIANO, Appellant, v. CITY OF LIGHTHOUSE POINT, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE20-003220. L.T. Case No. 19-0919. April 15, 2021. Appeal from the City of Lighthouse Point, Alan L. Gabriel, Special Magistrate. Counsel: Ryan A. Abrams, Abrams Law Firm, P.A., Ft. Lauderdale, for Appellant. Michael D. Cirullo, Jr., Goren, Cherof, Doody & Ezrol, P.A., Ft. Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the Final Order rendered on February 5, 2020 is hereby AFFIRMED. (BOWMAN, ROBINSON, and COLEMAN, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of detention and arrest—Deputy had reasonable suspicion to detain licensee for DUI investigation where licensee ran red light and failed to maintain single lane; licensee had odor of alcohol, slow movements, slurred speech and difficulty retrieving documents, and licensee admitted to consuming alcohol—Deputy had probable cause to arrest licensee where, in addition to other indicia of impairment, licensee performed poorly on one-leg stand field sobriety exercise—Hearings—Due process—No merit to argument that licensee was deprived of due process because he was provided with requested documents only two days prior to hearing where hearing was scheduled within 30 days of request for hearing, hearing was continued to allow licensee additional time to subpoena witnesses, and licensee's temporary driving permit was extended through date of continued hearing—Department of Highway Safety and Motor Vehicles is not required to complete hearing within 30 days of request or provide licensee with copies of documents prior to hearing—Failure of subpoenaed witness to appear—Licensee was not deprived of due process by failure of agency breath testing machine inspector to appear at hearing where licensee declined offered continuance to allow him to seek enforcement of witness subpoena—Breath test results—Hearing officer did not err in admitting breath test results without scientific predicate being established—Breath test affidavit, including date of most recent Intoxilyzer inspection, is admissible without further authentication and is presumptive proof of licensee's impairment—Challenge to scientific reliability of test results was beyond scope of formal review hearing—Hearing officer properly refused to issue subpoenas for Florida Department of Law Enforcement employees who were not identified in documents required to be furnished under section 322.2615(2)(a)—Petition for writ of certiorari is denied

WALKER ROBERT SACKMAN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 20-05-AP. June 18, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

(RUDISILL, J.) Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of his driver's license for driving or being in actual physical control of a motor vehicle while under the influence of alcoholic beverages. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

BACKGROUND

On December 1, 2019, at approximately 12:12 a.m., Deputy Brandon Fortenberry of the Seminole County Sheriff's Office conducted a traffic stop after he observed Petitioner run a red light and fail to maintain a single lane four times. Upon making contact with Petitioner, Deputy Fortenberry observed that he had a strong odor of alcohol coming from his breath as well as from the vehicle, his movements were slow, his speech was slurred, and he had a hard time retrieving his driver's license and registration. Petitioner advised Deputy Fortenberry that he was coming from a friend's party and going to another friend's party, and that he had consumed two or three beers. Deputy Fortenberry asked Petitioner to perform field sobriety exercises, and Fortenberry determined that he did not complete the exercises to standard. Petitioner was placed under arrest for DUI and transported to the John E. Polk Correctional Facility. DUI Technician Stephanie Berrios requested that Petitioner submit to a breath test, and he complied. The results were 0.187 and 0.179. Petitioner asked

Deputy Fortenberry to retrieve his cell phone from his vehicle, stating that he had dropped it. Fortenberry retrieved the phone from the backseat floorboard, where he also discovered a cold, open beer can. Petitioner was issued citations for DUI and failure to stop at a traffic light. His license was suspended pursuant to section 322.2615, Florida Statutes. He sought formal review of the license suspension.

The Department conducted an initial formal review hearing on January 2, 2020. The following documents were submitted into the record: Florida DUI Uniform Traffic Citation; Arrest Report; Offense Report; Breath Alcohol Test Affidavit; Request for Test Affidavit; DUI Technician Report; and DHSMV Driving Record. Counsel for Petitioner objected to the documents, claiming that he submitted a Public Records Request for Copies of Records on December 6, 2019, but did not receive the documents until two days before the hearing on December 31, 2019. Counsel moved to set aside the license suspension arguing that Petitioner was denied his right to have a meaningful hearing within the thirty-day requirement under section 322.2615(6)(a), Florida Statutes. The hearing officer reserved ruling on the motion, but continued the hearing to allow Petitioner to subpoena witnesses and extended Petitioner's temporary driving permit.

The Department conducted a second formal review hearing on February 5, 2020. The hearing officer stated that he watched the traffic stop video more than once. Deputy Fortenberry testified that he was sitting in a parking lot just southwest of the intersection of 1st Street and County Road 426 when he observed Petitioner traveling southbound on 1st Street. Although he could not see the color of the traffic light going southbound from his location, he could see the traffic light going eastbound and northbound, and "it was a solid green light going east and west." Once he stopped and made contact with Petitioner, "he smelled like alcoholic beverages." Deputy Fortenberry also swore and affirmed that all of the statements provided by him in the submitted documents were true and correct. DUI Technician Stephanie Berrios testified that she administered the breath test in this case but could not recall the exact breath volume for the two subject samples. She explained that she did not personally perform the test to determine whether the machine accurately measured breath volume when conducting the breath test.

Counsel for Petitioner moved to set aside the suspension, arguing that: (1) Petitioner was detained longer than necessary to issue a traffic citation because there was no founded suspicion of criminal activity; (2) there was no probable cause to arrest Petitioner for DUI to the extent his normal faculties were impaired; and (3) there was no agency inspection in the record to show that the breath test machine passed an inspection. Counsel also moved to strike the results of the horizontal gaze nystagmus (HGN) test because Deputy Fortenberry was not a drug recognition expert, and moved to strike the breath test results as scientifically unreliable. Counsel further renewed his motion to set aside the suspension based on the Department's failure to timely provide records. The hearing officer granted the motion as to the HGN results.

On February 7, 2020, the hearing officer issued his Findings of Fact, Conclusions of Law and Decision. The hearing officer noted that he watched the video in its entirety, and although Petitioner "was cooperative and able to converse in a competent manner," Deputy Fortenberry observed erratic driving, the odor of alcohol, slow movements, and slow speech, and Petitioner gave multiple clues of impairment during the one-leg stand exercise. The hearing officer denied Petitioner's remaining motions and found that all elements necessary to sustain the suspension for DUI were supported by a preponderance of the evidence.

STANDARD OF REVIEW

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell*, 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel*, 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D552a] (internal citation omitted).

ANALYSIS

In a formal review hearing for suspension of a driver's license for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, the hearing officer's scope of review is limited to the following issues:

> 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 had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in section 316.193.

§ 322.2615(7)(a), Fla. Stat. (2020).

Petitioner argues that the hearing officer violated the essential requirements of law and his decision was not based upon competent substantial evidence because: (1) there was no founded suspicion to detain Petitioner longer than necessary to issue a traffic citation and require field sobriety exercises; (2) there was no probable cause to arrest Petitioner; (3) Petitioner was deprived of due process by failing to have a meaningful hearing within a meaningful time; and (4) the hearing officer improperly admitted into evidence scientifically unreliable breath test results.

Detention

Petitioner contends that there was no competent substantial evidence in the record to establish reasonable suspicion to detain him longer than necessary to issue a traffic citation because there was no evidence that his normal faculties were impaired. He claims that an odor of alcohol is not indicative of an individual's normal faculties being impaired, and that the traffic stop video contradicted Deputy Fortenberry's other observations of impairment.

The Department argues that the evidence established reasonable suspicion to temporarily detain Petitioner for a DUI investigation, and that the video did not contradict or negate Deputy Fortenberry's observations of impairment.

"To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane*, 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.' " *Maldonado v. State*, 992 So. 2d 839, 842 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (quoting *Eldridge v. State*, 817 So. 2d 884, 888 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1009a]); *State v. Breed*, 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a]. "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda*, 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State*, 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly

D2302a]). Certain relevant factors may be evaluated to determine if reasonable suspicion exists, including "[t]he time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; [and] anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge." *State v. Stevens*, 354 So. 2d 1244, 1247 (Fla. 4th DCA 1978).

Evidence of an odor of alcohol, alone, is insufficient to establish reasonable suspicion. *State v. Kliphouse*, 771 So. 2d 16, 24 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (more than the mere odor of alcohol is required to establish reasonable suspicion for a DUI investigation). Here, however, the evidence in the record established that at approximately 12:12 a.m., while Petitioner was driving from one party to another, he ran a red light and repeatedly failed to maintain a single lane. He had a strong odor of alcohol coming from his breath and vehicle, had slow movements, had slurred speech, had a hard time retrieving his driver's license and registration, and admitted alcohol consumption. This evidence, which was not contradicted by the video in the record, is sufficient to support a finding of reasonable suspicion. *See State v. Taylor*, 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b] (finding reasonable suspicion where officer observed speeding, odor of alcohol, staggering, slurred speech, and watery and bloodshot eyes); *Castaneda*, 79 So. 3d 41 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and watery eyes); *Ameqrane*, 39 So. 3d 339 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and glassy eyes); *Origi*, 912 So. 2d 69 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot eyes); *State v. Liefert*, 247 So. 2d 18, 19 (Fla. 2d DCA 1971) (finding reasonable suspicion where officer observed driving in a weaving fashion and odor of alcohol). Thus, the hearing officer's finding of reasonable suspicion is supported by competent substantial evidence.

Arrest

Petitioner contends that there was no competent substantial evidence in the record to establish probable cause for his arrest. He claims that the video showed absolutely no diminishment of his normal faculties to justify an arrest.

The Department argues that the evidence gathered following the temporary detention, which included Petitioner's admission of drinking alcohol and his poor performance on the one-leg stand exercise, along with the evidence of driving erratically at 12:12 a.m., the odor of alcohol, slurred speech, and slow movements, established probable cause to arrest Petitioner for DUI.

"[P]robable cause sufficient to justify an arrest exists 'where 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] (quoting *Dep't of Highway Safety & Motor Vehicles v. Smith*, 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]).

Here, as noted above, Petitioner ran a red light, failed to maintain a single lane, smelled of alcohol, had slurred speech and slow movements, had a hard time retrieving his driver's license and registration, admitted drinking alcohol, and performed poorly on the one-leg stand field sobriety exercise. *See State v. Geiss*, 70 So. 3d 642, 653 n.1 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1132a] ("probable cause may be found by a combination of factors, including an 'odor of alcohol on a driver's breath . . . the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises' "); *Whitley*, 846 So. 2d at 1166 (holding that erratic driving, an odor of alcohol, glassy eyes, slurred speech, and an admission of drinking alcohol were sufficient to provide the officer with probable cause to arrest defendant for DUI). This evidence is not contradicted by the video in the record. *Wright v. Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 568a (Fla. 4th Cir. Ct. July 26, 2019) (finding that the video was not sufficient to objectively establish that the arresting officer did not have probable cause to believe that petitioner was impaired); *Dostie v. Dep't of Highway Safety & Motor Vehicles*, 24 Fla. L. Weekly Supp. 897b (Fla. 4th Cir. Ct. Jan. 6, 2017) ("Because the hearing officer is the trier of fact and is responsible for evaluating the credibility of witnesses and evidence, the DVD cannot be said to contradict the hearing officer's findings regarding the Petitioner's speech and the testimony of the Trooper constitutes competent and substantial record evidence."). Thus, the hearing officer's finding of probable cause is supported by competent substantial evidence.

Due Process

Petitioner contends that he was deprived of due process because he was not provided a meaningful hearing within thirty days under section 322.2615(6)(a), Florida Statutes. He claims that on December 6, 2019, he requested a formal review hearing and made a public records request for documents which the Department intended to use at the hearing. He asserts that a hearing was scheduled for January 2, 2020, but the Department did not provide the requested documents until December 30, 2019, which prevented him from being able to subpoena witnesses in time for the hearing.

The Department argues that Petitioner was not deprived of due process because a hearing was properly scheduled within thirty days, and his driving privilege was extended through the date of the continued hearing.

Section 322.2615(6)(a) provides that "[i]f the person whose license was suspended requests a formal review, the department must *schedule* a hearing within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing." § 322.2615(6)(a), Fla. Stat. (2020) (emphasis added). Section 322.2615(9) also provides that if the scheduled hearing is continued at the Department's initiative, the Department "shall issue a temporary driving permit that shall be valid until the hearing is conducted." § 322.2615(9), Fla. Stat. (2020).

The Department complied with this statute by scheduling the January 2, 2020 formal review hearing within thirty days after Petitioner requested the hearing on December 6, 2019. Nothing in the statute or relevant case law requires the Department to conduct or complete the formal review hearing within thirty days. *See Donohue v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 551b (Fla. 17th Cir. Ct. Mar. 5, 2013) (holding petitioner misinterpreted section 322.2615(6)(a) by arguing he had a right to a *completed* formal review hearing within thirty days of his request); *Vodar v. Dep't of Highway Safety & Motor Vehicles*, 15 Fla. L. Weekly Supp. 226a (Fla. 13th Cir. Ct. Jan. 11, 2008) (holding petitioner's argument that Department deprived her of due process rights by not holding hearing within thirty days lacked merit, and if hearing was required to be conducted within thirty days "there would be no purpose of any rules outlining continuance procedures under section 322.2615(9)"). The Department also issued Petitioner a temporary driving permit.

Furthermore, there is nothing in the statute or relevant case law that requires the Department to provide the driver with copies of documents to be presented at the formal review hearing prior to the

hearing. *Patel v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 111a (Fla. 9th Cir. Ct. Oct. 12, 2012) (holding petitioner was not deprived of a meaningful hearing where Department did not provide driver with copies of documents until the day of the hearing). Here, Petitioner was provided with the documents on December 30, 2019, the hearing was continued to February 5, 2020, subpoenas were issued for the witnesses, and therefore Petitioner was able to review the documents prior to the continued hearing and question the witnesses who testified at the hearing.

In addition, Petitioner argues a violation of due process based on the failure of witness Keith Betham, the agency inspector for the breath test machine, to appear at the continued hearing. However, the hearing officer offered a continuance to allow Petitioner to enforce the subpoena that was issued to Mr. Betham, and counsel declined, stating "we're just going to go forward with what we have right now." Also, contrary to Petitioner's argument, the Department would have been required to extend the temporary driving permit had he chosen to enforce the subpoena. *See* § 322.2615(9), Fla. Stat. (2020) (providing that if a driver enforces a subpoena as provided in subsection (6), "the department shall issue a temporary driving permit that shall be valid until the hearing is conducted").

As such, Petitioner was not deprived of a meaningful hearing or due process under section 322.2615.

Breath Test

Petitioner contends that the hearing officer improperly admitted the breath test results into evidence without a proper predicate showing that the results were scientifically reliable in violation of section 90.702, Florida Statutes, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Petitioner also argues that the hearing officer improperly prevented him from disputing the admissibility of the results by failing to issue requested subpoenas to Florida Department of Law Enforcement (FDLE) employees Patrick Murphy, Roger Skipper, Laura Barfield, and Jennifer Keegan.

The Department argues that the breath test results were self-authenticating and constituted presumptive proof of impairment. The Department also argues that courts have consistently rejected the argument that there must be a scientific predicate to consider breath test results, and that the four FDLE employees were not fact witnesses for which subpoenas should have been issued.

To be admissible, the Department must establish that the breath test was performed substantially according to the methods approved by the FDLE as reflected in the administrative rules and statutes. *Dep't of Highway Safety & Motor Vehicles v. Berne*, 49 So. 3d 779, 782 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D2238e]. "Once admitted, the [breath test] affidavit 'is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath.' " *Id.* at 783; § 316.1934(5), Florida Statutes (2020) ("An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content . . . is admissible in evidence . . . . Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses [certain required information]"); *see also* § 322.2615(2)(b), Fla. Stat. (2020) ("Materials submitted to the department by a law enforcement agency or correctional agency shall be considered self-authenticating and shall be in the record for consideration by the hearing officer.").

Petitioner does not argue that the breath test affidavit did not meet the requirements of the statutes. The Breath Alcohol Test Affidavit in this case reflects that the date of the last agency inspection was November 29, 2019, two days before the breath test was conducted. *Dep't of Highway Safety & Motor Vehicles v. Falcone*, 983 So. 2d 755, 757 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1504a] ("the Department met the requirements of section 316.1934(5) by providing documentation establishing the date of performance of the most recent required maintenance on the intoxilyzer."). Thus, the breath test affidavit admitted in this case is presumptive proof of Petitioner's impairment.

Furthermore, Petitioner's challenge to the scientific reliability of the breath test results was beyond the scope of the formal review hearing. *Klinker v. Dep't of Highway Safety & Motor Vehicles*, 118 So. 3d 835, 841 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1195a]. This same argument about the reliability of breath test results in a formal review hearing (which has previously been made by counsel for Petitioner) has consistently been rejected. *See, e.g., Torrence v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp. 37a (Fla. 9th Cir. Ct. July 8, 2014) (finding that counsel's attempt to ask questions regarding the approval process and scientific reliability of the Intoxilyzer 8000 and breath test results were beyond the scope of the hearing); *Scoma v. Dep't of Highway Safety & Motor Vehicles*, 22 Fla. L. Weekly Supp. 31a (Fla. 9th Cir. Ct. June 23, 2014) (finding that counsel's attempt to introduce documents about a 2002 approval study of the Intoxilyzer 8000 and other driver breath test results were irrelevant, and his challenges to the scientific reliability of the Intoxilyzer 8000 and breath test results were beyond the scope of the hearing).

In addition, under section 322.2615(6)(b), the hearing officer shall be authorized to "issue subpoenas for the officers and witnesses identified in documents provided under paragraph (2)(a)." § 322.2615(6)(b), Fla. Stat. (2020). Those documents include: the driver's license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical/controlled substances; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement or correctional officer and that the person refused to submit; the officer's description of a person's field sobriety test; and the notice of suspension.

Here, none of the documents submitted by Deputy Fortenberry identified the four FDLE employees as officers or witnesses for whom Petitioner had the right to seek subpoenas under section 322.2615(6)(b). In fact, in *Klinker*, the Fifth District Court of Appeal held that the hearing officer correctly refused to issue subpoenas for those same FDLE employees—Murphy, Skipper, Barfield, and Keegan—finding that those individuals were not witnesses identified in the documents for whom a driver has a right to request that subpoenas be issued under section 322.2615(6)(b). *Klinker*, 118 So. 3d at 840-41. Thus, the hearing officer properly refused to issue the subpoenas to the FDLE employees.

Based upon the foregoing, it is hereby **ORDERED** and **ADJUDGED** that the Petition for Writ of Certiorari Jurisdiction is **DENIED**. (STACY and RECKSIEDLER, JJ., concur.)

* * *

Licensing—Driver's license—Hardship license—Cancellation—Department of Highway Safety and Motor Vehicles' decision to cancel hardship license was supported by competent substantial evidence where licensee, who signed statement of abstinence upon entering special supervision services program agreeing not to violate substance abuse guidelines that define "substance abuse" as consumption of any substance containing any amount of alcohol, was observed driving dangerously, exhibited multiple indicia of impairment in addition to odor of alcohol and admitted to arresting officer that he had consumed alcohol—Petition for writ of certiorari is denied

PAUL VANBEBBER, Petitioner, v. STATE OF FLORIDA, DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 20-AP-05. June 28, 2021. Counsel: J.

Derek Verderamo, for Petitioner. Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(LAUREN L. BRODIE, J.) THIS CAUSE comes before the Court on Paul Vanbebber's Petition for Writ of Certiorari, brought pursuant to Fla. Stat. § 322.31. Petitioner is requesting for the "Court to enter an Order directing the Respondent to allow Defendant [sic] to re-enter the DUI Program under the Special Supervision Services" program. (Pet'r ['s] Pet. p.4). Petitioner alleges that he is eligible for reinstatement of his hardship license (Business Purpose Only "BPO"), which was cancelled for alleged substance abuse following a hardship hearing, and argues that there was no competent and substantial evidence that Petitioner was in violation of Fla. Admin. Code R. 15A-10.029(5), for the cancellation to have occurred. (*Id.* at 3-4.). Having reviewed the petition, Respondent's response, the appendices[1], and the applicable law, the Court finds as follows:

1. On October 19, 2000, Petitioner's license was permanently revoked in case no. 00-CF-0326. Five years later, Respondent granted Petitioner a BPO pursuant to Fla. Stat. § 322.271(4), which "requires Petitioner to be supervised by the Special Supervisor Services (SSS) program. (Resp't ['s] Resp. p.2). On March 6, 2012, Petitioner signed an SSS program Statement of Abstinence, agreeing not to violate the embodied "substance abuse" guidelines. (R.A. 1). On June 18, 2019, Petitioner was arrested for DUI, and refused a breath test. (R.A. 2). As a result, Petitioner's BPO was suspended. (*Id.*).

2. During formal review of the suspension of the BPO, it was discovered that an evidentiary arrest packet was not submitted by the arresting law enforcement agency, and thus, the suspension was set aside. (Resp't ['s] Resp. p.4). However, Petitioner did not notify SSS of the arrest, and once enlightened as to the circumstance, SSS sent Respondent correspondence recommending cancellation of Petitioner's BPO due to noncompliance with Chapter 15A-10, Fla. Admin. R. (R.A. 3). On December 23, 2019, Respondent sent Petitioner an Order of License Revocation, Suspension, or Cancellation, cancelling Petitioner's driving privilege indefinitely, beginning January 13, 2020. (R.A. 3). On Petitioner's request, a hearing was held for early reinstatement of his BPO. (Resp't ['s] Resp. p.5). Respondent issued a Final Order Denying Early Reinstatement, dated May 27, 2020.

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

4. In the instant matter, Petitioner argues that the third prong of the certiorari standard was not satisfied by stating that there was no competent and substantial evidence that Petitioner was in violation of Fla. Admin. Code R. 15A-10.029(5). (Pet' r ['s] Pet. p.5). Petitioner further argues that "there is no definition for substance abuse included in the Florida Administrative Code, and asks the Court to "define and create a legal standard per the Administrative Order" addressing the definition of substances and substance abuse. (*Id.*)

5. Fla. Admin. Code R. 15A-10.029(5) provides that "[n]o person shall be eligible for reinstatement in the Special Supervision Services who has previously been reinstated and had that reinstatement cancelled due to current substance abuse. In such a situation the entire statutory revocation period must be served." In regard to Petitioner's argument of the alleged ambiguity of the definition of "substances" and " substance abuse," Fla. Admin. Code Ann. R. 15A-10.002, Definitions, defines alcohol as "*any substance containing any amount of alcohol in any form* including, but not limited to, ethanol, methanol, propanol, and isopropanol. This includes "non-alcoholic" beer or wine. (emphasis added). Petitioner was also made aware of the exact definition of substance abuse when he signed the Statement of Abstinence By Applicant, which states in part, "*The following behaviors are considered substance abuse* and *will be reasons for denial or termination from the SSS:* . . . Alcohol: No consumption of alcohol in any form may be used, including the so-called non-alcoholic beer/wine." (R.A. 1). (emphasis added).

6. The Court in *Mathis v. Coats,* 24 So. 3d 1284 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D142b] expanded on factors for finding probable cause for DUI:

> Many factors contribute to a finding of probable cause for a driving under the influence arrest. For example, although an odor of alcohol is significant, it may not be dispositive. Other factors may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.

Id. On June 18, 2019, Officer Kyle Yurewitch observed Petitioner's vehicle "swerve from the far-right side of the road to the far-left side of the road nearly entering the vegetation of along the edge." (R.A. 2, 2). This speaks to the dangerous operation of a vehicle factor. Officer Yurewitch could smell a strong odor of alcohol from approximately 5 feet away, upon approaching Petitioner's vehicle, and a strong odor of alcohol emanating from Petitioner's person during the Standardized Field Sobriety Task (SFST). (*Id.*). Petitioner stated that the odor of alcohol was from "a beverage that had spilled in the back seat." (*Id.*). The Officer made observations that there were multiple alcohol containers as well as an empty red cup in the back seat area of Petitioner's vehicle. These observations relate to the odor of alcohol factor. Officer Yurewitch also observed Petitioner's "slurred speech, and bloodshot eyes." (*Id.*). Petitioner even admitted to drinking "one four loco and 2 beers" (*Id.*). This speaks to the admission factor. Officer Yurewitch administered a SFST to Petitioner, who displayed signs of impairment during the task. (*Id.*).

7. Petitioner argues that "proving a DUI under 316.192 is merely consumption of drugs or alcohol to the extent that your normal faculties are impaired." Referring back to R.A. 1, Petitioner would engage in behavior considered substance abuse if he would consume any amount of alcohol, which he admitted to doing. (R.A. 3). Based on the record, it appears that the Department's decision was supported by competent, substantial evidence.

It is therefore,

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

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[1]Petitioner's Appendix is cited as "P.A," and Respondent's, as "R.A." The appendices are attached to this order.

* * *

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CIRCUIT COURTS—ORIGINAL

Unemployment compensation—Federal Pandemic Unemployment Compensation—Opt out—Constitutional law—Separation of powers—Injunctions—Defendants did not violate chapter 443 by opting out of FPUC—Decision to opt out belongs to state's chief executive—Governor's strategy to promote reemployment by ending Florida's participation in FPUC program is a political issue—Legislature restricted the meaning of "reemployment assistance" to the unemployment cash benefits required by chapter 443, which includes cash benefits the state must pay to its unemployed citizens as mandated by federal law under titles 5, 26, and 43 of the United States Code, and nothing else—FPUC is a creature of title 15 of the United States Code with money appropriated from the United States Treasury and, as a result, fails to meet legislature's narrow definition of "reemployment assistance"—Chapter 443 does not mandate the state's voluntary participation in FPUC or any other federal program that is not required by an act of Congress—Legislative branch has authorized executive branch to exercise its discretion in its execution of chapter 443—Even if plaintiffs qualified for injunctive relief, plaintiffs' motion for injunction came too late to make a difference because FPUC will expire before state could opt back in, and before plaintiffs could accrue any benefits—Plaintiffs have not established by competent substantial evidence that retroactive FPUC benefits are available

GIA CUCCARO, HEATHER FULOP, LUISA COCOZELLI, LORI BETH ERTELL, HARRIETT RUBIN, JAMESHA BENT, EDWARD BRIAN SMOOT, ASHLEY BROCKINGTON, VICTORIA LABA, and IVAN VARELA, Plaintiffs, v. RON DESANTIS, in his official capacity as Governor of the State of Florida; FLORIDA DEPARTMENT OF ECONOMIC OPPORTUNITY; and DANE EAGLE, as Secretary of Florida Department of Economic Opportunity, Defendants. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2021 CA 1413. August 30, 2021. J. Layne Smith, Judge.

ORDER DENYING TEMPORARY INJUNCTION

On August 13, 2021, this Court received this case due to a transfer of venue from the Circuit Court of Broward County, Florida. In the Plaintiffs' amended complaint, they pled on count seeing a declaratory judgment and another count seeking a writ of mandamus. The Plaintiffs also moved for a temporary injunction on an expedited basis. Time being of the essence, on August 16, 2021, this Court scheduled a preliminary injunction hearing.

At this stage, the only parties to this action are the ten named Plaintiffs and the three named Defendants.

On August 25, 2021, the Court heard testimony from six Plaintiffs (Gia Cuccaro, Luisa Cocozelli, Lori Beth Ertell, Harriett Rubin, Jamesha Bent, and Victoria Labarbera), William Currie-the corporate representative for the Florida Department of Economic Opportunity (DEO), and Andrew Settner. The Court admitted eight exhibits into evidence (Plaintiffs' Exhibits 1-5; Defendants' Exhibits 1-3) and weighed the witnesses' credibility.

The Court has reviewed the Plaintiff's sixth request for judicial notice and the Defendants' objection to it. The Court sustains the objection and declines to take judicial notice of the print-outs the Plaintiffs attached to their request.

This Court has considered the evidence, weighed the credibility of the witnesses, and considered the oral and written arguments of counsel and the applicable law.

The Plaintiffs presented well, were forthright, and they detailed the difficult circumstances they are facing. The Plaintiffs relayed the hardships they have experienced due to the reduction of their unemployment benefits. The Court finds that all 10 Plaintiffs have made their best effort to find work. In fact, two Plaintiffs have started jobs since the lawsuit was filed. Each Plaintiff is financially vulnerable and the reduction in their weekly benefits has exacerbated their financial woes. Their lack of resources requires them to make daily trade-offs regarding life necessities.

William Currie testified for the Defendants. The Court found him to be knowledgeable on the issues, credible, and truthful.

Plaintiffs' witness, Andrew Settner, is a consultant who works for a progressive think tank in Washington, D.C. He testified that the month after unemployed Floridians stopped receiving FPUC benefits, the state's unemployment rate increased one-tenth-of-one-percent. He also admitted that Florida's labor force grew that month.

The unemployment rate only tracks the number of people who are actively seeking employment. A state's unemployment rate can increase if enough people who previously were not seeking employment join the job market. If employers are hiring, an influx of new job seekers often results in more people being hired. Mr. Settner was forthright, but his testimony lacked both detail and context.

The Judge's Role

My job requires me to determine and follow the law. For good reasons, our state's constitution separates the powers of government and my role as judge is to call balls and strikes, impartially, no matter which team is pitching or at bat.

Notwithstanding my ruling, this Court empathizes with the Plaintiffs and every unemployed Floridian. I sincerely hope they find employment and that their life circumstances improve quickly.

This Court finds and rules as follows:

Applicable Federal and State Law

1. The United States of America and the State of Florida are sovereign republics.

2. Congress sets the public policy of our nation by enacting laws. Likewise, the Florida legislature sets the public policy of this state by enacting statutes.

3. Congress has the power to provide for the general welfare of the United States. Article 1, Section 8, U.S. Constitution.

4. Congress enacted a nationwide employment security program that mandates a minimum floor of benefits that each state must provide to its eligible unemployed citizens.

5. Each state can enact laws that exceed these federally imposed minimums for their unemployed citizens, and some do. However, no state can provide its unemployed citizens with less than the federally imposed minimums.

6. Florida collects unemployment compensation taxes from employers to cover the unemployment compensation benefits it must pay out as mandated by federal law.

7. The Florida legislature enacted chapter 443 of the Florida Statutes to satisfy federal law requirements regarding unemployment compensation benefits and to establish this state's public policy concerning "reemployment assistance," which it expressly defined. Section 443.036(37).

CARES Act

8. In March 2020, in response to the COVID-19 pandemic crisis, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES). Among other things, CARES established three benefits programs: (1) Pandemic Unemployment Assistance (PUA); (2) Pandemic Emergency Unemployment Compensation (PEUC); and (3) Federal Pandemic Unemployment Compensation (FPUC).

9. FPUC is the only CARES program at issue in this case. Significantly, FPUC *is not* part of the nationwide employment security program codified in chapter 443.

10. Congress neither mandated the states to participate in FPUC, nor required the states to fund any part of the program by collecting local taxes from employers. Instead, Congress expressly allowed each state to opt-in or ignore FPUC. Specifically, 15 U.S.C. Section 9023(a) contains the operative language, which reads:

> "Any state which desires to do so may enter into and participate in an agreement with the Secretary of Labor (in this section referred to as the "Secretary"). Any State which is a party to an agreement under this Section may, upon thirty days written notice to the Secretary, terminate such agreement,"

11. On March 28, 2020, Governor Ron DeSantis delegated the authority for DEO to opt Florida into FPUC (Defendants' Exhibits 1, page 12). In response, DEC and its Secretary followed through (Defendants' Exhibit 1). Afterward, the United States paid FPUC benefits to eligible unemployed Floridians.

12. Initially, the United States paid FPUC benefits of $600 per week to persons receiving state unemployment compensation benefits. However, Congress set an expiration date for FPUC and the program expired. Afterward, Congress reinstated FPUC but reduced the weekly payout from $600 to $300. By operation of law, the FPUC program is set to expire again on September 6, 2021.

13. A state must provide the United States Secretary of Labor with thirty days written notice to opt out of FPUC. On May 25, 2021, Florida fulfilled this requirement (Defendants' Exhibit 2). Florida opted out of FPUC effective June 26, 2021 (Defendants' Exhibit 2).

This Lawsuit

14. Plaintiffs maintain that the Defendants violated chapter 443 by opting out of FPUC, and that Florida must participate in FPUC for as long as benefits are available.

15. Defendants disagree and assert that they have exercised executive branch discretion in full compliance with chapter 443. They maintain that the Plaintiffs have misconstrued the law.

16. Here, each party invokes the separation of powers.

17. "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches . . . . " Article 2, Section 3 of the Florida Constitution.

18. The Plaintiffs contend that due to the Defendants' failure to enforce chapter 443 as written, the executive branch has exercised legislative power.

19. In contrast, Defendants deny this allegation and respectfully argue that the Court cannot grant the Plaintiffs' motion without rewriting chapter 443, which would be judicial exercise of legislative power.

20. Only one of these positions is correct and it's my job to determine which one and to follow the constitution.

21. The Court will resolve this dispute by construing the relevant parts of chapter 443. Did the legislature command the state to participate in non-mandatory federal programs like FPUC? Otherwise, did the legislature authorize the executive branch to exercise discretion regarding non-mandatory federal programs?

22. All parts of the statute must be given effect, and the Court should avoid a reading of the statute that renders any part meaningless. See *Heart of Adoptions v. J.A.,* 963 So.2d 189, 199 (Fla. 2007) [32 Fla. L. Weekly S455a].

23. Moreover, "all parts of a statute must read together in order to achieve a consistent whole." *Borden v. East-European Ins. Co.,* 921 So.2d 587, 595 (Fla. 2006) [31 Fla. L. Weekly S34a] (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So.2d 452, 455 (Fla. 1992) (emphasis omitted)).

Chapter 443 of the Florida Statutes

24. Section 443.011 reads, "[t]his chapter may be cited as the 'Reemployment Assistance Program Law.' "

25. Section 443.031 is titled "Rule of liberal construction." It reads:

> "This chapter shall be ***liberally construed*** to accomplish its purpose ***to promote employment security by increasing opportunities for reemployment and to provide, through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment***. The Legislature hereby declares its intention to provide for carrying out the purposes of this chapter in **cooperation with the appropriate agencies of other states and of the Federal Government as part of a nationwide employment security program**, and ***particularly*** **to provide for meeting the requirements of *Title III*, the requirements of the *Federal Unemployment Tax Act*, and *the Wagner-Peyser Act of June 6, 1933*, entitled "An Act to provide for the establishment of a national employment system** and for cooperation with the states **in promotion of such system, and for other purposes**," ***each as amended***, in order ***to secure for this State and its citizens the grants and privileges available under such acts.*** All doubts as to the proper construction of any provision of this chapter shall be resolved in favor or conformity with such requirements." (emphasis added),

26. Section 443.031 instructs Florida to promote employment security, the reemployment of unemployed persons, and to both collect and distribute compensation to unemployed individuals. The accumulation of funds anticipates Florida's collection of local taxes from employers to pay these benefits. Cooperation with other states and the federal government expressly relates to the national employment security program mandates by federal law under Title III, the Federal Unemployment Tax Act, and the Wagner-Peyser Act of June 6, 1933, **each as amended " in order to secure . . . grants and privileges available under such acts**." The liberal construction the Legislature is commanding concerns unemployment benefits Florida is obligated by federal law to pay its eligible citizens. The closing language in the section requires proper construction of any provision of chapter 443 to be resolved "in favor of conformity with such requirements." This admonition is tied directly to the mandatory federal requirements referred to by citation in the section. Moreover, section 443.031 must be read in conjunction with section 443.036(37).

27. Section 443.036(37) defines the term "reemployment assistance," as applied throughout chapter 443. "Reemployment assistance" means:

> **"cash benefits payable to individuals with respect to their unemployment pursuant to the provisions of this chapter**. Where the context requires, reemployment assistance also means cash benefits payable to individuals **with respect to their employment pursuant to 5 U.S.C. ss. 8501-8525, 26 U.S.C. ss. 3301-3311, 42 U.S.C. s. 503. *Any reference to reemployment assistance shall mean compensation payable from an unemployment fund as defined in 26 U.S.C. s. 3306(f)***." (emphasis added).

28. The legislature restricted the meaning of "reemployment assistance" to the unemployment cash benefits required by chapter 443, which includes the cash benefits Florida must pay to its unemployed citizens as mandated by federal law under titles 5, 26, and 42 of the United States Code—and nothing else. Significantly, the Florida legislature expressly cited 26 U.S.C. Section 3306(f) and incorporated it by reference into its definition.

26 U.S.C. Section 3306(f) reads in pertinent part ". . . **'unemployment fund' means a special fund, *established under a State law*** and administered by a State agency, for the payment of compensation." (emphasis added).

29. FPUC is a federal program, FPUC is ***NOT*** "a special fund, established under a state law and administered by a state agency."

Instead, FPUC is a creature of title 15 of the United States Code. 15 U.S.C. § 9023. The money used to pay FPUC benefits is appropriated from the United States Treasury. 15 U.S.C. § 9023(d)(3). As a result, FPUC fails to meet the Florida legislature's narrow definition of "reemployment assistance." Moreover, states don't collect local taxes and accumulate money to cover FPUC benefits or costs. Instead, the federal government alone pays for FPUC.

30. Section 443.171(9)(a)1 regarding state-federal cooperation reads:

> "In the administration of this chapter, the Department of Economic Opportunity and its tax collection service provider **shall cooperate with the United States** Department of Labor to the fullest extent consistent with this chapter and shall take those actions, through the adoption of appropriate rules, administrative methods, and standards, necessary **to secure for this State all advantages available under the provisions of federal law relating to reemployment assistance**." (emphasis added).

31. Section 443.171(9)(a)1 is bound by section 443.036(37)'s definition of "reemployment assistance." Thus, section 443.171(9) does not require Florida to participate in FPUC.

32. The Florida legislature restricted chapter 443 to a narrow definition of "reemployment assistance" that does not mandate the State's voluntary participation in FPUC or any other federal program that is not required by an act of Congress.

33. ". . .the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.* Hence, where a statute enumerates the situations where it is to be operative, it is ordinarily construed as excluding from its opposition all those not expressly mentioned." *Thayer v. State.* 335 So.2d 815 (Fla. 1976); *Ideal Farms Drainage Dist. v. Certain Lands,* 19 So.2d 234 (Fla. 1944); *Special Disability Trust Fund v. Motor & Compressor Co.,* 446 So.2d 224, 227 (Fla. 1st DCA 1984).

34. Congress did amend the Social Security Act to impose new emergency unemployment relief on the states for governmental entities and nonprofit organizations. Congress could have written the law to require each state's participation in FPUC, but it did not. Instead, Congress allowed each state to decide whether to opt into FPUC. Moreover, Congress also allowed each state to opt-out of FPUC.

35. Likewise, if the Florida legislature wanted the state to participate in every federal unemployment program offered it could have accomplished that result in one clearly sentence. Instead, our legislature painstakingly defined what constitutes "reemployment assistance." When the Florida legislature met during its 2021 session, it did not amend chapter 443 to mandate Florida's participation in CARES or any other voluntary federal unemployment programs. Nor did it call a special session to amend chapter 443 after the Defendants gave notice that the State would opt-out of FPUC. Nor has it called a special session to address the issue at any time since.

36. The Court declines to alter the language enacted in sections 443.031, 443.036(37), and 443.171. If this Court construed these sections differently than written, it "would constitute an abrogation of legislative power." *City of Miami Beach v. Miami New Times, LLC,* 314 So.3d 562, 566-567 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D2805a].

37. "Where a statute generally incorporates a federal law or regulation, to avoid holding the subject statute unconstitutional, Florida courts interpret the statute as incorporating *only the federal law in effect on the date of adoption of the Florida Statute*." (Emphasis added). *Abbott Laboratories v. Mylan Pharmaceuticals, Inc.,* 15 So.3d 642, 655-56 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1827a] (Citing *State v. Rodriquez*, 365 So.2d 157 (Fla. 1978)). The legislature has not amended sections 443.031 and 443.171 since Congress passed the CARES Act.

38. Absent the direction provided by *Abbott Laboratories* and the cases cited therein, the Plaintiffs suggested construction of sections 443.031 and 443.171 would render both sections unconstitutional. The legislature cannot delegate its powers to future acts of Congress. Article 2, Section 3 of the Florida Constitution.

39. The Defendants have exercised discretion regarding the execution of chapter 443. That prerogative belongs exclusively to the executive branch.

40. Indeed, the judiciary violates the separation of powers if a court tells an administrative agency how to perform its duties. See *Fish & Wildlife Conservation v. Daws,* 256 So.2d 907, 917 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1891a]; *Florida Department of Children & Family Services v. J.B.,* 154 So.3d 479, 481 (Fla. 3rd DCA 2015) [40 Fla. L. Weekly D148b].

41. Likewise, this Court must follow chapter 443 as written to fulfill its constitutional role.

42. Significantly, chapter 443 is not solely limited to the payment of unemployment benefits. Section 443.031 states that the chapter shall also be liberally construed to "**promote employment security by increasing opportunities for reemployment**." (emphasis added). Moreover, Section 443.171(4) reads that DEO shall "**promote the reemployment of unemployed workers throughout the state in every other way that may be feasible**." (emphasis added). Thus, the legislature has authorized the executive branch to exercise discretion.

43. Two of the Plaintiffs have been hired since the lawsuit was filed.

44. The Defendants didn't violate chapter 443 by opting out of FPUC. That decision belongs to the state's Chief Executive. Ultimately, Governor DeSantis's strategy to promote reemployment by ending Florida's participation in the FPUC program is a political issue that the voters can approve or reject at the ballot box.

Temporary Injunction

45. A temporary injunction is an extraordinary remedy that should be granted sparingly. *Department of Health v. Bayfront HMA Med. Ctr., LLC,* 236 So. 3d 466, 472 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D100d].

46. The purpose of a temporary injunction is to preserve the status quo while the merits of the dispute are litigated. *Gawker Media, LLC v. Bollea,* 129 So.3d 1196, 1199 (Fla. 2nd DCA 2014) [39 Fla. L. Weekly D174a]. Here, the state opted out of the FPUC program effective June 26, 2021, and the Plaintiffs did not seek injunctive relief beforehand. Thus, there is no status quo to preserve.

47. Mandatory injunctions, which require a party to act rather than to forbear, are looked upon with disfavor. See *Spradley v. Old Harmony Baptist Church,* 721 So.2d 735, 737 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D1783a].

48. An injunction will not lie to forbid an action that has already happened. *Wilkinson v. Woodward,* 141 So. 313 (Fla. 1932); *City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So.2d 750, 754 (Fla. 1st DCA 1994).

49. To obtain a temporary injunction, the movant must establish four elements: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy at law; (3) the likelihood of irreparable harm absent the entry of an injunction; and (4) that injunctive relief will serve the public interest. *Bayfront HMA Med. Ctr., LLC*, 236 So.3d at 472. If the party seeking the temporary injunction fails to prove one of the requirements, the motion for injunction must be denied. *Id*. The movant must prove each element with competent, substantial evidence. *SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D311a].

50. The granting of a temporary injunction rests in the sound discretion of the judge as guided by the law and the facts of the case. See *Beily v. Christo,* 453 So.2d 1134, 1137 (Fla. 1st DCA 1984).

The Plaintiffs Did Not Satisfy the First Element

51. The Plaintiffs seek a declaratory judgment finding that sections 443.031 and 443.171(9) required the Defendants to secure FPUC benefits for them. In their count for a writ of mandamus, the Plaintiffs contend that the Defendants failed to perform non-discretionary ministerial duties to assure their receipt of FPUC benefits.

52. Given the Court's reading of chapter 443, the Court finds that the Plaintiffs do not have a substantial likelihood of success on the merits at trial on either count.

Plaintiffs' Motion for an Injunction Comes Too Late to Make a Difference

53. As the movant, the Plaintiffs bore the burden of proof at the hearing.

54. Both sides presented testimony regarding how long it takes it would take the state to opt back into FPUC and whether the federal government would cover missed FPUC payments retroactively.

55. FPUC expires on September 6, 2021. The last day any FPUC benefits would accrue is either Saturday, September 4, 2021, or Sunday, September 5, 2021 (Defendants' Exhibit 3, Page 3).

56. DEO witness Williams Currie testified that if the Court ordered the state to opt back into FPUC, it would take at least a week, and probably longer. Plaintiffs' witness Andrew Settner estimated that it would take two to three weeks to accomplish that task.

57. Moreover, William Currie testified that even if the state and federal government entered into a new FPUC agreement, the benefits would not begin accruing immediately. Rather, "the new agreement becomes effective the week of unemployment beginning after the new agreement is signed" (Defendants' Exhibit 3, Page 7 f.).

58. Defendants' Exhibit 3 is an "Unemployment Insurance Program Letter" from the U.S. Department of Labor to the state workforce agencies. This exhibit is chock-full of bureaucratic nomenclature. After careful study, the Court reads this exhibit to mean FPUC benefits will not start accruing until the Saturday or Sunday after the state has been accepted back into the program. This translates into additional delay.

59. One reason the Plaintiffs moved for a temporary injunction was to capture any FPUC benefits that could accrue before the program ended. Nevertheless, based on Mr. Currie's testimony and Defendants' Exhibit 3, the Court finds that it's too late for a temporary injunction to do the Plaintiffs any good in that regard.

60. The Court finds that FPUC will expire before the state could opt back in, and before the Plaintiffs could accrue any benefits—*even if the Court ordered Florida to reapply today.*

61. The Plaintiffs also moved for a temporary injunction to recover FPUC benefits they missed after June 26, 2021. They seek payment of these benefits retroactively.

62. Both sides presented testimony regarding back payments. William Currie testified that the United States will not make any back payments. He based his testimony on Defendant's Exhibits 3,a., which reads in pertinent part:

> "For states that terminate the Agreement to operate some or all of these programs before September 6, 2021, no payments for the terminated programs may be made with respect to weeks of unemployment ending after the date the state terminates participation in the Agreement."

Given that the federal government alone is funding all FPUC benefits, the only source of the referenced "payments" is the United States Treasury.

63. Mr. Currie had not talked to the federal government to confirm that his understanding is correct. Notwithstanding, the quoted language was probative of the United States' position, even if poorly articulated.

64. Andrew Settner testified he thinks the federal government is making back-payments of FPUC benefits to the unemployed citizens of Indiana. He based his testimony on what he has read online and while looking through similar lawsuits. Likewise, his testimony was probative but unpersuasive.

65. One would expect that counsels' first order of business will be to thoroughly and definitively answer this question.

66. The Court does not find the testimony of either witness to be persuasive concerning the availability of retroactive FPUC benefits. These benefits may or may not be available. However, the Plaintiffs, as the movants, carry the burden of proof, and they have not established by competent and substantial evidence that retroactive FPUC benefits are available.

67. Caselaw prohibits courts from directing the executive branch to exercise its powers "in a manner that is not feasible." See *Florida Fish & Wildlife Conservation Commission v. Daws,* 256 So.3d 907, 925 (Fla. 1st DCA 2019) [43 Fla. L. Weekly D1891a].

68. Given the imminent expiration of the FPUC program, the entry of a temporary injunction would be a fruitless exercise that would not yield any beneficial results for the Plaintiffs. See *State ex rel. Ostroff v. Pearson,* 61 So.2d 325, 326 (Fla. 1952); *Campbell v. State ex rel. Garrett,* 183 So. 340 (Fla. 1938).

Conclusion

69. This Court has tracked similar lawsuits in Arkansas, Maryland, Indiana, South Carolina, Oklahoma, and Michigan. These states' unemployment compensation statutes do not mirror Florida's chapter 443, but they bear similarities because every state must comply with the same federal mandates. Other states' trial judges have granted and denied similar motions only to be reversed by their appellate courts.

70. This Court must decide the law applicable to this case in accordance with Chapter 443 of the Florida Statutes, the Florida Constitution, and Florida caselaw.

71. The Plaintiffs have failed to carry their burden to establish a likelihood of success on the merits by competent and substantial evidence.

72. The Court finds that the Defendants did not violate Chapter 443 by opting out of the FPUC program. This decision belongs solely to the state's Chief Executive. Ultimately, Governor DeSantis's strategy to promote reemployment by ending Florida's participation in the FPUC program is a political issue that the voters can approve or reject at the ballot box.

73. The Plaintiffs' suggested reading of chapter 443 also fails because it would render sections 443.031 and 443.171 unconstitutional. The Florida legislature cannot delegate its powers to Congress.

74. if the Plaintiffs otherwise qualified for injunctive relief, given the imminent expiration of the FPUC program on September 6, 2021, the entry of a temporary injunction would be a fruitless exercise that would not yield them any beneficial results. There is no status quo to preserve.

75. I have rendered this order as soon as possible, mindful that the Plaintiffs may wish to file an appeal.

76. The Plaintiffs' motion for a temporary injunction is **DENIED**.

* * *

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

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. ARKAVIAN JAMENTE JAMISON, LATONYA GOODWIN DAVIS, SHARMAINE DAVIS, DASHAUN TYRIE BACKMON, NEUROLOGY PARTNERS, P.A., SOUTHERN

BAPTIST HOSPITAL OF FLORIDA, INC., CITY OF JACKSONVILLE FIRE RESCUE, INJURY CLINICS, LLC, EMERGENCY PHYSICIANS, INC., EQUIAN, LLC, CHRISTOPHER AARON TAYLOR, KAREN FAYE NAPIER, ROBERT DANIEL JOHNS, PROGRESSIVE AMERICAN INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, JOSEPH PATRICK ADAMS, NANCY SALMON and PAXON MOTORS, INC., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CA-008598. June 24, 2021. Marianne Aho, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS, NEUROLOGY PARTNERS, P.A., SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., INJURY CLINICS, LLC, AND EQUIAN, LLC

THIS CAUSE having come before this Court at the hearing on June 17, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, NEUROLOGY PARTNERS, P.A., SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., INJURY CLINICS, LLC, and EQUIAN, LLC, 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, Arkavian Jamente Jamison, and the Defendants, Latonya Goodwin Davis, Sharmaine Davis, Dashaun Tyrie Backmon, Neurology Partners, P.A., Southern Baptist Hospital of Florida, Inc., City of Jacksonville Fire Rescue, Injury Clinics, LLC, Emergency Physicians, Inc., Equian, LLC, Christopher Aaron Taylor, Karen Faye Napier, Robert Daniel Johns, Progressive American Insurance Company, State Farm Mutual Automobile Insurance Company, Joseph Patrick Adams, Nancy Salmon and Paxon Motors, Inc., regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated February 14, 2019. Plaintiff rescinded the policy of insurance on the basis that Arkavian Jamente Jamison failed to disclose that his mother, Latanya Goodwin Davis, lived at the policy garaging address at the time of policy inception and had he disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy. Arkavian Jamente Jamison initially completed an application for a policy of automobile insurance from Direct General Insurance Company on February 14, 2019. Arkavian Jamente Jamison failed to list his mother, Latanya Goodwin Davis, as a household member/resident when completing the application for insurance. Arkavian Jamente Jamison answered "NO" to the following application question, which provides:

> Are there any residents in your household who are 15 years and older, whether licensed or not, that you have not disclosed on this Application, including children/step-children or dependents who reside temporarily elsewhere?

Plaintiff determined that had Arkavian Jamente Jamison provided the proper information at the time of the insurance application then Plaintiff would have charged the insured a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to material misrepresentation and returned the paid premiums to Arkavian Jamente Jamison. 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 Arkavian Jamente Jamison, 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 January 6, 2020, the named insured, Arkavian Jamente Jamison, entered into a Stipulation for Consent Judgment, confirming that he lived with his mother, Latonya Goodwin Davis, at the policy garaging address at the time of application for insurance. Specifically, Arkavian Jamente Jamison admitted the following information in his Stipulation for Consent Judgment:

> On February 14, 2019, I, ARKAVIAN JAMENTE JAMISON, did not disclose on the application for insurance that I lived with LATONYA GOODWIN DAVIS at the policy address ([Editor's note: address redacted], Jacksonville, Florida 32207).

On January 6, 2020, Latonya Goodwin Davis entered into a Stipulation for Consent Judgment, confirming that she lived with her son, Arkavian Jamente Jamison, at the policy garaging address at the time of application for insurance. Specifically, Latonya Goodwin Davis admitted the following information in her Stipulation for Consent Judgment

> On February 14, 2019, I, LATANYA GOODWIN DAVIS, lived with ARKAVIAN JAMENTE JAMISON at the policy address ([Editor's note: address redacted], Jacksonville, Florida 32207).

Thereafter, on April 13, 2021, this Court entered an Order granting the Plaintiff, Direct General Insurance Company's Amended Motion for Final Consent Judgment against Arkavian Jamente Jamison and Latonya Goodwin Davis.

Plaintiff, Direct General Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the

circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furian,* 408 So.2d 767 (5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position was that Plaintiff properly rescinded the policy at issue based on an unlisted household member as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Person(s) in Household was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark*, 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendants failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen,* 999 F.2d 1532 (1993).

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose his mother, Latanya Goodwin Davis, as a household member living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member, Latanya Goodwin Davis, was involved in the subject motor vehicle accident on June 21, 2019, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

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

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Direct General Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

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

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

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

The Court hereby finds that the Plaintiff's application for insurance is clear and unambiguous regarding the applicant's obligation to disclose pertinent information at the time of the policy inception on the application. The Court hereby finds that the Plaintiff's application for insurance clearly and unambiguously required the applicant (Arkavian Jamente Jamison) to disclose his mother, Latanya Goodwin Davis as a household member living at the policy garaging address at the time of the policy inception. In addition to providing a "NO" response to application question #4, the applicant (Arkavian Jamente Jamison) 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 Arkavian Jamente Jamison on the application for insurance. Since the Carrier relied on the representations by Arkavian Jamente Jamison 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 Arkavian Jamente Jamison subsequently claimed that the

"agent did not ask" the questions on the application since Arkavian Jamente Jamison signed the application which is a legal contract and thus, Arkavian Jamente Jamison is bound by the terms and conditions of the contract. Further, the Defendant, Arkavian Jamente Jamison, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Arkavian Jamente Jamison 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, Arkavian Jamente Jamison, to disclose his mother, Latanya Goodwin Davis, as a household member living at the policy garaging address, that Plaintiff provided the required testimony to establish said that Defendant, Arkavian Jamente Jamison's failure to disclose his mother as a person in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against Defendants, NEUROLOGY PARTNERS, P.A., SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., INJURY CLINICS, LLC, and EQUIAN, LLC, is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, NEUROLOGY PARTNERS, P.A., SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., INJURY CLINICS, LLC, and EQUIAN, LLC.

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 Arkavian Jamente Jamison, the Stipulation for Consent Judgment by Latonya Goodwin Davis, the Motion for Final Summary Judgment and in the Affidavit of Rose Chrustic, are not in dispute, which are as follows:

e. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPAXXXXX3197, is rescinded and is void *ab initio;*

f. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

g. The Court hereby finds that the 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;

h. The Defendant, ARKAVIAN JAMENTE JAMISON, stipulated that he failed to disclose his mother, LATANYA GOODWIN DAVIS, as an additional household resident over the age of 15 at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPAXXXXX3197, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The Defendant, LATANYA GOODWIN DAVIS, stipulated that she lived with her son, ARKAVIAN JAMENTE JAMISON, at the policy garaging address at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPAXXXXX3197, issued by DIRECT GENERAL INSURANCE COMPANY;

j. Since the policy of insurance issued to the Defendant, ARKAVIAN JAMENTE JAMISON, bearing policy # FLPAXXXXX3197, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ARKAVIAN JAMENTE JAMISON to any medical provider, doctor and/or medical entity is void;

k. Since the policy of insurance issued to the Defendant, ARKAVIAN JAMENTE JAMISON, bearing policy # FLPAXXXXX3197, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from LATONYA GOODWIN DAVIS to any medical provider, doctor and/or medical entity is void;

l. Notwithstanding the policy rescission, the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPAXXXXX3197, does not provide any bodily injury liability insurance coverage;

m. There is no insurance coverage for ARKAVIAN JAMENTE JAMISON for any property damage liability coverage, personal injury protection coverage, collision coverage, or comprehensive coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

n. There is no insurance coverage for LATONYA GOODWIN DAVIS for any property damage liability coverage, personal injury protection coverage, collision coverage, or comprehensive coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

o. There is no insurance coverage for SHARMAINE DAVIS for any property damage liability coverage, personal injury protection coverage, collision coverage, or comprehensive coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend or indemnify the insured, ARKAVIAN JAMANTE JAMISON, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend or indemnify LATONYA GOODWIN DAVIS for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend or indemnify SHARMAINE DAVIS for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

s. There is no personal injury protection ("PIP") insurance coverage for LATONYA GOODWIN DAVIS for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

t. There is no collision insurance coverage for LATONYA GOODWIN DAVIS for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

u. There is no collision insurance coverage for PAXON MOTORS, INC. for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

v. There is no collision insurance coverage for SHARMAINE DAVIS for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

w. There is no personal injury protection ("PIP") insurance coverage for DASHAUN TYRIE BACKMON for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

x. There is no insurance coverage for any claim for bodily injuries for DASHAUN TYRIE BACKMON for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

y. There is no insurance coverage for any claim for bodily injuries for CHRISTOPHER AARON TAYLOR for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

z. There is no insurance coverage for any claim for bodily injuries for ROBERT DANIEL JOHNS for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

aa. There is no insurance coverage for any claim for property damage for KAREN FAYE NAPIER for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

bb. There is no insurance coverage for any claim for bodily injuries for NICOLE SIMON HAVE for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

cc. There is no insurance coverage for any claim for property damage for Elpidio Gallardo for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

dd. There is no insurance coverage for any claim for bodily injuries for Jonathon M. Govea for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

ee. There is no insurance coverage for any claim for property damage for NANCY SALMON for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

ff. There is no insurance coverage for any claim for bodily injuries for JOSEPH PATRICK ADAMS for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

gg. There is no insurance coverage for any claim for property damage for JOSEPH PATRICK ADAMS for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

hh. There is no obligation to provide Personal Injury Protection benefits coverage to NEUROLOGY PARTNERS, P.A. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

ii. There is no obligation to provide Personal Injury Protection benefits coverage to CITY OF JACKSONVILLE FIRE RESCUE for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

jj. There is no obligation to provide Personal Injury Protection benefits coverage to SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

kk. There is no obligation to provide Personal Injury Protection benefits coverage to INJURY CLINICS, LLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

ll. There is no obligation to provide Personal Injury Protection benefits coverage to EMERGENCY PHYSICIANS, INC. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

mm. There is no obligation to provide Personal Injury Protection benefits coverage to EQUIAN, LLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

nn. There is no obligation to provide Personal Injury Protection benefits coverage to Advanced Diagnostic Group for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on June 21, 2019, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197;

oo. The Defendant, ARKAVIAN JAMANTE JAMISON, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

pp. The Defendant, LATONYA GOODWIN DAVIS, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

qq. The Defendant, DASHAUN TYRIE BACKMON, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

rr. The Defendant, NEUROLOGY PARTNERS, P.A., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

ss. The Defendant, SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

tt. The Defendant, CITY OF JACKSONVILLE FIRE RESCUE, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

uu. The Defendant, INJURY CLINICS, LLC, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

vv. The Defendant, EMERGENCY PHYSICIANS, INC., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor

vehicle accident;

ww. The Defendant, EQUIAN, LLC, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

xx. The Defendant, CHRISTOPHER AARON TAYLOR, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

yy. The Defendant, KAREN FAYE NAPIER, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

zz. The Defendant, ROBERT DANIEL JOHNS, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

aaa. The Defendant, NANCY SALMON, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

bbb. The Defendant, JOSEPH PATRICK ADAMS, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

ccc. The Defendant, PAXON MOTORS, INC., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

ddd. Jonathon M. Govea is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

eee. Elpidio Gallardo is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

fff. Advanced Diagnostic Group is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

ggg. The Defendant, PROGRESSIVE AMERICAN INSURANCE COMPANY, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

hhh. The Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

iii. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Defendant, PROGRESSIVE AMERICAN INSURANCE COMPANY shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

jjj. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY shall have no rights of subrogation against DIRECT GENERAL INSURANCE COMPANY under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPAXXXXX3197, for the June 21, 2019 motor vehicle accident;

kkk. There is no insurance coverage for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

lll. There is no personal injury protection ("PIP") insurance coverage for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

mmm. There is no property damage liability coverage for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

nnn. There is no collision coverage for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

ooo. There is no comprehensive coverage for the motor vehicle accident which occurred on June 21, 2019, under policy # FLPAXXXXX3197;

ppp. Plaintiff shall serve a copy of this Order, by regular mail, to all parties not receiving service of court filings through the Florida Court's E-Filing Portal, and shall file a certificate of compliance in the court file.

* * *

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

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. KAREN JOHANA MONCADA, Individually, KAREN JOHANA MONCADA as the Parent, Natural and Legal Guardian of L.P., a minor, and FERNANDO PICO, Defendants. Circuit Court, 9th Judicial Circuit in and for Osceola County. Case No. 2021-CA-000497-OC. June 29, 2021. Robert J. Egan, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Karen Johana Moncada and Fernando Pico, Pro se, Kissimmee, Defendants.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS, KAREN JOHANA MONCADA, Individually, KAREN JOHANA MONCADA as the Parent, Natural and Legal Guardian of L.P., a minor, AND FERNANDO PICO

THIS CAUSE having come before this Court at the hearing on June 14, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, KAREN JOHANA MONCADA, Individually, KAREN JOHANA MONCADA as the Parent, Natural and Legal Guardian of L.P., a minor, and FERNANDO PICO, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Declaratory Judgment against the insured Defendant, Karen Johana Moncada, and the Defendants, Karen Johana Moncada as the Parent, Natural and Legal Guardian of L.P., a minor, and Fernando Pico, regarding the policy rescission as a result of the insured's material misrepresentations on the application for insurance

dated March 19, 2020. Plaintiff rescinded the policy of insurance on the basis that Karen Johana Moncada failed to disclose that her mother, Maria Alejandra Montiel, and her step-father, Israel Urbina, resided with her at the policy garaging address at the time of policy inception and had she disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

On the application for insurance dated March 19, 2020, Defendant, Karen Johana Moncada, answered "NO" to the following application question, which provides:

> Are there any residents in your household who are 15 years and older, whether licensed or not, that you have not disclosed on this Application, including children/step-children or dependents who reside temporarily elsewhere?

In addition, on the application for insurance dated March 19, 2020, Defendant, Karen Johana Moncada signed the pertinent page of the Applicant's Statement, which provides:

> 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.

On October 6, 2020, the named insured, Karen Johana Moncada, provided sworn testimony at her Examination Under Oath confirming that her mother (Maria Alejandra Montiel) and step-father (Israel Urbina) lived with her at the policy garaging address at the time of application for insurance.

Plaintiff determined that had Karen Johana Moncada provided the proper information at the time of the insurance application dated March 19, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Karen Johana Moncada. 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 Karen Johana Moncada, 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.

Plaintiff, Direct General Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position was that Plaintiff properly rescinded the policy at issue based on an unlisted household member(s) as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Person(s) in Household was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendants failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose her mother, Maria Alejandra Montiel, and her step-father, Israel Urbina, as household members living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member(s), Maria Alejandra Montiel and Israel Urbina, were involved in the subject motor vehicle accident on August 25,

2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

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

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

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

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

The Court hereby finds that the Plaintiff's application for insurance is clear and unambiguous regarding the applicant's obligation to disclose pertinent information at the time of the policy inception on the application. The Court hereby finds that the Plaintiff's application for insurance clearly and unambiguously required the applicant (Karen Johana Moncada) to disclose her mother and step-father as household members living at the policy garaging address at the time of the policy inception. In addition to providing a "NO" response to application question #4, the applicant (Karen Johana Moncada) 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 Karen Johana Moncada on the application for insurance. Since the Carrier relied on the representations by Karen Johana Moncada on the application to its detriment, the Carrier is entitled to rescind the policy due to the material misrepresentation. The Court hereby finds that since the terms of the Carrier's application are clear and unambiguous, it is irrelevant whether Karen Johana Moncada subsequently claimed that the "agent did not ask" the questions on the application since Karen Johana Moncada signed the application which is a legal contract and thus, Karen Johana Moncada is bound by the terms and conditions of the contract. Further, the Defendant, Karen Johana Moncada, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Karen Johana Moncada signed the application and acknowledged the above terms, she cannot later claim that she did not understand the application or that the agent did not ask her and/or explain to her the questions on the application.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Direct General Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Analysis Regarding Whether the Statements from the Examination Under Oath of Karen Johana Moncada are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Karen Johana Moncada during her Examination Under Oath (EUO) on October 6, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The statements from the Examination Under Oath are admissible and proper summary judgment evidence. Although a transcript of an EUO or a recorded statement is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although an EUO and/or a recorded statement is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (the EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the transcript of the Examination Under Oath (EUO) of Karen Johana Moncada is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Karen Johana Moncada, to disclose her mother, Maria Alejandra Montiel, and her step-father, Israel Urbina, as household members living at the policy garaging address, that Plaintiff provided

the required testimony to establish that Defendant, Karen Johana Moncada's failure to disclose her mother and step-father as persons in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, KAREN JOHANA MONCADA, Individually, KAREN JOHANA MONCADA as the Parent, Natural and Legal Guardian of L.P., a minor, and FERNANDO PICO.

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

d. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the transcript of the Examination Under Oath (EUO) of KAREN JOHANA MONCADA, Plaintiff's Motion for Final Summary Judgment, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

e. The Defendant, KAREN JOHANA MONCADA, failed to disclose her mother, Maria Alejandra Montiel, and her step-father, Israel Urbina, as additional household residents over the age of 15 at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # FLPGXXXXX1935, issued by DIRECT GENERAL INSURANCE COMPANY;

f. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

g. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPGXXXXX1935, is rescinded and is void *ab initio;*

h. 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;

i. The Defendant, KAREN JOHANA MONCADA breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # FLPGXXXXX1935, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The material misrepresentation of Defendant, KAREN JOHANA MONCADA on the application for insurance dated March 19, 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 # FLPGXXXXX1935, issued by DIRECT GENERAL INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, KAREN JOHANA MONCADA for any property damage liability coverage, personal injury protection benefits coverage, or accidental death coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

l. There is no insurance coverage for the Defendant, FERNANDO PICO for any property damage liability coverage, personal injury protection benefits coverage, or accidental death coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

m. There is no insurance coverage for the Defendant, L.P., a minor, for any personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

n. Notwithstanding the rescission, the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935, does not provide any bodily injury liability insurance coverage;

o. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, KAREN JOHANA MONCADA, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

p. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, FERNANDO PICO, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify KAREN JOHANA MONCADA for any bodily injury claim for L.P., a minor, arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify FERNANDO PICO for any bodily injury claim for L.P., a minor, arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

s. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify KAREN JOHANA MONCADA for any bodily injury claim for Alfonso Mejia Gomez arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

t. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify FERNANDO PICO for any bodily injury claim for Alfonso Mejia Gomez arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

u. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify KAREN JOHANA MONCADA for any bodily injury claim for Jesus Emilio Rivera arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify FERNANDO PICO for any bodily injury claim for Jesus Emilio Rivera arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

w. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify KAREN JOHANA

MONCADA for any property damage claim for Beatriz Elena Gomez arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

x. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify FERNANDO PICO for any property damage claim for Beatriz Elena Gomez arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

y. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify KAREN JOHANA MONCADA for any property damage claim for Jesus Emilio Rivera arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

z. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify FERNANDO PICO for any property damage claim for Jesus Emilio Rivera arising from the accident of August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

aa. There is no personal injury protection ("PIP") insurance coverage for KAREN JOHANA MONCADA for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

bb. There is no personal injury protection ("PIP") insurance coverage for FERNANDO PICO for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

cc. There is no personal injury protection ("PIP") insurance coverage for L.P., a minor, for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

dd. There is no bodily injury insurance coverage for L.P., a minor, for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

ee. There is no bodily injury insurance coverage for Alfonso Mejia Gomez for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

ff. There is no bodily injury insurance coverage for Jesus Emilio Rivera for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

gg. There is no property damage insurance coverage for Beatriz Elena Gomez for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

hh. There is no property damage insurance coverage for Jesus Emilio Rivera for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

ii. There is no property damage insurance coverage for Progressive American Insurance Company for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

jj. There is no property damage insurance coverage for Geico General Insurance Company for the accident which occurred on August 25, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

kk. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935;

ll. There is no obligation to provide Personal Injury Protection benefits coverage to University Diagnostic Institute Winter Park, PLLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935;

mm. There is no obligation to provide Personal Injury Protection benefits coverage to No Utter Way, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935;

nn. There is no obligation to provide Personal Injury Protection benefits coverage to AAA Physicians Group, LLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935;

oo. There is no obligation to provide Personal Injury Protection benefits coverage to Preferred Injury Physicians of Kissimmee, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935;

pp. There is no obligation to provide Personal Injury Protection benefits coverage to Teleemc, LLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # FLPGXXXXX1935;

qq. The Defendant, KAREN JOHANA MONCADA, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

rr. The Defendant, FERNANDO PICO, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

ss. The Defendant, KAREN JOHANA MONCADA as the Parent, Natural and Legal Guardian of L.P., a minor, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

tt. Alfonso Mejia Gomez is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

uu. Beatriz Elena Gomez is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for

the motor vehicle accident which occurred on August 25, 2020;

vv. Jesus Emilio Rivera is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

ww. University Diagnostic Institute Winter Park, PLLC is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

xx. No Utter Way, Inc. is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

yy. AAA Physicians Group, LLC is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

zz. Preferred Injury Physicians of Kissimmee, Inc. is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

aaa. Teleemc, LLC is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

bbb. Progressive American Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

ccc. Geico General Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

ddd. 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 # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

eee. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Geico General 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 # FLPGXXXXX1935, for the motor vehicle accident which occurred on August 25, 2020;

fff. There is no insurance coverage for the motor vehicle accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

ggg. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

hhh. There is no property damage liability coverage for the accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

iii. There is no accidental death coverage for the accident which occurred on August 25, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # FLPGXXXXX1935;

jjj. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from KAREN JOHANA MONCADA to any medical provider, doctor and/or medical entity is void;

kkk. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from FERNANDO PICO to any medical provider, doctor and/or medical entity is void;

lll. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from L.P., a minor, to any medical provider, doctor and/or medical entity is void;

mmm. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from KAREN JOHANA MONCADA to University Diagnostic Institute Winter Park, PLLC is void;

nnn. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from KAREN JOHANA MONCADA to No Utter Way, Inc. is void;

ooo. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from KAREN JOHANA MONCADA and FERNANDO PICO to AAA Physicians Group, LLC is void;

ppp. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from FERNANDO PICO to Preferred Injury Physicians of Kissimmee, Inc. is void;

qqq. Since the policy of insurance issued to the Defendant, KAREN JOHANA MONCADA, bearing policy # FLPGXXXXX1935, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from KAREN JOHANA MONCADA and FERNANDO PICO to Teleemc, LLC is void;

rrr. 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 compliance in the court file.

* * *

Civil procedure—Insurance—Declaratory action—Failure to comply with court orders—Sanctions—Where insurer failed to comply with court orders to include in second and third amended complaints a verified statement specifying basis for circuit court jurisdiction, dismissal with prejudice is required—Attorney's fees awarded to defendants

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. FATIMA DIAZ, ORLANDO INJURY CENTER, INC., and OPTIMUM ORTHOPAEDICS & SPINE,

LLC., Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-CA-006950. July 1, 2021. Denise Kim Beamer, Judge. Counsel: Travis Mehler and Alfred Villoch, III, for Plaintiff. David B. Alexander, Bradford Cederberg, Orlando, for Defendant Fatima Diaz. Aimee A. Gunnells, for Defendant Orlando Injury Center, Inc.

ORDER ON JUNE 17, 2021 HEARING GRANTING DEFENDANT, FATIMA DIAZ, MOTION TO DISMISS WITH PREJUDICE PLAINTIFF'S SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF, FOR PLAINTIFF'S FAILURE TO COMPLY WITH COURT ORDER AND DEFENDANT, FATIMA DIAZ, MOTION FOR ATTORNEYS' FEES AND COSTS (COS: 1/25/2021), GRANTING DEFENDANT, FATIMA DIAZ, MOTION FOR ATTORNEY'S FEES AND COSTS (COS: 6/17/2020), GRANTING DEFENDANT, ORLANDO INJURY CENTER, INC., MOTION TO DISMISS WITH PREJUDICE PLAINTIFF'S SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF FOR PLAINTIFF'S FAILURE TO COMPLY WITH COURT ORDERS AND MOTION FOR ATTORNEY'S FEES AND COSTS (COS: 1/29/2021) AND DENYING PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT WITH PREJUDICE AND PLAINTIFF'S MOTION TO TRANSFER TO COUNTY COURT (COS: 1/27/2021)

THIS MATTER having come before this Honorable Court on 1) Defendant, Fatima Diaz, Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint For Declaratory Relief, For Plaintiff's Failure to Comply With Court Order and Defendant, Fatima Diaz, Motion for Attorneys' Fees and Costs (COS: 1/25/2021); 2) Defendant, Fatima Diaz, Motion for Attorney's Fees and Costs (COS: 6/17/2020); 3) Defendant, Orlando Injury Center, Inc., Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint For Declaratory Relief For Plaintiff's Failure to Comply With Court Orders and Motion for Attorney's Fees and Costs (COS: 1/29/2021); and 4) Plaintiff's Response to Defendant's Motion to Dismiss Second Amended Complaint With Prejudice and Plaintiff's Motion to Transfer to County Court (COS: 1/27/2021) and this Honorable Court having heard argument of counsel on June 17, 2021, reviewed the entirety of the Court record, authority filed by the parties, and being otherwise fully advised in the premises, finds as follows:

1. This is a claim for Declaratory Judgment arising out of a motor vehicle collision that occurred on or about January 30, 2019.

2. On June 6, 2019, the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, filed a one (1) Count Complaint against Defendants, FATIMA DIAZ, ORLANDO INJURY CENTER, INC., and OPTIMUM ORTHOPAEDICS & SPINE, LLC.

3. On July 22, 2019, Plaintiff filed a one (1) Count Amended Complaint. A hearing occurred on October 11, 2019 and the Court executed an order on October 17, 2019, deeming Plaintiff's Amended Complaint, bearing certificate of service date July 22, 2019 filed.

4. On October 25, 2019, Defendant, Fatima Diaz, filed its Motion to Dismiss Plaintiff's Amended Complaint for Declaratory Relief and Motion for Attorneys' Fees and Costs. Thereafter, Defendant, Orlando Injury Center Inc., filed its Motion to Dismiss Plaintiff's Amended Complaint for Declaratory Relief and Motion for Attorney's Fees and Costs.

5. On June 15, 2020, a hearing was held upon Defendants' motions to dismiss Plaintiff's Amended Complaint and Defendants' motions for attorneys' fees and costs.

6. On June 15, 2020, the Court executed an order finding Plaintiff's Amended Complaint insufficient. In granting Defendants' motions to dismiss Plaintiff's Amended Complaint without prejudice, the Court's June 15, 2020 Order reads in pertinent part as follows:

> "2. In addition to various technical and legal defects raised by the Defendant, the Court finds that the Amended Complaint must be pled with specificity as to each Defendant and specifically allege the facts and elements applicable to support each cause of action brought by the Plaintiff and against each Defendant. See generally Fla. R. Civ. P. 1.110(b) and (f).
>
> 3. If applicable, the Plaintiff shall also attach supporting documents to the Amended Complaint as required by Fla. R. Civ. P. 1.130.
>
> 4. The Plaintiff shall file an Amended Complaint shall be filed within twenty (20) days from the date of this Order. The Amended Complaint shall contain a verified statement specifying the basis for jurisdiction in the Circuit Court.
>
> 5. The Court will reserve as to the Defendant's request for attorney's fees and costs."

See the Court's Order, executed June 15, 2020, E-Filed June 16, 2020 [28 Fla. L. Weekly Supp. 387a].

7. On June 17, 2020, Defendant, Fatima Diaz, filed its Motion for Attorney's Fees and Costs.

8. On July 1, 2020, Plaintiff filed a two (2) Count Second Amended Complaint against Defendants, FATIMA DIAZ, ORLANDO INJURY CENTER, INC., and OPTIMUM ORTHOPAEDICS & SPINE, LLC. Thereafter, Defendant, Fatima Diaz, filed its Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint for Declaratory Relief and Motion for Attorneys' Fees and Costs. Subsequently, Defendant, Orlando Injury Center, Inc., also filed its Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint for Declaratory Relief and Motion for Attorney's Fees and Costs.

9. On November 30, 2020, a hearing was held on Defendants' motions to dismiss Plaintiff's Second Amended Complaint.

10. On December 15, 2020, the Court executed an Order granting Defendants' motions to dismiss. The Court's December 15, 2020 Order reads in pertinent part as follows:

> "1. The Defendants' Motion to Dismiss is GRANTED without prejudice.
>
> 2. The Court finds that the Plaintiff failed to fully comply with paragraph two (2) of this Court's June 15, 2020 Order and paragraph four (4) requiring 'a verified statement specifying the basis for jurisdiction in the circuit court.'
>
> 3. The Plaintiff shall have twenty (20) days to file an Amended Complaint. The Plaintiff is on notice that its failure to comply with this Court's June 15, 2020 Order and allege sufficient ultimate facts or a legal theory upon which the Plaintiff can be granted relief may result in a dismissal with prejudice."

See the Court's Order, executed December 15, 2020, E-Filed December 17, 2020.

11. Pursuant to the Court's Order, executed December 15, 2020, E-Filed December 17, 2020, Plaintiff was required to file a third amended complaint no later than January 6, 2021.

12. Plaintiff failed to file a third amended complaint in this matter.

13. On January 25, 2021, Defendant, Fatima Diaz, filed its Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint For Declaratory Relief For Plaintiff's Failure to Comply With Court Order and Defendant, Fatima Diaz, Motion for Attorneys' Fees and Costs.

14. On January 29, 2021, Defendant, Orlando Injury Center, Inc., filed its Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint For Declaratory Relief For Plaintiff's Failure to Comply With Court Orders and Motion for Attorney's Fees and Costs.

15. At the June 17, 2021 hearing, Plaintiff had no viable excuse for its failure to file a third amended complaint in this matter. In fact, pursuant to Plaintiff's response to Defendants' motions to dismiss with prejudice, Plaintiff states that "rather than amend the Second Amended Complaint and risk a dismissal with prejudice, Plaintiff

respectfully believes the best course of action is to transfer the lawsuit to County Court. . ." *See Plaintiff's Response to Defendant's Motion to Dismiss Second Amended Complaint with Prejudice and Plaintiff's Motion to Transfer to County Court, bearing certificate of service date January 27, 2021*. Plaintiff has at all times, including during the June 17, 2021 hearing, maintained that this Court has subject matter jurisdiction over the instant matter, yet Plaintiff during the June 17, 2021 hearing requested that this Court transfer this matter to County Court. Importantly, Plaintiff failed to actually notice its Motion to Transfer to County Court for the June 17, 2021 hearing. This Court has jurisdiction over this matter and disagrees with Plaintiff's position as it is contrary to the Florida Rules of Civil Procedure, statutes, case law, and orders executed by the Court in this matter.

16. Due to the facts above and authority set forth below, dismissal of Plaintiff's Second Amended Complaint with prejudice is required.

DISMISSAL WITH PREJUDICE

17. Plaintiff has violated two (2) separate orders from this Court and dismissal with prejudice is appropriate for this reason.

21. In *Johnson v. Allstate Ins. Co.*, the Fifth District Court of Appeals, summed up the issue before this Court as follows:

> "A party may not ignore a valid order of court except at its peril. There are avenues of redress by appellate review for orders which may be erroneous, but so long as such orders are entered by a court which has jurisdiction of both the subject matter and the parties, they cannot be completely ignored without running the risk that an appropriate sanction may be imposed." *Johnson v. Allstate Ins. Co.*, 410 So. 2d 978, 980 (Fla. 5th DCA 1982).

22. In *Johnson v. Allstate Ins. Co.*, the Court found that violations of "two valid orders of the court requiring a response to an interrogatory" was sufficient, given the facts, to dismiss a complaint. *See Johnson v. Allstate Ins. Co.*, 410 So. 2d at 979 (Fla. 5th DCA 1982).

23. In *Kozel v. Ostendorf*, the Florida Supreme Court enumerated six (6) factors for a Court to consider when analyzing whether the actions of a party/counsel required the ultimate sanction of dismissal/striking of pleadings. The six (6) factors are as follows:

"1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;

2) whether the attorney has been previously sanctioned;

3) whether the client was personally involved in the act of disobedience;

4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;

5) whether the attorney offered reasonable justification for noncompliance; and

6) whether the delay created significant problems of judicial administration." *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993).

24. In *Erdman v. Bloch*, the Fifth District Court of Appeals reaffirmed the six (6) *Kozel* factors and stated "[i]f consideration of these factors suggests the attorney was at fault ***and*** if a sanction less severe than dismissal appears to be a viable alternative, the trial court should employ such an alternative." *Erdman v. Bloch*, 65 So. 3d 62, 66 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1191b] (emphasis added).

25. As it pertains to the first *Kozel* factor (whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience), this Court finds that based upon the record and the actions of Plaintiff and its counsel, the disobedience was willful. At the June 17, 2021 hearing, counsel for Plaintiff had no viable excuse for Plaintiff's violations. Plaintiff's counsel could not explain or justify why Plaintiff had not complied with the Court's orders.

26. As it pertains to the second *Kozel* factor (whether the attorney has been previously sanctioned), Plaintiff previously violated the Court's June 15, 2020 Order in this matter and the Court thereafter via the Court's December 15, 2020 Order placed Plaintiff on notice that further violation would result in a dismissal with prejudice. Given Plaintiff's prior notification the Court finds the second *Kozel* factor satisfied.

28. As it pertains to the fourth *Kozel* factor (whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion), this Court finds based upon the record and the actions of Plaintiff that the delay in this litigation has prejudiced Defendants. Plaintiff's violations of two (2) Court Orders has delayed this case and caused Defendants' counsel to expend additional time, expenses and resources.

29. As it pertains to the fifth *Kozel* factor (whether the attorney offered reasonable justification for noncompliance), this Court finds based upon the record, the arguments of counsel on June 17, 2021, and the actions of Plaintiff, that reasonable justification for noncompliance has not been provided by Plaintiff or counsel for Plaintiff. During the course of the hearing on June 17, 2021, counsel for Plaintiff admitted that the orders had been violated but provided no justification for the noncompliance. Counsel for Plaintiff admitted during the course of the June 17, 2021 hearing that Plaintiff 1) did not seeking rehearing or reconsideration of the Court's Orders, 2) did not seeking appellate relief from the Court's Orders, 3) failed to amend its Complaint in violation of the Court's December 15, 2020 Order. Instead of utilizing available redress regarding the Court's Orders in the instant matter, Plaintiff did nothing.

30. As it pertains to the sixth *Kozel* factor (whether the delay created significant problems of judicial administration), this Court finds based upon the record and the actions of Plaintiff, the delay has created problems of judicial administration.

31. Based upon the forgoing, this Court has fully considered and analyzed all six (6) factors set forth in *Kozel v. Ostendorf* surrounding dismissing/striking of pleadings and finds that all six (6) factors have been satisfied.

32. This Court is well aware of the fact that dismissal with prejudice should only be employed by this Court as a sanction in the most egregious of situations. This Court finds that Plaintiff's conduct in the instant matter was equivalent to willfulness and deliberate disregard for this Court's Orders, the judicial system as a whole, and Florida law. *See Erdman v. Bloch*, 65 So. 3d at 66, *also see Ham v. Dunmire*, 891 So. 2d 492, 495-96 (Fla. 2004) [30 Fla. L. Weekly S6a]. Finally, based upon the above, both Plaintiff and Plaintiff's counsel are at fault for the violations and dismissal with prejudice of Plaintiff's Second Amended Complaint is the only viable alternative. *Id*.

ATTORNEY'S FEES

33. Florida Statute §627.428 states:

> 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 trial 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 beneficiary's attorney prosecuting the suit in which the recovery is had. *See Fla. Stat. §627.428*.

34. Dismissal of a declaratory action brought by an insurer against any named or omnibus insured, or any assignee of any named or omnibus insured, is the "rendition of a judgment or decree . . . 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." *See Fla. Stat. §627.428, also see State Farm Fire and Casualty Ins. v. Palma*, 629 So.2d 830 (Fla. 1993)("[T]he statute (Florida Statute §627.428) clearly provides that attorney's fees shall be decreed

against the insurer when judgment is rendered in favor of an insured or when the insured prevails on appeal . . . Because the statute applies in virtually all suits arising under insurance contracts, we agree . . . that the terms of section 627.428 are an implicit part of every insurance policy issued in Florida."); *Insurance Co. of North America v. Lexow*, 602 So. 2d 528 (Fla. 1992)("[I]f the dispute is within the scope of section 627.428 and the insurer loses, the insurer is always obligated for attorney's fees . . . Florida courts have consistently held that the purpose of section 627.428 and its predecessor is to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts."); *De Leon v. Great Am. Assur. Co.*, 78 So. 3d 585, 591-92 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D2250a] ("[A]ny success in an action on an insurance policy, let alone the full payment of the asserted claim, requires an award of fees."); *United Auto. Ins. Co. v. Miami Dade County MRI Corp.*, 56 So. 3d 121 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D517c] *citing Dawson v. Aetna Cas.*, 233 So. 2d 860 (Fla. 3d DCA 1970)("[I]nsured entitled to a fee award upon dismissal of an action brought by insurer even though the same issue was then pending in an administrative proceeding."); *Dawson v. Aetna Cas.*, 233 So. 2d 860 (Fla. 3d DCA 1970) *citing James Furniture Mfg. Co., Inc. v. Maryland Cas. Co.*, 114 So. 2d 722 (Fla. 3d DCA 1959)("The dismissal of the insurance company's action, therefore, in our opinion is the '*** rendition of a judgment *** against an insurer in favor of an insured.' "); *Citizens v. Bascuas*, 178 So. 3d 902 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2342b] *citing Ramirez v. United Auto. Ins. Co.*, 67 So. 3d 1174 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1823a] ("The fact that Bascuas did not obtain a money judgment in its favor does not preclude their entitlement to fees . . . The failure to award fees under these circumstances would have been 'directly contrary to the mandatory, non-discretionary requirements of law as provided by section 627.428. . ."); *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207 (Fla. 2016) [41 Fla. L. Weekly S415a]; *Explorer v. Cajusma*, 178 So. 3d 923 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2500a].

It is ORDERED AND ADJUDGED that:

1. Defendant, Fatima Diaz, Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint For Declaratory Relief, For Plaintiff's Failure to Comply With Court Order and Defendant, Fatima Diaz, Motion for Attorneys' Fees and Costs (COS: 1/25/2021) is hereby **GRANTED**.

2. Defendant, Fatima Diaz, Motion for Attorney's Fees and Costs (COS: 6/17/2020) is hereby **GRANTED.**

3. Defendant, Orlando Injury Center, Inc., Motion to Dismiss With Prejudice Plaintiff's Second Amended Complaint For Declaratory Relief For Plaintiff's Failure to Comply With Court Orders and Motion for Attorney's Fees and Costs (COS: 1/29/2021) is hereby **GRANTED.**

4. Defendant, Fatima Diaz, is hereby **ENTITLED** to attorney's fees and costs pursuant to Fla. Stat. §§627.428, 627.736(8), and 57.041. The Court specifically reserves jurisdiction to determine the amount of Defendant, Fatima Diaz's attorney's fees and costs to be awarded in favor of Defendant, Fatima Diaz, and against Plaintiff, Direct General Insurance Company.

5. Defendant, Orlando Injury Center, Inc., is hereby **ENTITLED** to attorney's fees and costs pursuant to Fla. Stat. §§627.428, 627.736(8), and 57.041. The Court specifically reserves jurisdiction to determine the amount of Defendant, Orlando Injury Center, Inc.'s attorney's fees and costs to be awarded in favor of Defendant, Orlando Injury Center, Inc., and against Plaintiff, Direct General Insurance Company.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose actual garaging address of insured vehicle

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DAVID BOYER and GUIRLENE JEAN BAPTISTE, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-002768-CA-01, Section CA07. July 14, 2021. Maria de Jesus Santovenia, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Guirlene Jean Baptiste, Pro se, Defendant.

ORDER GRANTING PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANT, GUIRLENE JEAN BAPTISTE

THIS CAUSE having come before this Court at the hearing on July 13, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, GUIRLENE JEAN BAPTISTE, and the Court having considered the same, it is hereupon,

ORDERED AND ADJUDGED that:

a. The Defendant, GUIRLENE JEAN BAPTISTE, was provided proper notice of the hearing on July 13, 2021, on the Plaintiff's Motion for Final Summary Judgment against the Defendant, GUIRLENE JEAN BAPTISTE.

b. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, GUIRLENE JEAN BAPTISTE, is hereby **GRANTED**;

c. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, GUIRLENE JEAN BAPTISTE;

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

e. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, Motion for Final Summary Judgment, Stipulation of Defendant, DAVID BOYER, the transcript of the Examination Under Oath (EUO) of DAVID BOYER, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

f. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX8499, is rescinded and is void *ab initio;*

g. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

h. The Defendant, DAVID BOYER, failed to disclose the actual garaging address of the insured vehicle(s) at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX8499, issued by DIRECT GENERAL INSURANCE COMPANY;

i. The Defendant, DAVID BOYER breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX8499, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The material misrepresentations of Defendant, DAVID BOYER on the application for insurance dated April 4, 2020, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # XXXXXX8499, issued by DIRECT GENERAL INSURANCE COMPANY;

k. There is no insurance coverage for the Defendant, GUIRLENE JEAN BAPTISTE for any property damage liability coverage,

personal injury protection benefits coverage, comprehensive coverage or collision coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

l. Notwithstanding the rescission, the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX8499, does not provide any bodily injury liability insurance coverage;

m. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, GUIRLENE JEAN BAPTISTE, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

n. There is no personal injury protection ("PIP") insurance coverage for GUIRLENE JEAN BAPTISTE for the accident which occurred on August 5, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

o. There is no obligation to provide Personal Injury Protection benefits coverage to any medical provider, doctor and/or medical facility for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX8499;

p. There is no obligation to provide Personal Injury Protection benefits coverage to Context Medical Group, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX8499;

q. The Defendant, GUIRLENE JEAN BAPTISTE, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499, for the August 5, 2020 accident;

r. There is no insurance coverage for the motor vehicle accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

s. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

t. There is no property damage liability coverage for the accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

u. There is no comprehensive coverage for the accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

v. There is no collision coverage for the accident which occurred on August 5, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX8499;

w. Since the policy of insurance issued to the Defendant, DAVID BOYER, bearing policy # XXXXXX8499, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DAVID BOYER to any medical provider, doctor and/or medical entity is void;

x. Since the policy of insurance issued to the Defendant, DAVID BOYER, bearing policy # XXXXXX8499, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from GUIRLENE JEAN BAPTISTE to any medical provider, doctor and/or medical entity is void;

y. Since the policy of insurance issued to the Defendant, DAVID BOYER, bearing policy # XXXXXX8499, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DAVID BOYER to Context Medical Group, Inc. is void;

z. 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 compliance in the court file.

* * *

Criminal law—Carrying concealed firearm without permit—Search and seizure—Residence—Officers had probable cause to obtain warrant to search defendant's residence for firearm where officer with week-old knowledge that defendant was not licensed to carry concealed weapon saw firearm in waistband of defendant's pants as he walked outside his residence and defendant fled into residence—Law permitting unlicensed carrying of concealed firearm in person's yard is not applicable where defendant did not have exclusive possession of yard outside of multi-family dwelling—Although fact that officer had probable cause to believe defendant was not licensed to carry concealed firearm was omitted from affidavit supporting request for search warrant, good faith exception to exclusionary rule applies where officer conducting residence search did so in objectively reasonable reliance on validity of warrant—Motion to suppress evidence of scuffle between defendant and arresting officer is denied—Crimes of resisting officer and battery on officer are independent of lawfulness of underlying arrest or search

THE STATE OF FLORIDA, Plaintiff, v. DAMIAN WOODARD, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F18-02838, Section F009. June 10, 2021. Joseph Perkins, Judge. Counsel: Joshua Olin, for Plaintiff. Devon Silverang, for Defendant.

ORDER DENYING MOTION TO SUPPRESS PHYSICAL AND TESTIMONIAL EVIDENCE

This case presents two questions: First, does an officer with week-old knowledge that a defendant does not have a license to carry a concealed firearm have probable cause that a crime has been committed if the officer observes the defendant concealing a firearm in front of a duplex where the defendant lives? Second, if an officer (even unlawfully) follows the defendant into his home, does the exclusionary rule prevent the officer from testifying that when attempting to accomplish the arrest, the defendant repeatedly punched the officer?

For the reasons below, the answer to the first question is yes (based on the facts of this case) and the answer to the second question is no (as a matter of Florida law).[1]

FINDINGS OF FACT[2]

On February 9, 2018, Detectives Pinckney and Casiano were conducting an undercover surveillance operation. They were sitting in an unmarked vehicle with tinted windows parked in a driveway of 131/133 NW 70th Street, which is a duplex where Defendant Damian Woodard lives. Pinckney, who recognized Woodard because they had interacted before, saw Woodard approach the vehicle clutching his waistband over his jacket. Pinckney (wearing his badge and holding his police radio) rolled down his window and identified himself as police. Woodard turned and started to run toward his home. While turning, Woodard's jacket opened, and Pinckney saw what he recognized as being the butt of a handgun.

A week earlier, Pinckney had learned in connection with another shooting investigation that Woodard did not have a license to carry a concealed firearm. Intending to arrest Woodard, Pinckney twice yelled "STOP, POLICE!" but Woodard did not stop. Instead, he ran into his home, and Pinckney followed.

Once inside, Pinckney saw Woodard run into a bedroom. There were several people in the house, so Pinckney called for emergency backup before engaging. Around thirty seconds later, backup arrived, and Woodard exited the bedroom. When Pinckney approached Woodard to arrest him, Woodard repeatedly punched Pinckney in the face and abdomen. Ultimately, Pinckney successfully arrested Woodard, but the search incident to arrest did not reveal a firearm.

Detectives conducted a cursory safety check of the house looking for other possibly armed individuals. During the course of that check, Detective Cadavid opened a big closet in the bedroom Woodard ran into upon entering the house. There was a box with holes in it and, without opening the box, Detective Cadavid observed there was a firearm. Detective Cadavid sought and obtained a search warrant. When executing the warrant, detectives found the firearm.

Woodard was charged with one count each of carrying a concealed firearm without a license in violation of § 790.01(2), Florida Statutes, battery on a law enforcement officer in violation of § 790.07(2)(b), and resisting an officer with violence in violation of § 843.01.

WOODARD'S MOTION TO SUPPRESS

In his motion to suppress, Woodard argues that the detectives lacked probable cause to search Woodard's home because (a) the detectives lacked probable cause to believe that Woodard was unlicensed to conceal a firearm, and (b) unlicensed concealed firearm possession on one's own property is not illegal. As a result, Woodard argues, the Court should exclude testimony regarding the details of the alleged scuffle when officers tried to arrest Woodard as well as firearm(s) and firearm paraphernalia found on Woodard's property after detectives obtained an executed a search warrant.[3]

LEGAL STANDARD

Probable cause for a search exists where the facts and circumstances within an officer's knowledge and of which the officer has reasonably trustworthy information suffice to warrant a person of reasonable caution to believe that a criminal offense has been or is being committed. *State v. Hankerson,* 65 So. 3d 502, 506 (Fla. 2011) [36 Fla. L. Weekly S182a]. "The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search." *Murray v. United States,* 487 U.S. 533, 536 (1988) (citations omitted). "[T]he exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." *Id.* at 536-37 (quotation omitted).

ANALYSIS

I. THE COURT WILL NOT EXCLUDE EVIDENCE OF THE FIREARM OR FIREARM PARAPHERNALIA.

The Court denies Woodard's request to suppress evidence of the firearm or firearm paraphernalia.

"To establish probable cause for issuance of a search warrant, a supporting affidavit must set forth facts establishing two elements: (1) the commission element—that a particular person has committed a crime, and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located in the place to be searched." *State v. McGill,* 125 So. 3d 343, 348 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D2340b].[4]

Here, Woodard takes issue with the commission element. According to Woodard, "[t]here are two valid allegations: (1) that he possessed a gun in his pants; and (2) that he fled back into his home after approaching the unmarked police vehicle. These allegations alone do not support a finding of probable cause." Motion at 9.

The elements of the crime of carrying a concealed weapon without a permit are that (1) defendant knowingly carried a firearm, (2) that was concealed from the ordinary sight of another person, and (3) defendant is not licensed under § 790.06. Fla. Stat. § 790.01(2) *Mackey v. State,* 83 So. 3d 942, 946 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D637b] (first two elements), *aff'd on other grounds,* 124 So. 3d 176 (Fla. 2013) [38 Fla. L. Weekly S724a]; *Jackson v. State,* 289 So. 3d 967, 969 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D157a] (third element in light of 2015 amendment to § 790.01(2)).

As discussed below, Pinckney's week-old knowledge that Woodard was not licensed to carry a concealed firearm was not stale and contributed to probable cause. Additionally, Florida law permitting unlicensed carrying of a concealed firearm in one's yard does not apply here because it only applies where one has exclusive possession of the yard. Thus, the detectives had probable cause to obtain a search warrant.

A. Probable Cause that Woodard Was Unlicensed to Conceal a Firearm.

1. Week-old information regarding Woodard's lack of licensure was not stale.

Detective Pinckney testified that he had week-old information from another shooting investigation regarding Woodard's lack of licensure. Woodard argues that this information is stale and that to establish probable cause justifying a search warrant, Pinckney was required to have updated information that Woodard was unlicensed as of the date of the warrant. Permitting Detective Pinckney to rely on any older information, Woodard argues, would not account for the possibility that Woodard obtained a concealed carry permit during the week before the search warrant.

"Whether information is too stale to establish probable cause to support a search is not to be determined solely by the rigid application of a predetermined time period." *Cruz v. State,* 788 So. 2d 375, 379 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1549a]. Additionally, "[w]hile the passage of time is an important factor in support of the existence of probable cause, it is not the only factor." *Id.* The Court is confident that Pickney's week-old information that Woodard did not have a concealed carry license was not stale and was sufficiently recent to support a probable cause determination.

The facts here are materially identical to the facts in *State v. Wade,* 673 So. 2d 906 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1091a]. In *Wade,* the detective investigating the defendant conducted a computer record check revealing that the defendant's driver's license had been suspended. (At most) eleven days later, the detective saw the defendant driving and, based on his prior record check, pulled the defendant over. After determining that the defendant's driver's license was still suspended, the detective arrested the defendant. *Id.* at 906-07.

The trial court granted the defendant's motion to suppress, determining that while the detective's testimony was credible, the detective should have conducted a record check of the defendant's driver's license immediately before making the initial stop and subsequent arrest of the defendant. *Id.* at 907. On appeal, the Third District reversed, holding that "the detective's knowledge of the defendant's previously suspended driver's license was not stale and provided the officer with a reasonable suspicion upon which to make a valid legal stop." *Id.* at 907; ***compare*** *id.; State v. Leyva,* 599 So. 2d 691 (Fla. 3d DCA 1992) (holding that officer's four-to-five week-old knowledge that defendant's driver's license was suspended was not stale on the date of the stop and provided officer with the reasonable suspicion upon which to make a valid, legal stop, if not probable cause) ***with*** *Moody v. State,* 842 So. 2d 754, 758-59 (Fla. 2003) [28 Fla. L. Weekly S77a] (holding that an officer's one- to three-year-old information about a suspended license was too stale to justify an investigatory stop); *W.B. v. State,* 179 So. 3d 411, 413 (Fla. 3d DCA

2015) [40 Fla. L. Weekly D2556c] (holding that the officer's nine-month-old knowledge regarding defendant's eligibility to hold a driver's license was stale and did not provide a basis for reasonable suspicion to stop the defendant).

Here, the Court finds that Detective Pinckney's week-old knowledge that Woodard did not have a license to carry a concealed firearm not only gave rise to reasonable suspicion to stop Woodard, but also to probable cause to obtain the search warrant.[5]

2. Good faith exception to exclusionary rule applied.

Although Detective Pinckney had a basis for probable cause that Woodard was unlicensed to carry a concealed firearm, Detective Cadavid did not include such basis in the affidavit supporting his request for a search warrant. Nevertheless, the circuit judge on warrant duty issued the search warrant. As a result, should evidence discovered when executing the warrant be suppressed?

The Court determines that on these facts, the good faith exception to the exclusionary rule applies. "In general, the good faith exception to the exclusionary rule precludes the suppression of evidence secured pursuant to an invalid warrant when the officer who conducts the search does so in an objectively reasonable reliance upon the validity of the warrant." *State v. McGill,* 125 So. 3d 343, 351 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D2340b] (*citing United States v. Leon,* 468 U.S. 897 (1984)). In cases not involving police misconduct, "the good faith exception can apply to preclude suppression of evidence secured pursuant to an invalid warrant, even where the reviewing court determines that the facts in the affidavit do not demonstrate probable cause." *Id*.[6]

"In determining whether an officer acted in reasonable reliance on the validity of the warrant, courts must consider whether, given the totality of the circumstances, a well-trained officer armed with the information possessed by the officer conducting the search would have believed the warrant to be valid." *Id.* at 351 (*citing State v. Sabourin,* 39 So. 3d 376, 384 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1372a). The good faith exception is inapplicable

> (1) if, in issuing the warrant, the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) where the issuing magistrate wholly abandoned his judicial role; (3) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) where a warrant is so facially deficient (i.e., in failing to particularize the place to be searched or the items to be seized) that the executing officer could not reasonably presume it to be valid.

Id. at 351-52.

Here, the first factor does not apply because there was no allegation that the affidavit contained misrepresentations or omitted material facts. Indeed, Detective Cadavid easily could have included in the warrant Detective Pinckney's week-old-information regarding Woodard's lack of licensure. *Cf. Pazos v. State,* 654 So. 2d 1000, 1001 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1144a] (holding that good faith exception precluded application of exclusionary rule to warrant that provided that there "will" be cocaine in the residence tomorrow; defective anticipatory nature of affidavit could have easily been omitted simply by changing tense of declaration). The third factor does not apply because there is also no allegation that the circuit judge who signed the warrant wholly abandoned her judicial role. The fourth factor does not apply because the warrant was not technically deficient—it specified the place to be searched and the items to be seized.

As for the second factor, "where a trial judge determines that an affidavit did not allege sufficient facts to establish probable cause, the good faith exception applies as long as the affidavit was not so lacking in indicia of probable cause as to render official belief in its validity unreasonable." *McGill,* 125 So. 3d at 352. On these facts, the Court holds that the good faith exception applies. An experienced circuit judge reviewed Detective Cadavid's affidavit and determined that probable cause existed to justify the issuance of a search warrant. The police executed the search pursuant to the warrant issued by the judge. To reject the application of the good faith exception in this case, the Court would need to conclude that an objectively reasonable police officer would have a better understanding of the law of search and seizure and probable cause than did the circuit judge who issued the warrant. The Court is not willing to do so. *Cf. State v. Watt,* 946 So. 2d 108, 110 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D184c] (In order to reject the application of the good faith exception in this case, we would need to conclude that an objectively reasonable police officer would have a better understanding of the law of search and seizure and probable cause than did the trial judge who issued the warrant."); *see State v. Cook,* 972 So. 2d 958 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2948a] (holding that good-faith exception applied where "the sole debate . . . is over the existence of probable cause"); *State v. Harris,* 629 So.2d 983, 984 (Fla. 5th DCA 1993) (holding that good faith exception applied even though probable cause was lacking in that informant's reliability was not established and affiant did not corroborate informant's statement that he observed cocaine in defendant's house).

B. Argument that Woodard Possessed Weapon on His Own Property.

Woodard argues that his possession of a concealed weapon outside his home could not provide probable cause to issue a search warrant because, under Florida law, a person may lawfully possess a concealed firearm without a license at home and on surrounding property. The Court rejects Woodard's argument because the evidence established that Woodard possessed the firearm outside of a multifamily building[7] and not in a yard or on a driveway where he had exclusive possession.

Chapter 790, Florida Statues, governs the possession and use of firearms. Section 709.01(2) criminalizes concealed firearm carrying: "[A] person who is not licensed under s. 790.06 and who carries a concealed firearm on or about his or her person commits a felony of the third degree." Section 709.06 governs issuance of licenses to carry concealed firearms. Section 790.25(3)(n), in turn, provides that

> [t]he provisions of ss. 790.053 [governing open carrying of weapons] and 790.06 do not apply in the following instances, and, despite such sections, it is lawful for the following persons to own, possess, and lawfully use firearms . . . for lawful purposes: . . . (n) A person possessing arms at his or her home or place of business . .

Fla. Stat. § 790.25(3)(n).

It is well-settled that this provision authorizes the carrying of a concealed firearm at home without a license. *People's v. State,* 287 So. 2d 63, 66 (Fla. 1973) (holding that § 790.25(3)(n) authorizes carrying of a concealed weapon on one's person at home or place of business without a license); *accord Cockin v. State,* 453 So. 2d 189, 191 (Fla. 3d DCA 1984) (reversing conviction for carrying a concealed weapon because motel where defendant was residing was functional equivalent of defendant's home pursuant to § 790.25(3)(n)); *Santiago v. State*, 77 So. 3d 874, 875 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D161a] (holding that trial court erred as a matter of law when it instructed jury that carrying a concealed weapon in one's residence violated the concealed weapons law); *French v. State,* 279 So. 2d 317 (Fla. 4th DCA 1973) (holding that in light of § 790.25(3)(n), "the carrying of a concealed firearm in one's own home is not prohibited by s 790.01(2)").

"[T]he phrase 'at his [or her] home or business' [in § 790.25(3)(n)] refers to an individual's surrounding property as well as the buildings

and structures situated thereon." *Collins v. State,* 475 So. 2d 968, 969 (Fla. 4th DCA 1985) (holding that "at home" in § 790.25(3)(n) includes one's yard and driveway); *accord State v. Anton,* 700 So. 2d 743, 749 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D2327a] ("It is not unlawful for a person to possess firearms at his home or place of business, including surrounding property, as well as buildings and structures situated thereon."). The "at home" exception in § 790.23(3)(n) does not apply, however, in parts of one's home or surrounding property where one cannot claim exclusive possession. *See Sherrod v. State,* 484 So. 2d 1279, 1280-82 (Fla. 4th DCA 1986) (holding that the "at home" exception in § 790.25(3)(n) permits concealed firearm carrying in "[a] privately owned yard and driveway . . . where an owner can claim exclusive possession," but not "in the parking lot of a multi-unit apartment building"); *see also McNair v. State,* 354 So. 2d 473 (Fla. 3d DCA 1978) (holding that a defendant was not "at his home" where he was thirty to thirty-five feet from his apartment); *Brant v. State,* 349 So. 3d 674 (Fla. 3d DCA 1977) (holding that a defendant was not at home where he was carrying a concealed weapon in the hallway immediately outside of the hotel room where he was living); *Rash v. State,* 331 So. 2d 373, 374 (Fla. 3d DCA 1976) (holding that § 790.23(3)(n) did not apply on walkway 10 to 15 feet away from defendant's apartment).

Here, the uncontradicted evidence was that Woodard possessed the firearm outside of a multi-family dwelling and not that Woodard was in a location where he could claim the exclusive right of possession. *See* Exhibit 1 at 1, 6. The Court therefore rejects Woodard's argument as to this point.

II. THE COURT WILL NOT EXCLUDE TESTIMONY REGARDING THE SCUFFLE BETWEEN WOODARD, WITNESSES, AND OFFICERS.

The Court denies Woodard's request to suppress evidence of the scuffle between Woodard, witnesses, and officers when Pinckney tried to arrest Woodard. The crimes of resisting an officer with violence and battery on an officer are independent from the underlying arrest or search. Thus, it is well-settled that the exclusionary rule does not operate to exclude evidence of such crimes even when the underlying arrest or search is unlawful. *See Tims v. State,* 204 So. 3d 536, 538 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2257b] (discussing history of exclusionary rule and holding that the rule "does not command suppression of evidence that [the defendant] violently resisted arrest and accosted officers, lawfully present [in the defendant's home] or not"); *Motes v. State,* 37 So. 3d 301, 303 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D841b] (holding that even if officer's warrantless entry into motel room violated defendant's Fourth Amendment rights, such fact did not preclude defendant's conviction for resisting arrest with violence where officer's clothing displayed the sheriff's office logo, the officer had previously announced he was a police officer, and the defendant kicked and struck the officer during arrest); *State v. Clavette,* 969 So. 2d 463 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2719b] ("Even if the police had illegally entered the residence, Mr. Clavette would not have been entitled to suppress the observations and testimony of the deputies regarding the events [leading to his being charged, *inter alia,* with battery on a law enforcement officer and resisting an officer with violence]. This is because it is well-established that a person is not entitled to use force to resist even an illegal arrest."); *State v. White,* 642 So. 2d 842, 844 (Fla. 4th DCA 1994) (holding that the commission of an independent crime during an illegal search may be charged, and if the seized evidence relates to that crime as opposed to the objects of the search, such evidence should not be suppressed); *State v. Freeney,* 613 So. 2d 523, 525 (Fla. 2d DCA 1993) (holding that trial court erred as a matter of law when it suppressed evidence of the struggle between defendant and the arresting officer as being the "fruits of an illegal seizure"; "[e]ven though the altercations between Mr. Freeney and the police may never have occurred 'but for' the stop, the evidence concerning the defendant's battery on the police officer and his alleged obstruction is not legally derivative for purposes of the exclusionary rule").

CONCLUSION

For the foregoing reasons, the Court denies Woodard's motion to suppress.

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[1]The Court thanks Assistant Public Defender Devon Silverang and Assistant State Attorney Joshua Olin for their thoughtful written and oral arguments.

[2]The Court accepts the credible and uncontradicted testimony of Detective Pinckney and the search warrant and affidavit admitted as Composite Exhibit 1. *See Brannen v. State,* 114 So. 429 (Fla. 1927); *State v. Ojeda,* 147 So.3d 53 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1548e]; *State v. Williams,* 119 So.3d 544 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1818a].

[3]Woodard broadly asks the Court to exclude "all evidence obtained by . . . [and] all testimony provided as a result of, and about, the unconstitutional search and seizure," including, but not limited to, the specifically identified evidence above. Motion at 1. Generalized catch-all phrases, however, do not satisfy Rule 3.190(g)(2)'s requirement that, *inter alia,* "[e]very motion to suppress evidence . . . state clearly the particular evidence sought to be suppressed . . . ." Fla. R. Crim. P. 3.190(g)(2); *State v. Christmas,* 133 So. 3d 1093, 1096 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D280d]. The Court therefore denies the motion as legally insufficient as to any evidence not specifically identified in the motion.

[4]Woodard argues that "[t]he allegations in the warrant obtained independently from the unconstitutional search do not support a finding of probable cause." It is not clear to the Court what allegations Woodard wants the Court to exclude from consideration. As discussed below, the facts relating to Woodard's altercation with the detectives are independent from, and not derivative of, the facts relating to Woodard's carrying a concealed weapon. Nevertheless, for purposes of this analysis, the Court only considers the allegations in the affidavit up to Pinckney's entry into Woodard's home.

[5]*Jackson,* cited by Woodard, is inapposite because the issue there involved the State's failure to prove each element of the charges before the Court. 289 So. 3d at 971-72. Here, the issue relates to probable cause, not failure of proof.

[6]The rationale of the good faith exception is that the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id.* at 352 (quoting *Leon,* 468 U.S. at 916). "Therefore, when the police act in good faith on a warrant they have no reason to believe is invalid, the deterrent effect of suppressing illegally seized evidence is minimal." *Id.* (quoting *Leon,* 468 U.S. at 919-20).

[7]The State and defense both acknowledge that Woodard lives in a duplex, Motion, ¶4; State's Response, ¶3, and the uncontradicted evidence establishes that point.

* * *

Attorney's fees—Offer of judgment—Amount—Court applying offer of judgment statute does not have discretion to award no fees at all, but has broad discretion in determining amount of fees awarded—Time spent in furtherance of appeals and excessive, duplicative and unnecessary hours are deleted from lodestar—Indian tribes—Plaintiffs' claims against Indian Tribe for malicious prosecution had substantial factual and legal merit at the time tribe's proposal for settlement was served—It would be a miscarriage of justice to reward tribe for using the courts to bring a malicious prosecution and thereafter hide behind sovereign immunity when sued for damage caused by that conduct—Sanction of $30,000 is awarded to tribe rather than the approximately $900,000 in fees and costs sought by tribe

LEWIS TEIN, P.L. et al., Plaintiffs, v. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-021856-CA-01. June 17, 2021. Michael Hanzman, Judge. Counsel: Curtis Miner, Coral Gables, for Plaintiffs. Robert O. Saunooke, Cherokee, North Carolina; and George Blay Abney and Daniel F. Diffley, Atlanta, Georgia, for Defendants.

FINAL JUDGMENT FOR ATTORNEY'S FEES AND COSTS[1]

I. INTRODUCTION

Before the Court is the latest (and hopefully last) battle in what has been a brutal, decade long war waged between Plaintiffs, Lewis Tein, P.A., Guy Lewis and Michael Tein (collectively Plaintiffs, Lewis Tein, or the Firm) and Defendant, Miccosukee Tribe of Indians of

Florida (Tribe). This most recent clash is over the amount of attorney's fees, if any, the Tribe is entitled to recover because: (a) Plaintiffs rejected proposals of settlement served pursuant to Fla. Stat. § 768.79; and (b) the Tribe prevailed in this action when the Third District Court of Appeal held that Plaintiffs' claims were completely barred "on sovereign immunity grounds." *See Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 668-669 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1733a].

The Tribe's motion for attorney's fees and costs—based solely upon Fla. Stat. § 768.79—was filed on December 14, 2017. Docket Entry "DE" 176. The Tribe seeks approximately Nine-Hundred Thousand Dollars ($900,000.00) for fees and costs incurred after May 17, 2017, the date on which it served proposals for settlement, in the amount of Two Thousand Five Hundred Dollars ($2,500.00) on each of the three Plaintiffs. This Court's immediate predecessor, the Honorable Beatrice Butchko, denied the motion, finding that these offers were not made in good faith. *See* Fla. Stat. § 768.79 (7)(a). The Third District reversed, concluding that "the Tribe had a well-founded, good faith, and legally correct belief that sovereign immunity divested the trial court of subject matter jurisdiction," and that, for this reason, its "nominal offers had a reasonable foundation . . . ." *See Miccosukee Tribe of Indians of Florida v. Lewis Tein P.L.*, 277 So. 3d 299, 303 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2094a].

Although section 768.79 "automatically creates" an "entitlement to attorneys' fees when the statutory and procedural requirements have been satisfied . . .," *Anderson v. Hilton Hotels Corp.*, 202 So. 3d 846 (Fla. 2016) [41 Fla. L. Weekly S500a], our Supreme Court has emphasized that unlike fee-shifting statutes, which are designed to reimburse prevailing parties, section 768.79 is intended to encourage settlement, and fees under this provision are awarded not as compensation to offerors, but "as sanctions (against offerees) for unreasonable rejections of offers of judgment." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 218 (Fla. 2003) [28 Fla. L. Weekly S740a]. For this reason, a finding of entitlement does not compel a trial court to award an offeror its counsel's "lodestar."[1] Rather, the court is *required* to apply the six (6) "factors" enumerated in section 768.79 (7)(b), as well as all other relevant criteria, and determine an appropriate sanction to be awarded based upon the unique circumstances of the particular case. Fla. Stat. § 768.79 (7)(b); *McGregor v. Molnar*, 79 So. 3d 908, 911 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D432a] ("[i]f the court decides that the offer was made in good faith, section 768.79 (7)(b) and rule 1.442 (h)(2) set forth six factors to be considered in determining the reasonableness of an award."). So, this Court's task is to determine the lodestar for time expended by the Tribe's counsel after service of its settlement proposals (i.e., post May 17, 2017), and adjust that lodestar to the extent warranted by application of section 768.79's enumerated factors and any other relevant criteria.

II. FACTS

From 2005 to 2010, Plaintiffs represented the Tribe, and certain of its individual members, in a variety of civil, criminal, and administrative matters. That changed when a new Chairman of the Tribe, Colley Billie, was elected in December 2009. After assuming his new position, Billie—together with his newly appointed Tribal Counsel, Bernardo Roman III, Esquire (Roman)—discharged the Firm. The Tribe then filed lawsuits in both the United States District Court for the Southern District of Florida and the Eleventh Judicial Circuit in and for Miami-Dade County, alleging that Lewis Tein had engaged in serious criminal and civil wrongdoing, such as:

a. Fraudulently billing for legal work that was "fictitious" or "unnecessary";

b. Paying cash "kick-backs" to the Tribe's former Chairman;

c. Failing to report income received from the Tribe and "filing false returns"; and

d. Engaging in a money laundering scheme.

The Tribe's complaints advanced, among other causes of action, claims of racketeering, embezzlement, civil theft, fraud, and breach of fiduciary duty and legal malpractice.

The federal action filed by the Tribe was presided over by United States District Judge Marcia Cooke. After incurring substantial expense and being vilified in the press, Lewis Tein was eventually vindicated when the court found that:

> There was no evidence, or patently frivolous evidence, to support the factual contentions [in the Tribe's Second Amended Complaint] . . .

Miccosukee Tribe of Indians of Florida v. Cypress, 12-22439-CIV, 2015 WL 235433 (S.D. Fla. Jan. 16, 2015). After finding that the "Tribe is not relenting with its legal crusade" against Lewis Tein, and that its allegations were "inexcusable," Judge Cooke sanctioned the Tribe, and Roman, over One Million Dollars ($1,000,000.00).[2]

The related state court action filed by the Tribe was presided over by then Circuit Judge John Thornton, Jr. Like Judge Cooke, Judge Thornton found the Tribe's claims factually bankrupt and disposed of the case on summary judgment.[3] He later entered an "Order on Lewis Tein's Entitlement to Attorney's Fees and Costs," finding that: (a) the Tribe, and its counsel Roman, "had access at all times to the facts and evidence, which conclusively refuted their claims"; (b) "the Tribe and its lawyer Mr. Roman acted in bad faith," "motivated by personal animosity for Lewis Tein and this firm's close and financially lucrative relationship with the Tribe's former Chair"; and (c) the litigation was pursued "without regards to the truth." Judge Thornton later awarded Lewis Tein fees and costs of approximately Three Million Dollars ($3,000,000.00) as a sanction pursuant to Florida Statute § 57.105, and as prevailing party attorney's fees pursuant to Florida Statute § 772.104 (3) and § 772.11(1).[4]

Upon prevailing in these (and other) lawsuits initiated by the Tribe, Plaintiffs commenced this action advancing claims for: (a) violation of the Florida Civil Remedies for Criminal Practice Act (§ 772.103 (3)); and (b) malicious prosecution. Plaintiffs alleged that they had "an extremely successful and growing practice from its formation in 2005 through the year 2011, when the Tribe first publicly leveled highly damaging and completely false allegations against the law firm," and that the Tribe's "completely false" allegations "caused existing clients to stop using the firm's services and caused prospectively clients, general counsel and referral lawyers to cease to engage" the Firm for new matters. Plaintiffs also alleged that the Tribe's "malicious allegations which assailed Lewis and Tien's integrity and accused them of serious criminal acts," resulted in the resignation of "each and every one of" the Firm's associates. Finally, Plaintiffs Lewis and Tein alleged that they suffered extreme damages "to their professional reputations (a lawyer's most precious asset), personal humiliation and embarrassment and emotional distress." Compl. ¶¶ 100-106.

The Tribe responded by filing a motion to dismiss, insisting that it enjoyed—and had not waived—sovereign immunity, and that the court therefore lacked subject matter jurisdiction. DE 4.[5] Judge Thornton—who had also been initially assigned this case—denied the motion, finding that the Tribe's conduct in bringing bad faith litigation in federal and state court constituted "a clear wavier of sovereign immunity for redress sought against the Tribe, so long as that redress is a direct result of, and arises directly out of the Tribe's initial claims which have already been judicially determined to have been brought in bad faith." DE 14. In support of this ruling, Judge Thornton relied on—amongst other authorities—the Third District's opinion in *Miccosukee Tribe of Indians of Florida v. Bermudez*, 92 So. 3d 232 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1241a], holding that by providing evidence to counsel, which was "intended to influence ongoing litigation in our state court," the Tribe waived sovereign

immunity, as "[a]n election to participate in litigation is not a one-way street." *Id.*

The Tribe then moved to stay the case pending an interlocutory appeal authorized by Rule 9.130 (f) of the Florida Rules of Appellate Procedure. (DE 18). *See, e.g., United States v. Moats*, 961 F.2d 1198 (5th Cir. 1992) (staying discovery pending appeal because "sovereign immunity is an immunity from the burdens of becoming involved in any part of the litigation process . . . "). Judge Thornton denied the motion (DE 19), and the Tribe then sought a stay in the Third District. That request also was denied, and the case proceeded towards a September 2017 trial.

In March 2017, while the Tribe's interlocutory appeal remained pending, the parties mediated the case before retired judge Stanford Blake. During that mediation, the Tribe offered Plaintiffs Five Million Dollars ($5,000,000.00) as a full and complete settlement of their claims. Plaintiffs rejected that offer and the mediation resulted in an impasse. DE 79. The parties, however, continued to discuss a potential settlement. Then, on May 17, 2017—a week after the sovereign immunity appeal was argued at the Third District—the Tribe sent its proposals offering each Plaintiff Two Thousand Five Hundred Dollars ($2,500.00) in complete settlement of their claims. These offers were rejected.

On August 9, 2017, the Third District issued its opinion reversing the court's denial of the Tribe's motion to dismiss, finding that sovereign immunity barred all claims advanced in Plaintiffs complaint (as amended). Judge Luck, writing for the court, acknowledged that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity, *Miccosukee Tribe of Indians v. Lewis Tein, P.L.,* 227 So. 3d 656, 658 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1733a] (citing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998)), as it "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* The Third District also noted that while "Lewis and Tein had a right not to have their reputations ruined and their business destroyed by the Tribe . . .," and while some may suffer great harm due to tribal immunity, "[g]ranting immunity to Indian tribes is a policy choice made by our elected representatives to further important federal and state interests"; a choice that protects "the tribes understanding that others may be injured and without a remedy." *Id.* The Third District then concluded that "the Tribe did not clearly, unequivocally, and unmistakably waive its immunity as to this case . . ." *Id.*[6]

On November 15, 2017, Judge Thornton, in accordance with the Third District's mandate, dismissed Plaintiffs' complaint with prejudice for lack of subject matter jurisdiction. DE 173. The Tribe then filed its motion for attorney's fees and costs based upon its rejected proposals for settlement.

III. GOVERNING LAW

Florida Statute § 768.79 provides, in pertinent part:

768.79. Offer of judgment and demand for judgment

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him . . . from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer . . . .

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

As the Court pointed out earlier, the purpose of this statute, and its implementing rule of procedure (Rule 1.442), is to "reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions." *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010) [35 Fla. L. Weekly S196a].[7] The statute's aim is *not* to compensate offerors for attorney's fees expended after their offer is rejected. Rather, fees pursuant to section 768.79 and Rule 1.442 are again "awarded as sanctions for unreasonable rejections . . . ." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 218 (Fla. 2003) [28 Fla. L. Weekly S740a]. *Cent. Motor Co. v. Shaw*, 3 So. 3d 367, 369 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D160a] (". . . an award of attorney fees authorized by section 768.79 is a sanction against the rejecting party for the refusal to accept what is presumed to be a reasonable offer . . .").

Because the policy underlying section 768.79 is *not* to compensate offerors, but to instead motivate settlement through the prospect of sanctions, the legislature did not mandate that a trial court, upon a finding of entitlement, award offerors their counsel's "lodestar." Instead, the statute—plainly and unambiguously—*mandates* that the court, in setting an appropriate sanction, consider specified "factors," including the "then-apparent merit or lack of merit" of the offeree's case; "[t]he number and nature of proposals made by the parties"; the "closeness of questions of fact and law at issue"; "[w]hether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties"; and the "amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged." Fla. Stat. § 768.79 (7)(b). The legislature also mandated a trial court to consider "all other relevant criteria." *Id.*

While § 786.79 (7)(b) has received little appellate attention, it is apparent that the "factors" specified by the legislature do not corelate with, and bear no relation to, the amount of hours "reasonably" expended by an offeror's counsel or the "reasonable" rates of counsel (i.e., the "lodestar"). Factors such as whether the offeree's case had (or lacked) merit; what prior settlement offer(s) had been made; whether the case presented a close call or was in the nature of a test case, and the other "factors" a court is *required* to consider, have absolutely no impact on a "lodestar" analysis, as neither the time "reasonably" spent by counsel, nor counsel's "reasonable" rate, are influenced by any of them. And, as pointed out earlier, the legislature also mandated that the court consider any other "relevant criteria."

Given that these statutory "factors" have nothing to do with a "lodestar" analysis, it is clear that the legislature granted trial courts broad discretion to award an offeror less (and in appropriate cases far less) than its counsel's "lodestar" (i.e., award less of a "*sanction*") if the particular circumstances of the case warrant.

The question, then, becomes whether a trial court, applying section 768.79 (7)(b), may exercise its discretion to award no fees at all. Our intermediate appellate courts were initially divided on this point. *See Bridges v. Newton*, 556 So. 2d 1170 (Fla. 3d DCA 1990) (court may

deny fees altogether); *Schmidt v. Fortner*, 629 So. 2d 1036, 1042 (Fla. 4th DCA 1993) ("[u]nder subsection (7)(b), the court's discretion is directed by the statutory text solely to determining the reasonability of the *amount* of fees awarded . . ."). That conflict appeared to be resolved by our Supreme Court in *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611-613 (Fla. 1995) [20 Fla. L. Weekly S436a], where the court held that: (a) "section 768.79 provides for the award of attorney's fees regardless of the reasonableness of an offeree's rejection . . ."; and (b) "[u]nder subsection (7)(b), the court's discretion is directed . . . solely to determining the reasonability of the *amount* of fees awarded; and that discretion is informed, at least partially, by the 6 factors thereafter listed in that subsection". The *TGI Friday's* court reasoned, as a matter of statutory interpretation, that when a qualifying offer is made in good faith the offeror is entitled to "an award," *see* subsection (7)(b), and the "noun *award"* refers to "the process of fixing the amount . . ." *Id.* at 612-613.

Although *TGI Friday's* appeared to have settled this issue, the Third District, on three (3) subsequent occasions, sanctioned a complete denial of attorney's fees despite an offeror's compliance with section 768.79. *See Cent. Motor Co. v. Shaw*, 3 So. 3d 367, 370 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D160a] (affirming trial court's denial of any fees when awarding them would, under the unique facts of the case, "amount to nothing more than a gotcha tactic"); *Segundo v. Reid*, 20 So. 3d 933, 936 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1995a] (". . . pursuant to section 768.79(7)(b), the trial court abused its discretion by *not completely disallowing an award of attorney's fees* as that would be the only reasonable award under the circumstances of this case") (emphasis added); *Florida Diversified Films, Inc. v. Simon Roofing & Sheet Metal Corp.*, 118 So. 3d 240, 245 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1552a] (affirming trial court's denial of *any* fees based upon finding that "it was not unreasonable for [offeree] to reject the proposal for settlement"). *Cent. Motor Co.* drew a dissent from Judge Shepherd, who believed that the result reached by the majority was foreclosed by *TGI Friday's*. At least one other district court of appeal agreed. *See Braaksma v. Pratt*, 103 So. 3d 913, 916 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2577a] (". . . we are not persuaded that the Third District s analysis in *Segundo* and *Central Motor Co.* are consistent with the supreme court's holding in *TGI Friday's* . . ."). Yet in two more recent cases, the Third District has relied upon *TGI Friday's* in reversing an outright denial of fees. *Vanguard Car Rental USA, LLC v. Suttles*, 190 So. 3d 672 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1016b]; *Ruiz v. Policlinica Metropolitana, C.A.*, 260 So. 3d 1081 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2215b].

Upon careful review of this precedent, this Court concludes that it may not deny an award altogether based upon an application of section 768.79 (7)(b) in cases where the offer procedurally complies with the statute and the offeror recovers "a judgment in its favor at least 25 percent more or less than the demand or offer." *Suttles,* 190 So. 3d at 674. The *TGI Friday's* court, in fact, expressly rejected the argument that a court "could properly use the enumerated factors of subsection (7)(b) as the basis for denying all fees to an otherwise qualifying offeror." *TGI Friday's*, 663 So. 2d at 612. The Court must therefore award the Tribe "something," but it has considerable discretion in deciding what that "something" should be.

The fact that the legislature afforded trial courts broad discretion in setting the amount to be awarded as a sanction for an unreasonable rejection of a settlement offer is not surprising. First, in virtually all matters involving sanctions, a trial court is afforded broad discretion. *See, e.g., Deutsche Bank Nat'l Tr. Co. v. LGC*, 107 So. 3d 486, 488 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D342a] ("[i]t is well established that in imposing sanctions trial courts possess broad discretion"); *Michalak v. Ryder Truck Rental, Inc.*, 923 So. 2d 1277, 1280 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D931a] (the trial court has broad discretion to impose sanctions for discovery violations); *Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1148a] ("[a] trial court has broad discretion to impose sanctions on litigants for their conduct before the court."); *Parisi v. Broward Cty.*, 769 So. 2d 359, 367 (Fla. 2000) [25 Fla. L. Weekly S560a] (". . .courts have broad discretion in formulating a valid contempt sanction. . ."). Second, in granting such broad discretion, section 768.79 is no outlier. Many fee statutes grant even more discretion, allowing the court to deny fees altogether. *See, e.g.*, Fla. Stat. § 517.211(6) (providing for prevailing party attorney's fees "unless the court finds that the award of such fees would be unjust"); Fla. Stat. § 501.2105(1) ("[i]n any civil litigation resulting from an act or practice involving a violation of this part, . . . the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, *may* receive his or her reasonable attorney's fees and costs from the nonprevailing party") (emphasis added); Fla. Stat. § 57.111(4)(a) (prevailing small businesses entitled to award of fees and costs "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust"); Fla. Stat. § 607.1431(5) (". . .the court may, in its discretion, award attorney fees and other reasonable expenses" if it makes certain findings); Fla. Stat. § 607.1431(5) (". . . the court may, in its discretion, award attorney's fees . . . to other parties . . . who have been affected adversary . . ."). Although section 768.79 (7)(b), as interpreted by our Supreme Court, is not quite as generous in its grant of discretion, it undoubtedly affords trial courts great latitude in setting an appropriate sanction to be imposed.

IV. ANALYSIS

A. Counsels' Lodestar

The first step in determining a "reasonable fee" is the calculation of the "lodestar." This is a two-step process. The court first must "determine the number of hours reasonably expended in the litigation," and award "only those hours" that counsel could have properly billed "to his client." *Rowe,* 472 So. 2d at 1150. As the *Rowe* court explained, it is critical that counsel for the party seeking a fee keep "accurate and correct records of work done and time spent on the case, particularly when someone other than the client may pay the fee." *Id.* Inadequate time records or improper "unit billing" may result in a reduction of the claim, *see, e.g., Nickerson v. Nickerson,* 608 So. 2d 835 (Fla. 3d DCA 1992); *Browne v. Costales*, 579 So. 2d 161 (Fla. 3d DCA 1991), and a court should not award fees for time it finds to be duplicative, excessive or unnecessary. *Rowe* at 1150; *Rathmann v. Rathmann*, 721 So. 2d 1218 (Fla. 5th DCA 1998) [24 Fla. L. Weekly D61f] ("[w]hile the parties have the right to employ as many lawyers as they choose, the Court will not assess lawyer fees for or against any party for more than one lawyer for a matter in which more than one lawyer is not required."); *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b] ("[t]he time sheets also reflect a significant amount of time spent in conferences between the partner and the associate who were working on the case as well as multiple attorneys performing or reviewing the same items. Duplicative time charged by multiple attorneys working on the case are generally not compensable.").

Once the court fixes the appropriate number of reasonable hours spent, the second step of a "lodestar" calculation requires that it determine the reasonable hourly rate for the services of the prevailing party attorney . . ." *Rowe* at 1150. The parties here have stipulated to counsels' hourly rate.

The party seeking fees bears the burden of proving the number of hours reasonably expended on the litigation, as well as the prevailing

market rate of the attorneys who provided services. *Rowe* at 1050-1051. In this case the Tribe offered Bruce Rogow, Esquire as its fee expert. He opined, through an "Addendum" to his initial affidavit (DE 197), that the appropriate post-offer "lodestar" for the attorneys engaged by the Tribe (The Saunooke Firm and Alston & Bird) is a combined Eight Hundred Forty-Four Thousand Five Hundred Fifty-Seven Dollars ($844,557.00), Seventy-Six Thousand Three Hundred Seventy Dollars ($76,370.00) of which is attributable to time spent by Mr. Saunooke at the rate of Three Hundred Fifty Dollars ($350.00) per hour, with the remainder of time being spent by lawyers at Alston & Bird (i.e., Seven Hundred Sixty-Eight Thousand One Hundred Eighty-Seven Dollars ($768,187.00)).[8]

As an initial matter, Mr. Rogow's "lodestar" calculation includes appellate fees which this court lacks jurisdiction to award. *See Respiratory Care Services, Inc. v. Murray D. Shear, P.A.*, 715 So. 2d 1054, 1056 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D1807a] ("[g]enerally, the appellate court has exclusive jurisdiction to award appellate attorney's fees, and in order to invoke the jurisdiction of the court to award fees, the party seeking attorney's fees must timely file a motion, pursuant to Florida Rule of Appellate Procedure 9.400 (b), in the appellate court.").[9] The Tribe did not seek attorney's fees in either of the appeals to the Third District (i.e., the sovereign immunity appeal and the fee entitlement appeal) and, as a result, this Court is not authorized to award any time spent on these matters. The Court also concludes that it lacks authority to award fees for the time spent by the Tribe's counsel opposing Plaintiffs efforts to secure discretionary review in the Supreme Court of Florida and Supreme Court of the United States, as those fees were incurred in furtherance of the appellate process. Eliminating these appellate fees reduces the Tribe's claimed "lodestar" by Three Hundred Thirty-Two Thousand Four Hundred Seventy-Seven Dollars ($332,477.00).

Of the remaining "lodestar" sought Five Hundred Thousand Twelve Thousand One Hundred Nineteen Dollars and Fourteen Cents ($512,109.14), the Court finds much of the time spent (particularly by Alston & Bird) to be excessive, duplicative and unnecessary. Without belaboring the point, or lengthening this order with a discussion of individual time entries, the evidence presented persuades this Court that multiple attorneys were used to perform tasks that could have been handled by a single attorney; excessive time was spent in multiple layers of document review; time spent on other matters was mistakenly billed to this file; and Mr. Rogow mistakenly included in his "lodestar" calculation approximately Thirty Thousand Dollars ($30,000.00) of time spent *prior* to service of the Tribe's proposal for settlement. Based upon this evidence, the Court will reduce counsel's remaining lodestar by twenty percent (20%), bringing it down to Four Hundred Nine Thousand Six Hundred Eighty-Seven Dollars and Thirty One Cents ($409,687.31)—an amount this Court finds to be the proper post-offer "lodestar."

B. Application of § 768.79 (7)(b)

Having calculated the proper "lodestar," the Court's next task is to apply those mandatory "factors" set forth in section 768.79 (7)(b), as well as any other "relevant criteria," in order to determine an appropriate sanction to be imposed upon Plaintiffs for rejecting the Tribe's proposal. *Schmidt v. Fortner*, 629 So. 2d 1036, 1042 (Fla. 4th DCA 1993) ("[u]nder subsection (7)(b), the court's discretion is directed by the statutory text solely to determining the reasonability of the *amount* of fees awarded; and that discretion is informed, at least partially, by the 6 factors thereafter listed in that subsection."). The Court will now review those "factors" and "criteria" it finds relevant.

i. The Then Apparent Merit or Lack of Merit of the Claim

Putting aside for a moment the purely legal issue of sovereign immunity, it is obvious that Plaintiffs' claims were proverbial slam-dunks. Not one, but two, jurists (Judge Cooke and Judge Thornton) had already concluded that the Tribe, armed with no credible evidence, launched an "inexcusable" and relentless "legal crusade" against Lewis Tein and its principals, and that the Tribe and its counsel, Roman: (a) had evidence that conclusively refuted the Tribe's claims; (b) were motivated by personal animosity; and (c) acted in bath faith. A stronger case of liability for the tort of malicious prosecution is hard to imagine.[10]

As for damages, Lewis Tein was a highly successful firm that was decimated as a result of the Tribe's litigation onslaught and the barrage of adverse press it garnered. There also can be no doubt that the ferocious attack mounted by the Tribe in multiple courts took a severe toll on Messrs. Lewis and Tein, both financially and emotionally. These lawyers enjoyed a sterling reputation prior to this disgraceful episode, and while those reputations have been largely restored as a result of judicial vindication, this chapter in the book of their careers cannot be completely unwritten.

Suffice it to say, the harm caused was substantial. Plaintiffs' expert, Tony Argiz, opined that damages were in the range of Fifty-Five to Sixty-Four Million Dollars ($55,000,000.00 - $64,000,000.00), and the Tribe's expert placed them at approximately Five Million Dollars ($5,000,000.00). Plaintiffs were also granted leave to seek punitive damages, thereby significantly increasing the Tribe's exposure and the value of the case.

Turning next to the legal issue of sovereign immunity, the question of "waiver" was debatable and a close call. Judge Thornton—a highly accomplished and respected jurist—concluded that after using the court system as a sword to maim Plaintiffs, the Tribe could not hide behind the shield of sovereign immunity when haled into that *same* court to answer for their litigation misconduct. Other courts agree. *See, e.g., Wilkes v. PCI Gaming Auth.*, 287 So. 3d 330 (Ala. 2017). Also noteworthy is the fact that at the time the Tribe's nominal settlement offers were served, Judge Thornton *and* the Third District had denied the Tribe's stay request, and a review of the oral argument that had taken place a week earlier at the Third District hardly leaves one with the impression that a reversal was inevitable or even likely. To the contrary, questions by members of the panel reflected a hint of skepticism towards the Tribe's position.[11]

At the time it served its proposals, the Tribe also had doubts regarding the outcome of its appeal, and was not as confident in its legal "silver-bullet" as it now suggests. While that appeal was pending, the Tribe offered Plaintiffs Five Million Dollars ($5,000,000.00) in settlement of their claims. And while parties do evaluate and resolve lawsuits for reasons unrelated to the "merits," in this Court's experience defendants generally do not offer multi-million-dollar settlements when they are highly confident that a kill shot legal defense will eventually carry the day.

This Court concludes that at the time the Tribe's proposals were served, an objective review of the record establishes that Plaintiffs' case had substantial merit, both factually and legally.

ii. The Closeness of Questions of Fact and Law at Issue

But for the sovereign immunity obstacle, Plaintiffs case was again a proverbial slam-dunk, and the question of sovereign immunity was again a close call. For purposes of this order, it is not necessary to take a deep dive into the historical jurisprudence of tribal sovereign immunity, or discuss the considerable debate, both judicial and academic, this doctrine has spawned. It will suffice to say that the question of whether an Indian Tribe should enjoy absolute immunity is up for grabs in the Supreme Court, which itself has acknowledged that there are "reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). *Kiowa,* which held that the ". . . tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts

involve governmental or commercial activities and whether they were made on or off a reservation," drew a three-justice dissent. That dissent later grew to four justices. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 814 (2014) [24 Fla. L. Weekly Fed. S765a] ("I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention."). (Scalia, J., dissenting).[12]

Aside from the fact that this doctrine rests on shaky grounds, the primary debate *in this case* was whether its protection had been waived. While the Third District ultimately said it had not, that point was debatable, and a learned trial judge reasonably concluded otherwise. One thing, however, is certain: The Tribe employed the court system (both federal and state) maliciously and with the intent to bludgeon and cause severe injury to Lewis Tein and its principals. And while the Third District ultimately held that the Tribe could take cover under the blanket of sovereign immunity when called upon to answer for its conduct in the same court it weaponized—the issue was clearly one where reasonable jurists could (and did) differ.

This Court finds that this case presented a close-call; a factor that militates against an award of substantial sanctions.

iii. Other Relevant Criteria

Aside from the six (6) enumerated "factors" specified in section 768.79 (7)(b), the legislature also has *mandated* that this Court "consider . . . all other relevant criteria." *Id.* The Court will now do as legislatively directed.

This case is disturbing on a number of levels. The Tribe—using the law license of its now disbarred "Tribal Counsel"—launched an unprovoked and vicious assault on Plaintiffs using the court system as its weapon of choice. Plaintiffs were then forced to defend themselves against the Tribe's relentless pursuit of claims that had no factual or legal support, suffering through years of litigation in multiple fora. They were also forced to endure personal humiliation and embarrassment when this litigation received non-stop media attention something the Tribe banked on.

After having their law firm destroyed, and after suffering not only economically, but psychologically and emotionally as well, Plaintiffs finally prevailed. Then, when the Tribe was called upon to answer for its outrageous behavior—in the *same* court it had used to inflict harm—it successfully hid behind the doctrine of sovereign immunity. The law unfortunately sanctioned the Tribe's one-way use of the court system. This Court, however, is authorized to (and does) find the despicable conduct on the part of the Tribe, *and* the fact that it was able to avoid answering for that conduct by taking refuge in its immunity, "relevant criteria" that should inform its analysis. Fla. Stat. § 786.79 (7)(b). The Court also finds that rewarding the Tribe with a substantial recovery by sanctioning Plaintiffs would be a perverse miscarriage of justice.

V. CONCLUSION

Florida Statute section 768.79, as interpreted by our Supreme Court, does not grant this Court the discretion to refuse to impose *some* sanction (i.e., award the Tribe *some* fee), even though Plaintiffs reasonably rejected these *nominal* settlement proposals, and even though entry of *any* award here is manifestly unjust. But fortunately this statute not only authorizes, but in fact *mandates*, that the court apply the "factors" enumerated in subsection (7)(b), as well as any other "relevant criteria," and exercise its discretion in determining the amount of fees that should be imposed upon a party as a sanction for rejecting a settlement proposal.

As our Supreme Court confirmed in *TGI Friday's*, subsection (7)(b) grants trial courts broad discretion to do equity in determining "the amount of the fee to be awarded," taking into account the totality of the circumstances presented. As an example, the *TGI Friday's* court pointed out that:

> . . . in a given case, the court could justifiably reduce the amount of the attorney's fee to be assessed against a severely injured plaintiff who suffered an adverse verdict after rejecting a small settlement offer.

TGI Friday's, 663 So. 2d at 613. This is that case. And if this Court had the discretion to do so it would award *no* fee at all. But because—and *only* because that discretion is lacking, the Court is compelled to impose "some" sanction upon Plaintiffs, and give the Tribe "an" award of fees. *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257, 262 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2068a] (". . . the law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served").

Upon consideration of all "factors" enumerated in section 768.79 (7)(b), and all other "relevant criteria," this Court—exercising the broad discretion afforded by our legislature—will impose a sanction against each Plaintiff in the total amount of ten thousand dollars ($10,000.00), for a total of thirty thousand dollars ($30,000.00) in attorney's fees and costs to be paid to the Tribe.

On a final note, this Court urges the legislature to jettison section 768.79 altogether. Anecdotal evidence confirms that while the goal of this statute is laudatory, the "juice" it delivers is "not worth the squeeze." *Miccosukee Tribe of Indians, supra.* Disputes over the proper application of this statute have consumed our courts for decades, and an end is nowhere in sight. At last count, over 160 published appellate decisions have addressed this poorly written, unworkable and irrational piece of legislation, and countless other disputes arising out of statutory settlement proposals have either not made it to the appellate level, or were decided on appeal without a published opinion. The attorney's fees tail is wagging the merits dog, and litigation over this statute has exacted an unjustified toll upon litigants and the judiciary. The strict application of this statute can also lead to grossly inequitable results, as this case amply illustrates.

Alternatively, if the legislature elects to leave this statute on the books, this Court urges it to require a finding that an offer was "reasonable" (or that the rejection of the offer was "unreasonable"), as a condition to imposing sanctions against a rejecting party. Our citizens have a constitutional right to access the courts and should not be punished for rejecting ridiculous settlement offers untethered to any objective assessment of the case. As the goal of this statute is to encourage settlement, a requirement that an offer be "reasonable" (or that a rejection be "unreasonable") will force parties to tender realistic proposals, thereby resulting in more pretrial resolutions, and sanctions will only be imposed upon litigants who reject serious offers. The legislature should also, as it has done *many* times, give trial courts the discretion to deny fees if it finds that an award would be "unjust," particularly given the fact that this statute (as opposed to prevailing party fee statutes) operates as a sanction. *See, e.g.,* Fla. Stat. § 517.211 (6); *Newsom v. Dean Witter Reynolds, Inc.*, 558 So. 2d 1076, 1078 (Fla. 1st DCA 1990) (affirming denial of fees in case where plaintiff's claim had substantial merit but defendant prevailed on a statute of limitation defense, because "it would be unjust under the circumstances to require plaintiff to pay for [defendants] technical escape").

This Court hereby enters Final Judgment against Lewis Tein, P.L. and in favor of the Miccosukee Tribe of Indians of Florida for the amount of Ten Thousand Dollars ($10,000.00), for which let execution issue. This Court hereby enters Final Judgment against Guy Lewis and in favor of the Miccosukee Tribe of Indians of Florida for the amount of Ten Thousand Dollars ($10,000.00), for which execution issue. This Court hereby enters Final Judgment against Michael Tein and in favor of the Miccosukee Tribe of Indians of Florida for the amount of Ten Thousand Dollars ($10,000.00), for which execution issue.

For the benefit of all concerned this Court hopes that this decade old combat is now concluded. *Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 597-98 (5th Cir. 1963) (". . . it is for the public interest and policy to make an end to litigation . . . so that . . . suits may not be immortal, while men are mortal").

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[1]The Court is hereby converting its prior order on Defendant's Motion for Attorney's Fees and Costs into a final judgment and, at the same time, correcting minor typographical errors contained in the prior Order.

[1]The lodestar is the amount of time reasonably spent by counsel, multiplied by their reasonable hourly rates. *See Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985).

[2]This sanction was paid to Lewis Tein's insurance carrier. None of the funds went to the Firm or its principals, Lewis and Tein.

[3]A summary judgment that was affirmed on appeal. *Miccosukee Tribe of Indians of Florida v. Guy Lewis, et. al.,* 165 So. 3d 9 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D752c].

[4]That award, in its entirety, also went to the Firm's insurers.

[5]The Tribe also attacked the case on other, more traditional, pleading grounds.

[6]Plaintiffs unsuccessfully sought review of this decision in the Florida Supreme Court and the United States Supreme Court.

[7]That, however, has clearly not been the case, as these provisions have created more litigation, consumed more judicial resources, and resulted in more uncertainty then either are worth. *See, e.g., Andrews v. Frey,* 66 So. 3d 376 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1644b] (lamenting the fact that the statute and rule encourage more litigation); *Design Home Remodeling Corp. v. Santana*, 146 So. 3d 129, 133 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1862a] (Emas, J, encouraging revisions to provide an offeror the opportunity to "cure any procedural defects so that the offeree has a genuine opportunity to weigh the substantive merits of a proposal for settlement").

[8]Two Hundred Fifty-Two Thousand Nine Hundred and Seven Dollars (252,907.00) of Alston & Bird's "lodestar" is based on time spent by miscellaneous "time keepers," including a substantial number of contract lawyers hired for purposes of gathering and reviewing electronic discovery.

[9]*See also Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213, 1215 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1866b] ("[b]ecause a trial court has no authority to award appellate attorney's fees absent specific authorization from the appellate court . . . this portion of the award [awarding appellate fees] must be reversed."); *Unifirst Corp. v. City of Jacksonville, Tax Collector's Office*, 97 So. 3d 846 (Fla. 1st DCA 2011) [37 Fla. L. Weekly D68a] (same); *Milanick v. Osborne*, 6 So. 3d 729 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D786a] (same).

[10]Roman was later permanently disbarred for his conduct in these related cases.

[11]The Court has reviewed the videotape of the oral argument, which is available at the Third District's website: http:/3dca.flcourts.org/archived video.shtml.

[12]In fact, the Tribe's fee expert, Mr. Rogow, has himself urged the Supreme Court to abrogate this antiquated doctrine.

* * *

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

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of DATAN ROBINSON, a minor, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of HAIDEN BELLAMY, a minor, and EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of Z'RENITY BELLAMY, a minor, Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2021-CA-000994. July 12, 2021. Emily A. Peacock, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Ebony Monique Graham and Fabian Lavar Bellamy, Pro se, Plant City, Defendants.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANTS, EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of DATAN ROBINSON, a minor, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of HAIDEN BELLAMY, a minor, and EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of Z'RENITY BELLAMY, a minor

THIS CAUSE having come before this Court at the hearing on June 28, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of DATAN ROBINSON, a minor, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of HAIDEN BELLAMY, a minor, and EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of Z'RENITY BELLAMY, a minor, and the Court having considered the same, it is hereupon,

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

Factual Background

Plaintiff, Direct General Insurance Company brought the instant Action for Declaratory Judgment against the insured Defendant, Ebony Monique Graham, and the Defendants, Fabian Lavar Bellamy, and Ebony Monique Graham as the Parent, Natural and Legal Guardian of Datan Robinson, Haiden Bellamy and Z'Renity Bellamy, minors, regarding the policy rescission as a result of the insured's material misrepresentations at the time of the application for insurance on August 29, 2020. Plaintiff rescinded the policy of insurance on the basis that Ebony Monique Graham failed to disclose that her son, Datan Robinson, and her mother, Tonya Renee Graham, resided with her at the policy garaging address at the time of policy inception and had she disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

At the time of the application for insurance on August 29, 2020, Defendant, Ebony Monique Graham, answered "NO" to the following application question, which provides:

> Is the insured vehicle regularly available to any non-listed operators, like anyone besides yourself?

In addition, at the time of the application for insurance, Defendant, Ebony Monique Graham stated her full name "Ebony Graham" to acknowledge and agree with this statement, which provides:

> You agree that all answers given on this Application for insurance are true and correct. You further agree that all persons of eligible driving age or permit age who live with you, as well as the operators who regularly operate your vehicles and do not reside in your household, have been disclosed. In addition, you understand you have a continuing duty to notify the company within 30 days of any changes to the information provided on this application for this policy. You understand the company may rescind this policy if you are not compliant with your continuing duty of advising the company of any of these changes. Please state your full name to acknowledge and agree with this statement.

On October 28, 2020, the named insured, Ebony Monique Graham, provided sworn testimony at her Examination Under Oath (EUO) confirming that her son, Datan Robinson, and her mother, Tonya Renee Graham, lived with her at the policy garaging address at the time of application for insurance.

Plaintiff determined that had Ebony Monique Graham provided the proper information at the time of the insurance application on August 29, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, Direct General Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Ebony Monique Graham. 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 Ebony Monique Graham, Direct General Insurance Company may void the insurance policy as follows:

MISREPRESENTATION AND FRAUD

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

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

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

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

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

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

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

Further, Florida Statute § 627.409(1) provides:

(1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), ***a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply***:

(a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.

(b) ***If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith*** would not have issued the policy or contract, ***would not have issued it at the same premium rate***, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Plaintiff, Direct General Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position was that Plaintiff properly rescinded the policy at issue based on an unlisted household member(s) as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Person(s) in Household was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendants failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose her son, Datan Robinson, and her mother, Tonya Renee Graham, as household members living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member(s), Datan Robinson, and Tonya Renee Graham, were involved in the subject motor vehicle accident on September 10, 2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

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

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

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

An applicant's failure to read an application for insurance prior to signing does not prevent an insurer from rescinding the policy on the basis of nondisclosure of material information. *See Nationwide Mut. Fire. Ins. Co. v. Kramer,* 725 So.2d 1141, 1143 (Fla.2d DCA 1998) [23 Fla. L. Weekly D2326a]. Florida Courts have consistently held

that a party's failure to read a contract does not invalidate the contract. See *Allied Van Lines, Inc. v. Bratton,* 351 So. 2d 344, 347 (Fla. 1977) ("No party to a written contract in this State can defend against its enforcement on the sole ground that he signed it without reading it.").

The Court hereby finds that the Plaintiff's application for insurance is clear and unambiguous regarding the applicant's obligation to disclose pertinent information at the time of the policy inception on the application. The Court hereby finds that the Plaintiff's application for insurance clearly and unambiguously required the applicant (Ebony Monique Graham) to disclose her son and her mother as household members living at the policy garaging address at the time of the policy inception.

The Carrier, Direct General Insurance Company has a right to rely on the information provided by Ebony Monique Graham on the application for insurance. Since the Carrier relied on the representations by Ebony Monique Graham at the time of the application to its detriment, the Carrier is entitled to rescind the policy due to the material misrepresentation. The Court hereby finds that since the terms of the Carrier's application are clear and unambiguous, it is irrelevant whether Ebony Monique Graham subsequently claimed that the "agent did not ask" the questions on the application since Ebony Monique Graham signed the application which is a legal contract and thus, Ebony Monique Graham is bound by the terms and conditions of the contract. Further, the Defendant, Ebony Monique Graham, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

In addition, since Ebony Monique Graham signed the application and acknowledged the above terms, she cannot later claim that she did not understand the application or that the agent did not ask her and/or explain to her the questions on the application.

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Direct General Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Analysis Regarding Whether the Statements from the Examination Under Oath of Ebony Monique Graham are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Direct General Insurance Company's position that the statements provided by Ebony Monique Graham during her Examination Under Oath (EUO) on October 28, 2020 are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The statements from the Examination Under Oath are admissible and proper summary judgment evidence. Although a transcript of an EUO or a recorded statement is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although an EUO and/or a recorded statement is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct. June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (the EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the transcript of the Examination Under Oath (EUO) of Ebony Monique Graham is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant, Ebony Monique Graham, to disclose her son, Datan Robinson, and her mother, Tonya Renee Graham, as household members living at the policy garaging address, that Plaintiff provided the required testimony to establish that Defendant, Ebony Monique Graham's failure to disclose her son and mother as persons in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

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

b. This Court ***hereby enters final judgment*** for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendants, EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of DATAN ROBINSON, a minor, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of HAIDEN BELLAMY, a minor, and EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of Z'RENITY BELLAMY, a minor.

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

d. The Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the transcript of the Examination Under Oath (EUO) of EBONY MONIQUE GRAHAM, Plaintiff's Motion for Final Summary Judgment, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

e. The Defendant, EBONY MONIQUE GRAHAM, failed to disclose her son, Datan Robinson, and her mother, Tonya Renee Graham, as additional household residents over the age of 15 at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX1680, issued by DIRECT GENERAL INSURANCE COMPANY;

f. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by DIRECT GENERAL INSURANCE COMPANY;

g. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX1680, is rescinded and is void *ab initio;*

h. 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;

i. The Defendant, EBONY MONIQUE GRAHAM, failed to disclose that additional residents over the age of 15 lived within her household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX1680, issued by DIRECT GENERAL INSURANCE COMPANY;

j. The Defendant, EBONY MONIQUE GRAHAM breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX1680, issued by DIRECT GENERAL INSURANCE COMPANY;

k. The material misrepresentation of Defendant, EBONY MONIQUE GRAHAM at the time of the application 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 # XXXXXX1680, issued by DIRECT GENERAL INSURANCE COMPANY;

l. There is no insurance coverage for the named insured, EBONY MONIQUE GRAHAM for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, collision coverage or comprehensive coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

m. There is no insurance coverage for the Defendant, FABIAN LAVAR BELLAMY for any bodily injury liability coverage and personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

n. There is no insurance coverage for the Defendant, DATAN ROBINSON, a minor, for any bodily injury liability coverage and personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

o. There is no insurance coverage for the Defendant, HAIDEN BELLAMY, a minor, for any bodily injury liability coverage and personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

p. There is no insurance coverage for the Defendant, Z'RENITY BELLAMY, a minor, for any bodily injury liability coverage and personal injury protection benefits coverage, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

q. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, EBONY MONIQUE GRAHAM, for any claims made under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

r. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify EBONY MONIQUE GRAHAM for any bodily injury claim for FABIAN LAVAR BELLAMY arising from the accident of September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

s. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify EBONY MONIQUE GRAHAM for any bodily injury claim for DATAN ROBINSON, a minor, arising from the accident of September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

t. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify EBONY MONIQUE GRAHAM for any bodily injury claim for HAIDEN BELLAMY, a minor, arising from the accident of September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

u. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify EBONY MONIQUE GRAHAM for any bodily injury claim for Z'RENITY BELLAMY, a minor, arising from the accident of September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

v. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify EBONY MONIQUE GRAHAM for any bodily injury claim for Jorge Alfredo Navarrete arising from the accident of September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

w. The Plaintiff, DIRECT GENERAL INSURANCE COMPANY, owes no duty to defend and/or indemnify EBONY MONIQUE GRAHAM for any property damage claim for Lucina Romero Marquez arising from the accident of September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

x. There is no personal injury protection ("PIP") insurance coverage for EBONY MONIQUE GRAHAM for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

y. There is no personal injury protection ("PIP") insurance coverage for FABIAN LAVAR BELLAMY for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

z. There is no personal injury protection ("PIP") insurance coverage for DATAN ROBINSON, a minor, for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

aa. There is no personal injury protection ("PIP") insurance coverage for HAIDEN BELLAMY, a minor, for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

bb. There is no personal injury protection ("PIP") insurance coverage for Z'RENITY BELLAMY, a minor, for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

cc. There is no collision insurance coverage for EBONY MONIQUE GRAHAM for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

dd. There is no comprehensive insurance coverage for EBONY MONIQUE GRAHAM for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy

XXXXXX1680;

ee. There is no collision insurance coverage for Grand Motors, Inc. for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

ff. There is no comprehensive insurance coverage for Grand Motors, Inc. for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

gg. There is no bodily injury liability insurance coverage for FABIAN LAVAR BELLAMY for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

hh. There is no bodily injury liability insurance coverage for DATAN ROBINSON, a minor, for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

ii. There is no bodily injury liability insurance coverage for HAIDEN BELLAMY, a minor, for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

jj. There is no bodily injury liability insurance coverage for Z'RENITY BELLAMY, a minor, for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

kk. There is no bodily injury liability insurance coverage for Jorge Alfredo Navarrete for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

ll. There is no property damage liability insurance coverage for Lucina Romero Marquez for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

mm. There is no property damage liability insurance coverage for Geico General Insurance Company for the accident which occurred on September 10, 2020, under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

nn. 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 September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

oo. There is no obligation to provide Personal Injury Protection benefits coverage to Complete Care Centers, LLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

pp. There is no obligation to provide Personal Injury Protection benefits coverage to Preferred Injury Physicians of Brandon, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

qq. There is no obligation to provide Personal Injury Protection benefits coverage to Chambers Medical Group, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

rr. There is no obligation to provide Personal Injury Protection benefits coverage to Paragon Contracting Services, LLC for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

ss. There is no obligation to provide Personal Injury Protection benefits coverage to Radiology Imaging Specialists of Lakeland, P.A. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

tt. There is no obligation to provide Personal Injury Protection benefits coverage to South Florida Baptist Hospital, Inc. for treatment of injuries alleged to be a result of the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, bearing policy # XXXXXX1680;

uu. The Defendant, EBONY MONIQUE GRAHAM, is excluded from any insurance coverage under the policy of insurance issued by DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

vv. The Defendant, FABIAN LAVAR BELLAMY is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

ww. The Defendant, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of DATAN ROBINSON, a minor, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

xx. The Defendant, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of HAIDEN BELLAMY, a minor, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

yy. The Defendant, EBONY MONIQUE GRAHAM as the Parent, Natural and Legal Guardian of Z'RENITY BELLAMY, a minor, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

zz. Jorge Alfredo Navarrete is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

aaa. Lucina Romero Marquez is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

bbb. Grand Motors, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

ccc. Complete Care Centers, LLC is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

ddd. Preferred Injury Physicians of Brandon, Inc. is excluded from

any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

eee. Chambers Medical Group, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

fff. Paragon Contracting Services, LLC is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

ggg. Radiology Imaging Specialists of Lakeland, P.A. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

hhh. South Florida Baptist Hospital, Inc. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

iii. Geico General Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680, for the September 10, 2020 accident;

jjj. Since DIRECT GENERAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, Geico General 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 # XXXXXX1680, for the September 10, 2020 motor vehicle accident;

kkk. There is no insurance coverage for the motor vehicle accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

lll. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

mmm. There is no bodily injury liability coverage for the accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

nnn. There is no property damage liability coverage for the accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

ooo. There is no collision coverage for the accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

ppp. There is no comprehensive coverage for the accident which occurred on September 10, 2020, under the policy of insurance issued by Plaintiff, DIRECT GENERAL INSURANCE COMPANY, under policy # XXXXXX1680;

qqq. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM to any medical provider, doctor and/or medical entity is void;

rrr. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from FABIAN LAVAR BELLAMY to any medical provider, doctor and/or medical entity is void;

sss. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from DATAN ROBINSON, a minor, to any medical provider, doctor and/or medical entity is void;

ttt. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from HAIDEN BELLAMY, a minor, to any medical provider, doctor and/or medical entity is void;

uuu. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from Z'RENITY BELLAMY, a minor, to any medical provider, doctor and/or medical entity is void;

vvv. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, DATAN ROBINSON, a minor, HAIDEN BELLAMY, a minor, and Z'RENITY BELLAMY, a minor, to Complete Care Centers, LLC is void;

www. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, DATAN ROBINSON, a minor, HAIDEN BELLAMY, a minor, and Z'RENITY BELLAMY, a minor, to Preferred Injury Physicians of Brandon, Inc. is void;

xxx. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM, HAIDEN BELLAMY, a minor, and Z'RENITY BELLAMY, a minor, to Chambers Medical Group, Inc. is void;

yyy. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM, FABIAN LAVAR BELLAMY, DATAN ROBINSON, a minor, and HAIDEN BELLAMY, a minor, to Paragon Contracting Services, LLC is void;

zzz. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM and DATAN ROBINSON, a minor, to Radiology Imaging Specialists of Lakeland, P.A. is void;

aaaa. Since the policy of insurance issued to the Defendant, EBONY MONIQUE GRAHAM, bearing policy # XXXXXX1680, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from EBONY MONIQUE GRAHAM, DATAN ROBINSON, a minor, and HAIDEN BELLAMY, a minor, to South Florida Baptist Hospital, Inc. is void.

bbbb. 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 compliance in the court file.

* * *

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

CENTURY-NATIONAL INSURANCE COMPANY, Plaintiff, v. ZANE TAYLOR SMALLWOOD, LESA CRISTI BAGLEY, a/k/a LISA CRISTI ANDREASEN and JUSTIN DAVID THORPE, Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CA-009818, Division B. July 12, 2021. Mark R. Wolfe, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Zane Taylor Smallwood, Pro-se, Gibsonton, Defendant.

ORDER ON PLAINTIFF, CENTURY-NATIONAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANT, ZANE TAYLOR SMALLWOOD

THIS CAUSE having come before this Court at the hearing on June 28, 2021, on the Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ZANE TAYLOR SMALLWOOD, 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, Century-National Insurance Company brought the instant Action for Declaratory Judgment against the insured Defendant, Zane Taylor Smallwood, and Defendants, Lesa Cristi Bagley and Justin David Thorpe, regarding the policy rescission as a result of the insured's material misrepresentations at the time of the application for insurance on October 5, 2020. Plaintiff rescinded the policy of insurance on the basis that Zane Taylor Smallwood failed to disclose that Lesa Cristi Bagley, resided with him at the policy garaging address at the time of policy inception and had he disclosed this information the Plaintiff would not have issued the policy on the same terms; namely, Plaintiff would have charged a higher premium to issue the policy.

On the application for insurance dated October 5, 2020, ZANE TAYLOR SMALLWOOD was required to disclose, "[n]ames of all drivers in household or children 14 years of age or older who reside at the mailing/garaging address, and include all persons that drive the insured vehicles on a regular basis."

In addition, on the application for insurance, Defendant, Zane Taylor Smallwood initialed the pertinent portion of the Certification of Applicant, which provides:

> I have listed all persons in the household 14 years of age or older, and all drivers of the vehicles, whether in my household or not, as well as all children 14 years of age or older, whether living with me or not.

The named insured, Zane Taylor Smallwood, unequivocally confirmed during his recorded statement taken during the investigation of the subject claim, that his girlfriend, Lesa Cristi Bagley, was a household member over the age of 14 residing with him at the policy garaging address at the time of the policy inception.

Plaintiff determined that had Zane Taylor Smallwood provided the proper information at the time of the insurance application on October 5, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, Century-National Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Zane Taylor Smallwood. 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 Zane Taylor Smallwood, Century-National Insurance Company may void the insurance policy as follows:

> **MISREPRESENTATION AND FRAUD**
>
> A. This Policy was issued in reliance on the information provided on **your** written or verbal insurance application. **We** reserve the right, at **our** sole discretion, to void or rescind this Policy if **you** or a **relative**:
>
> 1. Made any false statements or representations to **us** with respect to any material fact or circumstance; or
>
> 2. Concealed, omitted or misrepresented any material fact or circumstance or engaged in any fraudulent conduct; in any application for this insurance or when renewing this Policy. **We** will not be liable and will deny coverage for any **accident**, **loss** or claim occurring thereafter.
>
> A fact or circumstance will be deemed material if **we** would not have:
>
> 1. Written this Policy;
>
> 2. Agreed to insure the risk assumed; or
>
> 3. Assumed the risk at the premium charged.
>
> This includes, but is not limited to, failing to disclose in a verbal or written application all person residing in your household or regular operators of a covered auto.

Further, Florida Statute § 627.409(1) provides:

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

Plaintiff, Century-National Insurance Company, argued in their summary judgment that, as both the statute and the binding appellate decisions state, materiality of the risk is determined by the insurer, not the insured. *See Fla. Stat. 627.409.* As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). Therefore, the insurer determines materiality. Additionally, as an insurer rates risks based on the likelihood of a future event, such as an accident, then the insurer may treat any resident/household member as a potential risk. For example, a resident relative may be covered under an automobile insurance policy if struck by a vehicle whilst walking, and thus an insurer must determine rates accordingly. *See Travelers Ins. Co. v. Furlan*, 408 So.2d 767 (5th DCA 1982). Therefore, to ensure both parties enter the contract with full understanding, the Plaintiff is entitled to all information that Plaintiff deems necessary to determine the risk. Additionally, the Legislature allows an insurer to rescind for a material misrepresentation, regardless of the insured's intent, and thus the Legislature clearly burdened the applicant with the duty to fully disclose all requested information. *See United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. It was the Plaintiff's position was that Plaintiff properly rescinded the policy at issue based on an unlisted household member(s) as the terms were unambiguous within the application.

Analysis Regarding Whether the Undisclosed Person(s) in Household was Material

The Court ruled that the question of materiality is considered from the perspective of the insurer. Further, the Court found that "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any policy* issued and is an absolute defense to enforcement of the policy." *United Auto. Ins. Co. v. Salgado,* 22 So.3d 594 (3rd DCA 2009) [34 Fla. L. Weekly D1578a]. The Court ruled that the failure to disclose a household member that would have caused the insurer to issue the policy at a higher rate is sufficient to support a rescission. *See Privilege Underwriters Reciprocal Exch. v. Clark,* 174 So. 3d 1028, 1031 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1810a]. Additionally, the Court found that as Defendants failed to provide testimony to contradict Plaintiff's claim that the disclosure would have caused Plaintiff to issue the policy at a higher premium rate, then Plaintiff was entitled to rescind. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532 (1993).

The Court ruled that the materiality of the risk regarding the failure to disclose a household member on an application for insurance is determined at the time of inception and/or application, not at the time of a subsequent loss. Here, the insured failed to disclose Lesa Cristi Bagley, as a household member living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household member(s), Lesa Cristi Bagley, were involved in the subject motor vehicle accident on September 14, 2020, for purposes of determining the materiality of the risk as to the policy premium at inception pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy.

Additionally, the Court found that the affiant, Maribel Lopez, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Zane Taylor Smallwood, and could claim personal knowledge from a review of the records, therefore, Plaintiff's affiant, Ms. Lopez, 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 Maribel Lopez.

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 (Zane Taylor Smallwood) to disclose Lesa Cristi Bagley as a household member living at the policy garaging address at the time of the policy inception.

The Carrier, Century-National Insurance Company has a right to rely on the information provided by Zane Taylor Smallwood on the application for insurance. Since the Carrier relied on the representations by Zane Taylor Smallwood at the time of the application to its detriment, the Carrier is entitled to rescind the policy due to the material misrepresentation. The Court hereby finds that since the terms of the Carrier's application are clear and unambiguous, it is irrelevant whether Zane Taylor Smallwood subsequently claimed that the "agent did not ask" the questions on the application since Zane Taylor Smallwood signed the application which is a legal contract and thus, Zane Taylor Smallwood is bound by the terms and conditions of the contract. Further, the Defendant, Zane Taylor Smallwood, did not establish any proof of coercion, duress, and/or fraud in the inducement during the application process.

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

Analysis Regarding the Florida Statute Governing Policy Rescissions

The Court hereby finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by Century-National Insurance Company. Where an insurer seeks to rescind a voidable policy, it must both give notice of rescission and return or tender all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy. Accordingly, the Court hereby finds that the PIP statute (Florida Statute § 627.736) does not govern policy rescissions nor the amount of time to rescind an insurance policy. Specifically, F.S. § 627.736(4)(i) does not apply to policy rescissions based on a material misrepresentation at the inception of the contract. The provisions of F.S. § 627.736(4)(i) pertain solely to investigating a "fraudulent insurance act," not a material misrepresentation on an application for insurance.

Analysis Regarding Whether the Statements from the Recorded Statement of Zane Taylor Smallwood are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Century-National Insurance Company's position that the statements provided by Zane Taylor Smallwood during his recorded statement are admissible under the exception to the hearsay rule applicable to an admission by a party and as a statement by an opposing party.

The statements from the recorded statement are admissible and proper summary judgment evidence. Although a transcript of an EUO or a recorded statement is not an affidavit or deposition, it holds the same evidentiary value and fits under "other materials as would be admissible in evidence" under Florida Rule of Civil Procedure 1.510(c). *See Star Casualty Ins. Co,* 25 Fla. L. Weekly Supp. 502a (Fla. 11th Cir. Ct. October 3, 2017). Although an EUO and/or a recorded statement is hearsay, it is admissible under the party admission hearsay exception [§ 90.803(18), Fla. Stat. (2014)]. *Smith v. Fortune Ins. Co.*, 44 So. 2d 821, 823 (Fla 1st DCA 1981); *Millennium Diagnostic Imaging Ctr. a/a/o Alejandro Gonzalez v. Allstate Prop. & Cas. Ins. Co.*, 14 Fla. L. Weekly Supp. 84a (Fla. 11th Cir. Ct.

June 21, 2016) and *cert. denied*, 2017 WL 2561208 (Fla. 3d DCA May 25, 2017) (without opposition) (same issue) (the EUO testimony was determined to be admissible to support a motion for summary judgment for material misrepresentation citing section 90.803(18), Florida Statutes, *Smith* and *Gonzalez*).

Therefore, the Court finds that the transcript of the recorded statement of Zane Taylor Smallwood is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Century-National Insurance Company's application for insurance unambiguously required Defendant, Zane Taylor Smallwood, to disclose Lesa Cristi Bagley, as a household member living at the policy garaging address, that Plaintiff provided the required testimony to establish that Defendant, Zane Taylor Smallwood's failure to disclose Lesa Cristi Bagley as a person in the household was a material misrepresentation because Plaintiff would not have issued the policy on the same terms, and thus Plaintiff properly rescinded the subject policy of insurance. Consequently, Plaintiff properly denied coverage for the loss at issue.

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

a. Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY's Motion for Final Summary Judgment against Defendant, ZANE TAYLOR SMALLWOOD, is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, and against the Defendant, ZANE TAYLOR SMALLWOOD.

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

d. The Court finds that the facts alleged by the Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the transcript of the recorded statement of ZANE TAYLOR SMALLWOOD, Plaintiff's Motion for Final Summary Judgment, and in the Affidavit of Maribel Lopez, are not in dispute, which are as follows:

e. The Defendant, ZANE TAYLOR SMALLWOOD, failed to disclose Lesa Cristi Bagley as an additional household resident over the age of 14 at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # PFV051559-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

f. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by CENTURY-NATIONAL INSURANCE COMPANY;

g. The CENTURY-NATIONAL INSURANCE COMPANY Policy of Insurance, bearing policy # PFV051559-00, is rescinded and is void *ab initio;*

h. 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 CENTURY-NATIONAL 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;

i. The Defendant, ZANE TAYLOR SMALLWOOD, failed to disclose that an additional driver and/or household member over the age of 14 lived within his household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # PFV051559-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

j. The Defendant, ZANE TAYLOR SMALLWOOD breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # PFV051559-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

k. The material misrepresentation of Defendant, ZANE TAYLOR SMALLWOOD on the application for insurance dated October 5, 2020, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # PFV051559-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

l. There is no insurance coverage for the named insured, ZANE TAYLOR SMALLWOOD for any property damage liability coverage and personal injury protection benefits coverage, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

m. There is no insurance coverage for the Defendant, LESA CRISTI BAGLEY for any personal injury protection benefits coverage, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

n. There is no insurance coverage for the Defendant, JUSTIN DAVID THORPE for any personal injury protection benefits coverage, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

o. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, ZANE TAYLOR SMALLWOOD, for any claims made under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

p. Notwithstanding the rescission, the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, bearing policy # PFV051559-00, does not provide any bodily injury liability insurance coverage;

q. Notwithstanding the rescission, the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, bearing policy # PFV051559-00, does not provide any comprehensive and/or collision insurance coverage;

r. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ZANE TAYLOR SMALLWOOD for any bodily injury claim for LESA CRISTI BAGLEY arising from the accident of October 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

s. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ZANE TAYLOR SMALLWOOD for any bodily injury claim for JUSTIN DAVID THORPE arising from the accident of October 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

t. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, owes no duty to defend and/or indemnify ZANE TAYLOR SMALLWOOD for any property damage claim for Alterman Transport Lines, Inc. arising from the accident of October 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

u. There is no personal injury protection ("PIP") insurance coverage for ZANE TAYLOR SMALLWOOD for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

v. There is no personal injury protection ("PIP") insurance

coverage for LESA CRISTI BAGLEY for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

w. There is no personal injury protection ("PIP") insurance coverage for JUSTIN DAVID THORPE for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

x. There is no comprehensive insurance coverage for ZANE TAYLOR SMALLWOOD for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

y. There is no collision insurance coverage for ZANE TAYLOR SMALLWOOD for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

z. There is no comprehensive insurance coverage for American Financial, LLC for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

aa. There is no collision insurance coverage for American Financial, LLC for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

bb. There is no bodily injury liability insurance coverage for LESA CRISTI BAGLEY for the accident which occurred on October 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

cc. There is no bodily injury liability insurance coverage for JUSTIN DAVID THORPE for the accident which occurred on October 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

dd. There is no property damage liability insurance coverage for Alterman Transport Lines, Inc. for the accident which occurred on October 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

ee. 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 November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, bearing policy # PFV051559-00;

ff. The Defendant, ZANE TAYLOR SMALLWOOD, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00, for the November 26, 2019 accident;

gg. The Defendant, LESA CRISTI BAGLEY, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00, for the November 26, 2019 accident;

hh. The Defendant, JUSTIN DAVID THORPE, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00, for the November 26, 2019 accident;

ii. Alterman Transport Lines, Inc., is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00, for the November 26, 2019 accident;

jj. American Financial, LLC, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00, for the November 26, 2019 accident;

kk. There is no insurance coverage for the motor vehicle accident which occurred on November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

ll. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

mm. There is no property damage liability coverage for the accident which occurred on November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV051559-00;

nn. Since the policy of insurance issued to the Defendant, ZANE TAYLOR SMALLWOOD, bearing policy # PFV051559-00, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from ZANE TAYLOR SMALLWOOD, LESA CRISTI BAGLEY, and/or JUSTIN DAVID THORPE to any medical provider, doctor and/or medical entity is void.

oo. 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 compliance in the court file.

* * *

Insurance—Uninsured motorist—Attorney's fees—Because coverage of UM claim is not in dispute, claim for attorney's fees under section 627.428 is dismissed

URNINE LINTON, Plaintiff, v. TODD ROLLE, et al., Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21004599, Division 03. June 15, 2021. Nicholas Lopane, Judge. Counsel: Judd Rosen, Goldberg & Rosen, P.A., Miami, for Plaintiff. Emilio Cacace, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT PROGRESSIVE'S MOTION TO DISMISS COUNT III OF THE COMPLAINT

THIS CAUSE having come before the Court for consideration, and the Court being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Count III of the Complaint is an uninsured/underinsured motorist action which includes a claim for attorney fees pursuant to Florida Statute 627.428. Coverage is not in dispute pursuant to the four corners of the complaint which includes attachments. Therefore, Count III is dismissed pursuant to Florida Statute 627.727(8). Plaintiff shall have ten (10) days from this order to file an amended complaint.

* * *

Child custody—Disestablishment of paternity—Mother seeking to disestablish paternity of legal father on ground that legal father's paternity was a material mistake of fact—Section 742.18, which provides means by which men may disestablish paternity without proof of fraud, duress, or material mistake is not gender-neutral and violates equal protection—There is no exceedingly persuasive justification that would serve important governmental objective to exclude women—Mother's request to disestablish paternity of legal father is granted

CYRIELLE NICOLE PERDUE, Petitioner/Mother, and DARRYL CURRY, Respondent/Legal Father, and KELTON JABARRI GLASPIE, Respondent/Biological Father. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-DR-001726, Family Court Division. May 11, 2021. Susan Stacy, Judge. Counsel: Serena E. Pines and Dawn Welkie, Community Legal Services of Mid-Florida, for Petitioner. Darryl Curry and Kelton Jabarri Glaspie, Pro se, Respondents.

ORDER ON AMENDED PETITION FOR DISESTABLISHMENT, TERMINATION OF CHILD SUPPORT, ESTABLISHMENT OF PATERNITY, AND DECLARATORY RELIEF

THIS CAUSE came before the Court for a non-jury trial on February 24, 2021, pursuant to the Amended Petition for Disestablishment, Termination of Child Support, Establishment of Paternity, and Declaratory Relief of Petitioner/Mother, Cyrielle Nicole Perdue (hereinafter referred to as "Mother"). Mother, Mother's counsel, Respondent/Legal Father, Darryl Curry (hereinafter referred to as "Legal Father"), and Respondent/Biological Father, Kelton Jabarri Glaspie (hereinafter referred to as "Biological Father") appeared before the Court by Microsoft Teams. The Court, having received the argument of counsel, having reviewed the file and evidence, and having received testimony from the parties, makes the following findings of fact and conclusions of law based on the evidence, testimony, and argument of counsel:

1. The Court has jurisdiction over the parties and the subject matter.

2. One of the parties hereto was a resident of Seminole County, Florida, for six months before the action was filed.

3. Petitioner has complied with Florida Statutes Section 86.091 and Florida family Law Rule of Procedure 12.071, with respect to the constitutional challenge of Florida Statute Section 742.18.

4. Pursuant to Section 742.10 (4), Florida Statutes, the unrefuted evidence submitted by Mother showed Legal Father's paternity to Dereon Zymeir Curry, Male, born November 30, 2010, was a material mistake of fact.

5. After DNA Analysis Results proved Legal Father was not the father of Dereon Zymeir Curry (hereinafter D.Z.C.), Legal Father took no further action to affirm paternity, provide child support, or visit with the minor child.

6.. Mother, Biological Father, and D.Z.C. have lived in an intact household since 2017. Biological Father and Mother are now married and live in a supportive relationship.

7. Biological Father desires to assume all rights and responsibilities as the father of D.Z.C., and he understands the rights and responsibilities that emanate from the establishment of his paternity.

8. The February 20, 2020 DNA Analysis Results from Arcpoint Labs submitted into evidence prove D.Z.C. is the child of Biological Father.

9. Mother's request to change D.Z.C.'s name to [D.Z.G.] [editor's note: initials substituted for child's name] was unrefuted.

10. Florida Statute Section 742.10(4) created an extra burden on Mother to prove fraud, duress, or material mistake of fact to challenge Legal Father's paternity.

11. The language of Florida Statute 742.18 is not gender neutral.

12. The United States Constitution and the Florida Constitution provide equal protection under the law. Laws must be gender-neutral except when there is an "exceedingly persuasive justification that would serve an important governmental objective to exclude women" for gender-based classifications. *U.S. v. Virginia,* 518 U.S. 515, 534 (1996).

13. There is no exceedingly persuasive justification that would serve an important governmental objective to exclude women for the gender-based classification found in Florida Statute 742.18. Accordingly, the Court finds Florida Statute 742.18 violates the 14th Amendment of the United States Constitution and Article I section 2 of the Florida Constitution.

14. The Court finds it is in the best interest of D.C.Z for the paternity of Legal Father to be disestablished, the paternity of Biological Father to be established, and the child's name to be changed to Dereon Zymeir Glaspie.

15. Legal Father's child support obligation for D.C.Z. ordered in Seminole County case 2018 DR 0088 is terminated.

16. Mother does not desire to pursue child support arrearages owed by Legal Father.

17. The Arcpoint Labs DNA Analysis Results dated February 20, 2020, filed with the petition, were ninety-nine (99) days old when filed. Florida Statute 742.18 requires scientific test results be administered ninety (90) days from the filing of a petition for disestablishment of paternity. The Court finds the nine (9) day filing delay de minimus. Further, good cause existed for the delay due to Covid-19. Such delay is a curable pleading defect.

NOW, THEREFORE, it is hereby **ORDERED** and **ADJUDGED** as follows:

A. Mother's request to disestablish the paternity of Darryl Curry pursuant to Florida Statute 742.10(4) is granted.

B. Darryl Curry's paternity of Dereon Zymeir Curry is disestablished.

C. Darryl Curry's child support obligation to Dereon Zymeir Curry is terminated and no child support arrearage is ordered in this matter.

D. Kelton Jabarri Glaspie is established as the father of Dereon Zymeir Curry.

E. Dereon Zymeir Curry's name shall be changed to Dereon Zymeir Glaspie. A new birth certificate reflecting the name change and change of paternity shall be issued.

F. Florida Statute 742.18 violates equal protection pursuant to the 14th Amendment of the United States Constitution and Article I Section 2 of the Florida Constitution and is accordingly unconstitutional.

G. A new DNA analysis of the likelihood of paternity between Kelton Jabarri Glaspie and Dereon Zymeir Glaspie is ordered by this Court and must be completed and filed with the Court within ninety days of the date of this order to cure any pleading defect.

* * *

Insurance—Property—Standing—Assignment—Validity—Assignment of post-loss insurance benefits that fails to comply with mandatory statutory requirement that assignment contain written, itemized, per-unit cost estimate of services to be performed is invalid and unenforceable—Invoice of services already performed does not satisfy requirement for estimate of services to be performed

WATER DRYOUT, LLC, a/a/o Beatrice Philogene, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY, d/b/a FRONTLINE INSURANCE COMPANY, Defendant. Circuit Court, 19th Judicial Circuit in and for St. Lucie County. Case No. 2021SC000290. June 24, 2021. Daryl Isenhower, Judge. Counsel: Elizabeth Mitchell, David Low & Associates, P.A., Ft. Lauderdale, for Plaintiff. Melissa G. McDavitt, Conroy Simberg, West Palm Beach, for Defendant.

ORDER OF DISMISSAL WITHOUT PREJUDICE

THIS CAUSE having come before the Court for hearing on June 11, 2021 upon Defendant's Motion to Dismiss Plaintiff's Complaint, the Court having reviewed the file, having heard argument from counsel, and otherwise being fully advised in the premises, finds:

The assignment agreement as attached to Plaintiff's Complaint as (hereinafter referred to as the "Assignment") purports to be executed on January 15, 2020.

Plaintiff attached to its Complaint an invoice for the services it performed dated January 23, 2020, eight days after the AOB was executed.

In 2019, the Florida Legislature passed HB 7065, which bill was entitled, "An Act relating to insurance assignment agreements." Ch. 2019-57, Laws of Fla. The Governor signed that legislation into law on May 23, 2019, which is now codified at section 627.7152, Florida Statutes.

Section 627.7152 requires an AOB to include several specific

provisions as a prerequisite for validity. §627.7152(2)(a)1.-7., Fla. Stat. The law is clear that an AOB "that does not comply with this subsection is **invalid and unenforceable**." *Id.* § 627.7152(d) (emphasis added).

Relevant to the instant matter, an assignment agreement must:

. . . .

4. Contain a written, itemized, per-unit cost **estimate** of the services to be performed by the assignee.

5. Relate **only** to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.

. . . .

7. Contain a provision **requiring the assignee to indemnify and hold harmless the assignor** from all liabilities, damages, losses, and costs, including, but not limited to, attorney fees, should the policy subject to the assignment agreement prohibit, in whole or in part, the assignment of benefits.

§ 627.7152(2)(a), Fla. Stat. (emphasis added).

Here, the AOB does not contain a written, itemized, per-unit cost estimate of the services that Plaintiff intended to perform on the date Insureds executed the agreement. Plaintiff attached to its Complaint not an estimate "of the services to be performed," but rather an invoice for the services that it already performed. Although the AOB was executed on January 15, 2020, the invoice is dated January 23, 2020, and therefore could not have been shown to the Insureds at the time they signed the AOB.

The language of section § 627.7152(2), Florida Statutes is mandatory and not permissive. Therefore, § 627.7152 Florida Statutes applies to all assignment agreements executed on or after July 1, 2019.

The Court finds that the Assignment fails to satisfy the requirements of § 627.7152, Florida Statutes. Therefore, pursuant to § 627.7152(2)(d) the assignment agreement is invalid and unenforceable and Plaintiff lacks standing.

This Court finds that § 627.7152 is a mandatory statutory provision which requires ALL assignments of post-loss insurance benefits compliance with the subsections therein, including the contents of the assignment "form" and pre-suit requirements. It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion is GRANTED WITHOUT PREJUDICE.

Plaintiff shall have leave to file an Amended Complaint within 20 days.

* * *

Schools—Public schools—Public health—Pandemic-related masking policies—Parents' Bill of Rights—Challenge to Governor's executive order stating that local school districts in Florida could not adopt a face mask mandate unless it allowed a parental opt-out—Plaintiffs failed to meet burden of proof for relief on count alleging violation of constitutional duty to provide safe public school system—Home rule—Discussion of competing roles of local school board and state in operating public schools—Because court cannot find that state law clearly sets forth that the issues raised are solely local, relief is denied on this count—Separation of powers—Governor did not have emergency powers pursuant to Chapter 252 where state of emergency declared in prior executive order had lapsed—Both the challenged executive order and the actions taken as a result are without authority and are null and void—Political question—Defendants not entitled to political question defense were they have not proved sufficient authority for the challenged executive order, their anti-mask mandate policy, and the enforcement actions—Parents' Bill of Rights—There is no prohibition in Parents' Bill of Rights against schools adopting mandatory face mask policies without a parental opt-out so long as the policy is reasonable and otherwise complies with the provisions of law—Count challenging Department of Health rule dismissed, as DOH is not party to suit—Injunctions—Injunction against Governor denied—Remaining defendants enjoined from violating Parents' Bill of Rights

ALLISON SCOTT, individually and on behalf of W.S., a minor; LESLEY ABRAVANEL and MAGNUS ANDERSSON, individually and on behalf of S.A. and A.A., minors; KRISTEN THOMPSON, individually and on behalf of P.T., a minor; AMY NELL, individually and on behalf of O.S., a minor; DAMARIS ALLEN, individually and on behalf E.A., a minor; PATIENCE BURKE, individually and on behalf of C.B., a minor; and PEYTON DONALD and TRACY DONALD, individually and on behalf of A.D., M.D., J.D., and L.D., minors, Plaintiffs, v. GOVERNOR RON DESANTIS, in his official capacity as Governor of the State of Florida; RICHARD CORCORAN, in his official capacity as Florida Commissioner of Education; FLORIDA DEPARTMENT OF EDUCATION; and FLORIDA BOARD OF EDUCATION, Defendants. Circuit Court, 2nd Judicial Circuit in and for Leon County, Florida Civil Division. Case No. 2021-CA-001382. September 2, 2021. John C. Cooper, Judge.

[Notice of appeal filed; stayed pending appeal. (DeSantis v. Scott, Case No. 1D21-2685)]

FINAL JUDGMENT

This case came before this Court for a non-jury trial from August 23 -26, 2021. A verbal ruling was announced on August 27, 2021.

"Under the American System of laws and government every one is required to so use and enjoy his own rights as not to injure others in their rights or to violate any law in force for the preservation of the general welfare." *State ex rel. Hosack v. Yocum,* 186 So. 448,451 (Fla. 1939)(citing from *Dutton Phosphate Co. v. Priest,* 65 So. 282, 284-85 (Fla. 1914)(emphasis supplied). "The wisdom and necessity, as well as the policy, of a statute are authoritatively determined by the Legislature. Courts may inquire only into the **power** of the Legislature to lawfully enact a particular statue." *Id.*

These two quotes from the Florida Supreme Court over 100 years ago describe the balancing of ones own rights with the rights of others, and that, when considering separation of powers, courts may properly consider whether a law (and as a logical extension of this quote an executive action) was *lawfully* enacted or exercised. A governor's executive order and an agency's actions must be based on authority granted to them by the Constitution or the Legislature. Executive power exercised without authority is illegal, null and void, and unenforceable.

Incorporation of Verbal Order

This Court's findings and conclusions of law are listed verbatim in the attached transcript of the Court's verbal ruling on August 27, 2021, as Exhibit "A", which is incorporated by reference in this Final Judgment.[1]

Issues and Background

The issues in this case are formed by the pleadings, the evidence presented, the statements and contentions of the parties in the pleadings and at trial.

Before this Court, is a dispute between the Governor, the Florida Commissioner of Education, the Florida Department of Education, and the Florida Board of Education (the Defendants) and parents and students in the Florida public school system (the Plaintiffs).[2] The dispute is whether state law permits local school districts in Florida to adopt and enforce a face mask mandate for students, teachers, and staff. This dispute arises out of the opening of public schools for the new school year and the increasing COVID crisis in Florida. This has resulted from the less than complete vaccination of the population in Florida and the dominance of a COVID virus variant referred to as the Delta variant. The Delta variant has a higher viral load and is more contagious than the form of COVID present in Florida in 2020. Also, the Delta variant presents a higher risk of infection to children then did the previous form of COVID. The combination of lack of vaccination, decreasing social distancing, and the Delta variant has resulted in

dramatically increased COVID infections in Florida over the past several months. Although vaccinated persons have significant protection against the Delta variant, they can still become infected with it. As a result, the CDC (Centers for Disease Control), the American Academy of Pediatrics, and the wide majority of the medical and scientific community in this country recommend universal indoor masking for all school students, staff, teachers, and visitors to K-12 schools regardless of vaccination status and social distancing.

On April 14, 2021, Commissioner Corcoran sent a memorandum (Defendants' Exhibit 45) to School Superintendents requesting that they not implement a mandated mask policy. He said, "we ask that districts, which currently are implementing a mandated face covering policy, revise their policy to be voluntary for the 2021-2022 school year." Based on this memorandum, this Court concludes that the issue of voluntary versus mandated face mask policies was being considered at least as early as April of 2021. At that time, the Delta variant of COVID had not hit in Florida with full force. It seems that the policy mentioned in the April 14, 2021, memorandum was focusing on the former less infectious form of COVID.

In late June 2021, the Governor declared there was no longer a state of emergency in Florida. He did this by allowing the time-limited declaration of state of emergency order to lapse without renewal. Consequently, his emergency powers under Chapter 252, Florida Statutes expired at that time.

On July 27, 2021, the Governor held a Round Table Meeting on face mask policy in schools. The video of that meeting was introduced into evidence and published at the trial. It was noted at the August 27, 2021, verbal ruling according to this Court's notes and memory, that the participants at this meeting were the Governor, two charter school representatives, a high school student, and some doctors. One of the doctors present was Jayanta Bhattacharya, M.D., Ph.D., who also testified at trial. No Round Table participant proposed a face mask mandate with no parental opt-out. All participants present proposed or suggested a parental opt-out policy. No one advocated for any CDC recommended policy or guideline. In its verbal ruling, this Court provided additional detail of statements and positions taken at the Round Table meeting.

On July 30, 2021, the Governor issued Executive Order 21-175, which continued the formulation of a policy and the enforcement of that policy by the Defendants that local school districts in Florida could not adopt a face mask mandate unless it allowed a parental opt-out.[3] The Parents' Bill of Rights was the keystone of this policy and its enforcement.

The Executive Order went on to direct certain actions (which were premised on enforcing the Parents' Bill of Rights) which would result in a blanket banning—in advance of all school board mask mandates with no parental opt-out. The apparent way to accomplish this was to institute a policy that would likely result in a violation of the Parents' Bill of Rights.[4]

The Executive Order specifically directed the Florida Department of Health and the Florida Department of Education to work together to immediately adopt rules and take any additional agency action necessary to ensure safety protocols for controlling the spread of COVID. This direction was interpreted by the agencies as a direction to pass a rule to put into effect Executive Order 21-175, which they did. The Florida Department of Health, after consultation with the Florida Department of Education, passed an emergency rule (64DER21-12) which said that "[t]his emergency rule conforms to Executive Order Number 21-175", and incorporated the Executive Order by reference. The Department of Health rule directs "that any COVID-19 mitigation actions taken by school districts comply with the Parents' Bill of Rights, and 'protect parents' right to make decisions regarding masking of their children in relation to Covid-19." The record in this case demonstrates that the Executive Order had two functions: (1) prohibit mask mandates by public schools that do not have a parent opt-out, and (2) enforce this policy by using the Parents' Bill of Rights.

Among its general protocols for controlling COVID spread, the emergency rule states that "the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask."[5] This accurately reflects the Defendants' position and actions, and is the direct result of the Executive Order.

In addition, the Defendants have acted to threaten and impose sanctions on school districts if they do not comply with the Defendants' directions.[6] "The Executive Order tasks agencies to draft rules and the State Board to enforce the laws and rules." (Defendants' Motion to Dismiss, p. 31).

Thus, the Governor, the Commissioner, the Florida Department of Education, and the Florida Board of Education (by seeking to threaten enforcement of the Executive Order) have directed that school boards may not under any circumstances enact a face mask mandate unless it includes an opt-out provision for the parents pursuant, they say, to the Parents' Bill of Rights.[7] The Executive Order was issued for the purpose of using the Parents' Bill of Rights to block all no parent opt-out face mask mandates, and to put into effect the policies raised in the April 14, 2021, memorandum and the July 27, 2021, Round Table meeting.

The Plaintiffs contend, for various reasons set forth in the pleadings, the evidence, the attorneys' presentations in the motion to dismiss hearing, and at trial, that the Executive Order, which directed and became incorporated into the expressed per se no exceptions anti-mask mandate with no parental-opt out, is unconstitutional, illegal, without authority, and unenforceable. The enforcement action of the Defendants (per the August 20, 2021, press release from the Department of Education) noted both the executive order and the Department of Health rule it directed. It said each order (Executive Order and Department of Health rule) requires school districts to document compliance with the Parents' Bill of Rights and the Department of Health rule. Even after the Department of Health rule was adopted, the Department of Education and the State Board of Education are using the Executive Order and the Parents' Bill of Rights to enforce the no mask mandate without a parent opt-out policy. The parties have called on this Court for a resolution to their dispute.

Count I - Safe Schools

This Court does not grant relief pursuant to Count I because the proof does not rise to the level required by the decision in *DeSantis v. FEA,* 306 So.3d 1202 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2314a], and other cases discussing the burden of proof for claims in such cases. There is at least some dispute in the medical community on the issue of masking, therefore, the decision in *DeSantis v. FEA* mandates a finding by this Court that the burden of proof has not been met for relief.[8]

Count II - Home Rule

School Board Control And The Constitution

There has been discussion for many years in many cases regarding the sometimes competing roles of the local school board and the State of Florida in operating public schools.

For example, Article IX, Section 4(b) of the Florida Constitution says in pertinent part: "The school board shall operate, control and supervise all free public schools within the school district."

Yet the Florida Supreme Court in *Citizens for Strong Schools v. Florida State Board of Education,* 262 So.3d 127, 137 (Fla. 2019) [44 Fla. L. Weekly S79a] quoted from an earlier decision in *Coalition v. Chiles*, 680 So.2d 400, 408 (Fla. 1996) [21 Fla. L. Weekly S271a],

"[w]e hold that the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools." In *Coalition* and *Citizens,* the Court dealt with a claim that the Legislature had failed to sufficiently fund the public schools. In general, funding decisions by the Legislature have been granted substantial deference by the appellate courts of Florida. However, the issue here is not whether the State has adequately funded the school system.

Last year the First District Court of Appeal said: "whatever the outcome of Appellees' lawsuit, the choice of how to deliver education to students remains with Florida's school boards". *DeSantis v. FEA*, 306 So.3d 1202, 1214 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2314a]. Although the State retains responsibility for establishing a system of public education through laws, standards, and rules to assure efficient operation of a system of public education, the state constitution states that each county constitutes a school district. Responsibility for the actual operation and administration of all schools within the districts are delegated by law to the school boards of the respective districts. In this regard, all public schools conducted within the district are under the direction and control of the district school board. 46 Fla. Jur. 2d Schools, Universities, and Colleges §19. Although subject to the Parents' Bill of Rights, the setting of local policies for health and safety of students substantially remains a local function. Florida is a large state including small rural counties to large densely populated counties. What is appropriate in one county may not be appropriate in another county. Thus, a one-size-fits-all policy for student health and safety as dictated by Tallahassee seems to run contrary to Article IX, Section 4(b) of the Florida Constitution. However, the passing of the Parents' Bill of Rights and other case law in Florida does not make it sufficiently clear that the issue presented in this case is not clearly, strictly, and soley a local issue with no right of the State to intervene. There exist cases which seem to validate State imposed laws regulating teachers and imposing certain obligations on local school boards regarding charter schools.

Therefore, I cannot find that the law of Florida clearly sets forth the issues in this case as solely local. Thus, this Court finds and **DENIES** relief to the Plaintiffs on Count II of the Complaint.

Counts III and IV

This Court grants relief with respect to Counts III and IV for the reasons announced at the August 27, 2021, hearing and this Final Judgment.

Separation of Powers

The Defendants argue that the Plaintiffs seek relief that would violate the doctrine of separation of powers. This doctrine is set forth at Article II, Section 3 of the Florida Constitution. It provides that the powers of government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided. As it relates to the powers of the judiciary, the separation of powers concept stands for the proposition that the judicial branch must not interfere with the ***authorized*** discretionary functions of the legislative or executive branches of government ***absent violation*** **of constitutional or** ***statutory rights.*** 10 Fla. Jur. 2d Constitutional Law §158; and *Florida Department of Children and Families v. J.B.*, 154 So.3d 479, 481 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D148b] (finding that "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional *or* statutory rights"); *see also Forney v. Crews,* 112 So.3d 741, 743 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1036a] (finding that the court cannot dictate the operation of the state prison system "so long as no statute or constitutional requirement is violated."). The courts will not substitute their judgment with reference to matters properly within the domain of the legislative and executive branches of government. Likewise, neither the Governor nor the executive agencies are permitted to substitute their judgment for the legislature nor can they perform the function of the legislature. By the assertion of separation of powers as an affirmative defense in this case, the Defendants must show that the actions challenged (here, the Executive Order, the blanket prohibition of mask mandates that do not include a parental opt-out, and related enforcement actions) are within the powers of the Defendants as provided by the Constitution or by the Legislature.

Here, the Defendants argue that they are entitled to deference provided by the separation of powers doctrine because they were exercising their authority to act. This is something they must prove. If their actions are not authorized by the Constitution or the Legislature, then they have no authority to take that action, they are not protected by the separation of powers doctrine, and their actions are invalid as being taken without authority. In *DeSantis v. FEA,* 306 So.3d 1202 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2314a], the First District Court of Appeal held that the Governor was acting in accordance with his emergency powers pursuant to Fla. Stat. §252.36(1)(b) because he declared a state of emergency to address the COVID pandemic. Thus, the Governor had authority under the declared state of emergency to "issue executive orders to address a pandemic in accordance with the Act."

In this case, however, the state of emergency lapsed in June 2021, before Executive Order 21-175 was issued. Thus, the Governor did not have emergency powers pursuant to Chapter 252, Florida Statutes. Because the Governor had no emergency powers, he and the other Defendants must look to some other authorization in statute or the Constitution to provide them authority to enforce a blanket ban of mask mandates without a parental opt-out. The Defendants have not shown any convincing authority in the Constitution or any statute. However, they cite the Parents' Bill of Rights as their authority. If Defendants do not show that they had authority to issue the Executive Order, take the actions it called for, and all the things that it led to, the Defendants do not have a separation of powers defense. Thus, the Executive Order and the actions taken as a result are without authority and are null and void.

Political Question

The political question affirmative defense is a form of separation of powers, therefore, the above analysis applies here. As the First District noted in *DeSantis,* 306 So.3d at 1214, "the nonjusticiability of a political question is primarily a function of the separation of powers." The political question doctrine must be cautiously invoked, and the mere fact that a case touches on the political process does not necessarily create a political question beyond the Court's jurisdiction. 10 Fla. Jur, 2d Constitutional Law §157. If the Defendants' Executive Order and related actions are ultra vires (i.e., without authority in law) they are without legal basis and therefore null and void. Thus, the defenses of separation of powers or political question are not available. As will be further discussed in this Final Judgment and noted herein, I find that the Defendants have not proven sufficient authority for the Executive Order, their anti-mask mandate policy, and the enforcement actions for them to be entitled to the defenses of Separation of Powers and Political Question.

Parents' Bill of Rights And Additional Rulings

As the case has proceeded, the Parents' Bill of Rights and its use to effect the Defendants' anti-mask mandate has become a focal point.

The Parents' Bill of Rights (Fla. Stat. §§ 1014.01-06) (2021) was passed by the Legislature and signed by the Governor. It took effect July 1, 2021. No party has challenged the constitutionality of this statute. This Court has found no appellate opinion that discusses this

new law.

The provision of the law that is most relevant to this case is: Fl. St. §1014.03, which says in pertinent part, no "governmental entity . . . may. . . infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child *without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means."* (emphasis supplied).

It seems that the Defendants are relying only on the first portion of Fla. Stat. §1014.03 that prohibits infringement on parents rights, but ignoring the remaining portion of the section which provides that infringement may occur if the action is reasonable and necessary to achieve a compelling state interest and that the action is narrowly tailored and is not otherwise served by a less restrictive means. In plain English, this law says that the government cannot interfere with parental rights regarding education and health care *unless* there is a reasonable basis to do so and that the remaining elements of Fla. Stat. §1014.03 are met.

This law does not make invalid various laws in Florida that do affect parents rights to direct health care of children. Examples are Fl. Stat. §1003.22(3) which mandates vaccines for specific diseases prior to school admittance, and Chapter 39 of the Florida Statutes which sets forth procedures in Child Dependency cases to provide for the care, safety, and protection of children.

The Parents' Bill of Rights expressly gives governmental entities, such as school boards, the right to adopt policies regarding health care and education of children in school, even if the policies affect a parents' rights to make decisions in these areas. However , the statute requires the governmental agency to show that the policy is reasonable and necessary to achieve a compelling state interest, and that the policy is narrowly tailored and not otherwise served by a less restrictive means.

There is no prohibition in the Parents' Bill of Rights against schools adopting mandatory face mask policies without a parental opt-out so long as the policy is reasonable and otherwise complies with the provisions of the law. The Defendants do not have authority under this law to enforce a before the fact of policy adoption blanket mandate against a mandatory face mask policy by a local school board. This statute does not support a state-wide order or action interfering with the constitutionally provided authority of local school districts to provide for the safety and health of the children based on the unique facts on the ground in a particular county. As stated in this Final Judgment the Parents' Bill of Rights statute does allow a challenge of a policy and a requirement that the school demonstrate the reasonableness requirements of the statute.

The law of Florida does not permit the Defendants to punish school boards, its members, or officials for adopting face mask mandates with no parental opt-outs if the school boards have been denied their due process rights under the Parents' Bill of Rights to show that this policy is reasonable and meets the requirements of the statute. If the Defendants act to deny the school districts their due process rights provided by the statute, as is the case if the Defendants strictly enforce the Executive Order, the Department of Health rule, or any other policy prohibiting mask mandates without a parental opt-out, then they are acting without authority and are refusing to comply with all provisions of the law.

Therefore, the Parents' Bill of Rights permits local school boards to enact policies relating to health care and education, including mask mandates. The school boards are not required to secure permission in advance to adopt a policy. To do otherwise would submit local schools to endless court suits and/or administrative hearings on inumerable local policy decisions. If there is an objection to a school board adopted policy by a parent or the Department of Education, those objecting must initiate an authorized proceeding at which it may be demonstrated that the policy is reasonable and necessary to achieve a compelling state interest, that it is narrowly tailored, and is not otherwise served by a less restrictive means.

By passing the Parents' Bill of Rights, the Florida Legislature necesarily recognized the importance of parental rights. But it also recognized that parents' rights are not immune to some reasonable limitation depending upon safety and reasonableness and compelling state need regarding health care or condition of the child.

The standard of proof a school board must meet is reasonableness. The school board is not required to establish that its policy is the best or only policy available or that the policy might be disagreed with by others.

A school district which adopts a policy (such as a mask mandate) is acting within the discretion given to it by the Legislature in the Parents' Bill of Rights. So long as the requirements provided for in the Parents' Bill of Rights are met, the doctrine of separation of powers requires that the discretionary power exercised by the school board cannot be interfered with by the judiciary or executive branch of government, and neither the judiciary nor the executive can substitute their judgment for that of the school board.

The purpose of the Executive Order and the actions it set in motion were to prohibit local school boards from adopting face mask mandates that did not include a parental opt-out provision. The Defendants have contended by their actions and positions in this case that the Parents' Bill of Rights authorizes them to enforce a blanket prohibition against mask mandates. The Defendants have additionally used threats of enforcement and have engaged in enforcement actions generated as a result of the Executive Order to enforce this blanket prohibition. The Defendants contend that the Parents' Bill of Rights as referenced in the Executive Order authorized the enforcement actions against school boards that adopted face mask mandates with no parent opt-out provision.

The Defendants' assertion in this regard is incorrect because the Parents' Bill of Rights does not ban school board face mask mandates. The statute expressly permits school boards to adopt policies regarding the healthcare of students (such as a face mask mandate) even if a parent disagrees with the policy. The statute requires only that the policy be reasonable, is necessary to achieve a compelling state interest, and be narrowly tailored and not otherwise served by a less restrictive means. The actions of the Defendants do not pass constitutional muster because they seek to deprive the school boards in advance and without their right to show reasonableness of such a policy. The statue does not require that the school board secure permission for adopting a policy in advance. It only requires in the instance of a policy challenge, that the school board, has a burden to prove it policy's validity under the guidelines of the statute.

Therefore, an executive order and/or action or agency action which bans under all circumstances a face mask mandate for school children does not meet constitutional muster because such action exceeds the authority given to the Governor and the other Defendants under the Parents' Bill of Rights. Seeking to enforce a policy through the Executive Order and through actions that violate the provisions of the Parents Bill of Rights is arbitrary and capricious because there is no reasonable or rational justification for a violation of this statute. A policy or action which violates the Parents' Bill of Rights cannot be lawfully enforced by the Defendants.

Further, an Executive Order and/or agency action, such as blanket ban of a face mask policy, denies school boards their right to show reasonableness, which violates the Parents' Bill of Rights, exceeds any authority to issue the order or take the action to the extent it sets in motion or causes a violation of the Parents' Bill of Rights and exceeds

the authority of the Defendants granted to them by the Parents' Bill of Rights. Such action is arbitrary, unreasonable, and violates the separation of powers doctrine because it would exceed the powers granted by the Legislature in the Parents' Bill of Rights as discussed in this Final Judgment.

Count V - Department of Health Rule

The Defendants' Motion for Involuntary Dismissal as to Count V is granted because the Plaintiffs did not sue the Department of Health and it is an indispensable party to that count. The Court cannot take any action that affects the Department of Health because it is not a party to this suit. Therefore, thin Court cannot issue an order to the Department of Health ordering it to strike its rule. However, this ruling does not limit the Court from enjoining or otherwise prohibiting the Defendants from engaging in actions that violate the Parents' Bill of Rights.

Count VI - Injunctive Relief

As stated at the August 27th hearing, this Court declines to grant an injunction against the Governor. This Court is not granting an injunction against the Governor because the other Defendants are primarily involved in the enforcement actions on a day-to-day basis against local school boards However, this Court does issue a permanent injunction and enjoins the remaining Defendants ("Enjoined Defendants") from violating the Parent's Bill of Rights.

The "Enjoined Defendants" are ordered not to violate the Parents' Bill of Rights by taking action to effect a blanket ban on face mask mandates by local school boards and by denying the school boards their due process rights granted by the statute which permits them to demonstrate the reasonableness of the mandate and the other factors stated in the law. I also enjoin the "Enjoined Defendants from enforcing or attempting to enforce the Executive Order and the policies it caused to be generated and any resulting policy or action which violates the Parents' Bill of Rights as outlined in this Final Judgment. In granting this injunction I find that the act or conduct to be enjoined (violation of the Parents' Bill of Rights) is a clear legal right, there is no adequate remedy at law, and relief is necessary to prevent an irreparable injury. In this case irreparable injury is demonstrated by the increased risk of Delta variant infection (as demonstrated by CDC guidance and medical evidence in the record) if universal face mask mandates are blocked in violation of the Parents' Bill of Rights. A continuing constitutional violation is in and of itself irreparable harm. *Board of County Commissioners v. Home Builders Association of West Florida,* 2021 WL 3177293, at *3 (Fla. 1st DCA July 28, 2021) [46 Fla. L. Weekly D1705a].

This Court notes that it is not enjoining the enforcement of the Parents' Bill of Rights, so long as the complete statute is enforced without omitting portions of it. Defendants can enforce the Parents' Bill of Rights but must do so in accordance with the terms of the law and allow a due process proceeding to permit the local school boards to meet their burden under the statute.

Local school boards can adopt policies dealing with the health and education of school children, and to the extent that those policies may affect parents' rights to control their children's education or health, then, it is incumbent on the school board, if challenged to demonstrate its policy's reasonableness along with the other factors required by the Parents' Bill of Rights.

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[1]As indicated at the hearing on August 27, 2021, this Court's verbal order would be close to a final order that could be used by the parties preparing the order as a guideline. This Court has received a proposed Final Judgment from the Plaintiffs and comments by the Defendants. After reviewing these, this Court will write its own order and will take into account any portions of the proposal/comments that are applicable. The verbal order was lengthy. Because of the pressing need to reduce the verbal ruling to a written order, this Court will do its best to include all the rulings. However, the complete transcript attached hereto is a more complete recitation of the ruling.

[2]The trial transcript will list the Plaintiffs dismissed by the Court who failed to put on any evidence to support their standing. As to the Plaintiffs not dismissed during the trial, this Court found that they had standing and reaffirms that finding here.

[3]This is reflected in the Defendants' Seventh Affirmative Defense which said, "the Parents' Bill of Rights precludes school boards from implementing categorical mask mandates that do not allow parents to opt their children out of the requirement."

[4]The Defendants contended that "[t]he Executive Order requires that any rules adopted by either agency be in accordance with the Parents' Bill of Rights and tasks the Commissioner of Education with ensuring school districts adhere to Florida law." Defendants' Motion to Dismiss, p. 8. In their Motion to Dismiss, p.14, the Defendants contended that "the State Board can *** enforce the Rule and the Parents' Bill of Rights through its discretionary application of its statutory enforcement powers under Section 1008.32, Florida Statutes." Finally, the Defendants contended in their Motion to Dismiss, p. 31, that under the Bill of Rights "parents—not school— boards have the discretion to choose whether their children will wear masks in school."

[5]The Defendants' Motion to Dismiss, at p. 33, said, "[n]either the Executive Order nor the Rule require that unvaccinated or non-masked students attend school. Rather, they seek to ensure that school boards are complying with the Parents' Bill of Rights—leaving the decision of masking of children to the children's parents."

[6]The Defendants confirmed by stating at p. 31 of their Motion to Dismiss, "school boards still have the option—albeit with consequences—to categorically mandate masking without exception."

[7]The Department of Health issued its rule after consulting with the Department of Education. The rule confirms this consultation and the Defendant accept this by stating in their Motion to Dismiss, at p.9, "[i]n accordance with the Executive Order, the Department of Health, after consultation with the Department of Education, promulgated the Rule."

[8]In this case, the evidence clearly demonstrated that the recommendation of the CDC for universal masking of students, teachers, and staff represents the overwhelming consensus of scientists, medical doctors, and medical organizations. However, the Plaintiffs failed to disprove that there is at least some dispute within the medical community on the issue of masking.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Evidence—Refusal to perform field sobriety exercises—Motion to suppress refusal is denied where deputy did inform defendant of adverse consequences of refusal—Medical information—Where information that defendant's condition was due to impairment rather than a medical issue was provided by fire and rescue personnel without inquiry or solicitation by deputy, motion to suppress information is denied

STATE OF FLORIDA, Plaintiff, v. EMMA RYAN COLLINS, Defendant. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 45-2020-CT-000855-CTAY, Criminal Traffic Division. June 10, 2021. Jenny Higginbotham Barrett, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS and LIMITING TESTIMONY

This matter came to be heard on June 8, 2021 (via ZOOM) on the Defendant's MOTION TO SUPPRESS, filed pursuant to Rule 3.190(h) and (i), of the Florida Rules of Criminal Procedure. The Defendant is seeking an Order prohibiting the State from introducing any evidence obtained via an unlawful search and seizure of the Defendant; to wit: any and all statements made by the Defendant to law enforcement or other agents of the State of Florida, any observations or conclusions made by law enforcement, any field sobriety exercise results, or refusals, and or chemical tests.

The Court having heard testimony, argument of counsel, and being advised, the Court FINDS as a matter of fact and CONCLUDES as a matter of law as follows:

ISSUE

There are two issues argued in this motion. The Defendant argues Deputy Edwards failed to advise the Defendant of the adverse consequences of refusing to perform the Field Sobriety Exercises and thus, the is seeking suppression of the Defendant's refusal to perform the Field Sobriety Exercises.

Next, the Defendant argues Fire and Rescue Personnel released confidential medical records to Deputy Edwards without a subpoena or warrant and in violation of the Defendant's statutory and constitutional rights, and thus seeks suppression of the information provided to Deputy Edwards. In addition, Defendant argues Defendant Edwards lacked reasonable suspicion, probable cause, or legal justification to seize and detain the Defendant without the confidential information related to Defendant's medical condition.

FINDINGS OF FACT

The Court heard testimony from Deputy Edwards. At the hearing, Deputy Edwards testified he observed the Defendant with a flushed face, odor of alcohol, slurred words and she was barely able to respond to NCSO's questions. Once Fire and Rescue Personnel completed their evaluation of Ms. Collins, Deputy Edwards inquired whether Fire and Rescue would be transporting the Defendant to the hospital. In response, Fire and Rescue advised Deputy Edwards that the Defendant would not be transported because her condition appeared to be due to impairment and not due to a medical condition. The Court finds that Deputy Edwards did not inquire as to the medical condition or diagnosis of the Defendant. Rather, the Fire and Rescue Personnel advised Deputy Edwards that they were not transporting the Defendant to the hospital because she suffered from impairment rather than a medical condition.

Further, Deputy Edwards testified he arrested the Defendant for DUI based on the totality of the circumstances—including observations of strong odor of alcohol, flushed face, slurred and mumbling speech, confused, sleepy and lethargic behavior and the Defendant's "in and out of consciousness." In addition, Deputy Edwards testified that he spoke to civilian witnesses that advised Ms. Collins smelled of alcohol and appeared impaired. Based on Deputy Edwards testimony, he did not rely on the Fire and Rescue Personnel's statement as the only reason for the arrest. Rather, he testified he was not surprised by this statement as his own observations led him to believe she was impaired. The Court finds Deputy Edwards did not rely on the statement from Fire and Rescue Personnel as the only requisite for the probable cause required to arrest the Defendant for DUI.

The Court finds the information provided by Fire and Rescue Personnel was not solicited by Deputy Edwards in violation of the Defendant's statutory and fourth amendment rights to privacy.[1] Thus, the motion to suppress the statement from Fire and Rescue is DENIED.

The Court finds Deputy Edwards did advise the Defendant of the adverse consequences she would face if she did not complete the field sobriety exercises, and thus, the motion to suppress the refusal is DENIED.

It is, therefore,

ORDERED and ADJUDGED:

Defendant's Motion to Suppress testimony from Fire and Rescue Personnel as illegally obtained is DENIED. However, in the interest of justice, this Court orders for the statement from Fire and Rescue, "because she is impaired" to be limited and not allowed into evidence.

Defendant's Motion to Suppress the evidence seized as the result of an unlawful arrest is DENIED.

Defendant's Motion to Suppress the Defendant's refusal to perform the Field Sobriety Exercises is DENIED.

[1]F.S. 395.3025(4)(d) and 456.057(7)(a)

* * *

Criminal law—Driving under influence—Search and seizure—Community caretaking—Where deputy observed defendant slumped over wheel of vehicle parked at angle with lights and motor on, deputy had legal basis to conduct welfare check and ask defendant to roll down window—Where deputy subsequently observed signs of impairment and two bottles of tequila in front seat, deputy had reasonable suspicion to ask defendant to exit vehicle—Stop, detention, and warrantless arrest were valid

STATE OF FLORIDA, Plaintiff, v. DANIEL ROBERT VELTRI, Defendant. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 45-2020-CT-000491-CTAY, Criminal Traffic Division. March 31, 2021. Jenny Higginbotham Barrett, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND/OR SUPPRESS

This cause came before the Court on Defendant's MOTION TO SUPPRESS and/or to DISMISS, filed pursuant to Rule 3.190(G). The Defendant seeks to suppress the following evidence: any and all paraphernalia, controlled substances, and firearm located incident to the search of the vehicle.

The Defendant argues the evidence was seized without a warrant in violation of the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution and in violation of Defendant's right to privacy guaranteed by Article I, Section 23 of the Florida Constitution.

This matter came to be heard on February 11, 2021. The Court, having considered the testimony of Deputy Mark Hunter and argument of Counsel, finds as follows:

STATEMENT OF FACTS

Deputy Hunter testified that he received a call from dispatch on May 18, 2020, in the Amelia Island Parkway area, of a silver Acura vehicle driving in a reckless manner. While on patrol, Deputy Hunter testified he pulled into an apartment complex in the area. While in the

apartment complex, Deputy Hunter testified he observed a silver Acura parked at an angle, with the motor and lights on, with the driver slumped over the steering wheel console. Deputy Hunter testified he pulled beside the Defendant's vehicle and made contact. Upon making contact, Deputy Hunter testified he knocked on the window to get the Defendant's attention and asked for the Defendant to roll down his window. Upon making verbal contact with the Defendant, Deputy Hunter testified he made additional observations of the Defendant. He observed a smell of alcohol, a flushed face, and thick tongued speech. In addition, Deputy Hunter testified he observed two bottles of Tequila in the front seat.

Deputy Hunter ordered the Defendant to exit the vehicle, and Deputy Hunter testified the Defendant appeared to be unsteady on his feet. Deputy Hunter testified he told the Defendant he would be conducting a DUI investigation at which time the Defendant refused to perform the Field Sobriety Exercise and Deputy Hunter arrested the Defendant for Driving Under the Influence.

LEGAL ARGUMENT AND ANALYSIS

Firstly, the Defendant argues Deputy Hunter did not have a founded suspicion supported by articulable facts to justify the stop. During the hearing, there was considerable questioning and testimony regarding the dispatched call of a silver Acura driving in a reckless manner in the Amelia Parkway area. The Defendant argues the description of the vehicle from dispatch and the Defendant's vehicle did not match. Specifically, the Defendant argues the car was black despite the officer's testimony the car was silver. Because of this argument, the Defendant argued Deputy Hunter had no founded suspicion the Defendant had committed a crime.

Despite this argument, during the hearing, Deputy Hunter testified he was on patrol in the area and observed a car parked at an angle, with the motor and lights on, with the driver slumped over the steering wheel console. Deputy Hunter testified he would have done a welfare check on the Defendant regardless of the dispatched call of a silver Acura driving in a reckless manner.

Secondly, the Defendant argues the investigatory detention following the arousal of the Defendant was not justified by reasonable suspicion of criminal activity.

During the hearing, Deputy Hunter testified he conducted a welfare check on the Defendant. When he knocked on the window to get the Defendant's attention, Deputy Hunter observed a flushed face, and thick tongued speech. Deputy Hunter asked for the Defendant to roll down his window. When he did, Deputy Hunter made additional observations and based on the totality of the circumstances, that were consistent with impairment.

The legal questions presented in this case is whether Deputy Hunter had a legal basis to ask the Defendant to roll down his window to make contact with the Defendant.

This Court finds Deputy Hunter's stop was conducted as a welfare check under the community caretaking doctrine. While checking on the Defendant, Deputy Hunter observed signs of impairment while the Defendant was in control of the vehicle. Deputy Hunter provided an articulable suspicion the Defendant was impaired when he requested for the Defendant to exit the vehicle. While continuing with his investigation, Deputy Hunter testified the Defendant was unsteady on his feet. Thus, Deputy Hunter arrested the Defendant for Driving Under the Influence.

The Defendant argues the seizure of evidence should be suppressed as Deputy Hunter's investigation went beyond a welfare check and cited to *State vs. Brumelow* and *State vs. Greider.* Unlike in *Greider* and *Brumelow,* in the instant case, Deputy Hunter had an articulable suspicion of a criminal act. While confirming the welfare of the Defendant, Deputy Hunter observed indicators of impairment while in control of the vehicle. He also observed two bottles of tequila in the front seat while speaking with the Defendant.

Thus, the Court finds based on the totality of the circumstances, the stop, detention, and warrantless arrest of the Defendant were valid. Therefore, it is

ORDERED and ADJUDGED:

Defendant's Motion to SUPPRESS and/or DISMISS is hereby **DENIED.**

* * *

Insurance—Homeowners—Attorney's fees—Insolvent insurer—Florida Insurance Guaranty Association—FIGA is excused from statute providing for an award of attorney's fees to insured who prevails in an action against an insurer except when FIGA "denies by affirmative action, other than delay, a covered claim or portion thereof"—FIGA's filing of affirmative defenses did not constitute a "denial" of insureds' claim by affirmative action other than delay, as FIGA only restated legitimate defenses under the policy that were asserted by original insurer

TAMER KEKEC and SERRA MUALLA KEKEC, Plaintiffs, v. FLORIDA INSURANCE GUARANTY ASSOCIATION, INC., Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2020-CC-005735. June 25, 2021. Mose L. Floyd, Judge. Counsel: Jonathan Aversano and Jeremy F. Tyler, Geyer Fuxa Tyler, Sunrise, for Plaintiff. Kara C. Cosse, Kubicki Draper, Jacksonville, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE ATTORNEY'S FEES

THIS CAUSE having come before the Court on Defendant, FLORIDA INSURANCE GUARANTY ASSOCIATION, INC., Motion to Strike Attorney's Fees and the having heard argument of counsel and being otherwise fully advised of the premises, the Court makes the following findings and rulings:

1. Pursuant to Florida Statute §631.70, the Plaintiff asserts that they are entitled to attorney fees because the Defendant's Third and Fifth Affirmative Defenses constitute denials by affirmative action, other than delay, a covered claim or a portion thereof.

2. The Plaintiff cites to *Alon Rahabi v. Florida Insurance Guaranty Associations. Inc*., 71 So. 3d. 241 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2259a]. In *Rahibi,* the Fourth DCA held that FIGA affirmatively denied the claim by alleging in multiple affirmative defenses that the insureds' damages were not caused by a covered loss. Thereby, permitting the insureds to recover their attorney's fees.

3. The Defendant counters that they have not taken affirmative action to deny the claim. In Affirmative Defenses Three and Five, the Defendant claims to only have alleged that Florida Specialty, a wholly separate entity, found that there was no coverage as to those losses.

4. The Defendant cites to two cases in support of its position. Pursuant to *FIGA v. Petty,* 80 So. 3d 313, the Florida Supreme found that FIGA does not step into the insolvent insurer shoes. Therefore, FIGA is not bound by the coverage determinations made by the insolvent insurer. Without affirmative action on the part of FIGA, the insureds are prohibited from recovering attorney's fees for those actions.

5. Defendant also cites to *FIGA v. Ehrlich,* in support of its petition, 82 So. 3d 849 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D939c]. In *Ehrlich,* the insureds filed suit after their insurance company became insolvent. FIGA filed an answer and affirmative defenses alleging that the insureds failed to satisfy the conditions precedent to filing a suit. Therefore, no valid coverage existed. The parties were able to resolve the underlying claim. The insured then moved the court to award their attorney's fees, which the court granted. FIGA sought review of the lower court's determination of the insureds entitlement to attorney's fees. The Fourth DCA reversed the lower court's findings that FIGA did not affirmatively deny the claim by filing an answer in affirmative defenses, as they were only asserting legitimate defenses under the policy. At this point, FIGA has not taken any affirmative action to deny the insureds' claim

6. This Court agrees with the Defendant in that the facts in this case are consistent with those in the *Ehrlich* case. FIGA has only restated legal defenses available under the policy that were asserted by the original insurer and at this point, has not taken any independent affirmative action to deny the Plaintiffs' claims. Therefore, the Plaintiffs' Motion for Attorney's Fees is respectfully denied.

7. Defendant, FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.'s, Motion to Strike Attorney's Fees is hereby GRANTED.

* * *

Criminal law—Driving under influence—Search and seizure—Stop—Where officer, with emergency lights activated, executed traffic stop of motorcyclist traveling in tandem with defendant, and offficer thereafter waved defendant over to site of stop and requested her driver's license, offficer's show of authority constituted seizure of defendant—Even if defendant was not seized when summoned by offficer, continued retention of defendant's driver's license at time she was asked to perform field sobriety exercises elevated encounter to a seizure—Officer lacked reasonable suspicion to seize defendant at time she was summoned where defendant's driving pattern exhibited no signs of impairment—If seizure occurred at retention of driver's license, officer lacked reasonable suspicion for seizure of defendant who had odor of alcohol but exhibited no indicia of impairment—Motion to suppress is granted

STATE OF FLORIDA, v. SANDY KAY COWART, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 2020-CT-003823. June 10, 2021. Jason J. Nimeth, Judge. Counsel: Gennady Gusak, Office of the State Attorney, Tavares, for State. Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before this Court on Defendant's Motion to Suppress, and the Court held an evidentiary hearing on March 5, 2021, which was then continued to March 15, 2021, and Sandy Kay Cowart (hereinafter "Defendant") was present with counsel at both hearings. The Court having reviewed the admitted evidence, considered the testimony, heard and considered the arguments of the parties, the Court finds the following.

FINDINGS OF FACT

On July 30, 2020, Deputy Chessher of the Lake County Sheriff's Office observed two motorcycles in front of her while patrolling. The motorcycle closest to Deputy Chessher had a male driver wearing an orange vest while the motorcycle furthest from Deputy Chessher had a female driver later identified as Defendant wearing a black vest. She followed the motorcycles for several miles.

Over the course of several miles, both drivers increased and decreased speeds. When Defendant slowed, she would then level out her speed once she was close to the male driver. When Deputy Chessher first observed the motorcycles, Defendant moved her vehicle from one side of the lane to the other to allow the male driver to drive next to her. Defendant properly used her turn signals at all turn lights. Defendant was able to maintain balance without swerving in her lane of travel. While following the vehicles, Deputy Chessher was specifically interested in stopping the male driver, and finally determined that she had enough to execute a stop based upon a speed violation.

After Deputy Chessher activated her emergency equipment, the male driver stopped at the entrance to a subdivision, but the Defendant who was a good distance in front of the male driver, continued forward. While talking with the male driver, Defendant returned. Defendant properly used her turn signal to enter into the turn-lane into the subdivision located in the middle of the road allowing for a left-hand turn. Defendant's motorcycle stalled as she was stopping in the turn lane. Deputy Chessher yelled to Defendant to get out of the road. Contemporaneously, Deputy Chessher used her hand to waive Defendant to the traffic stop. Defendant had trouble restarting the motorcycle, but once it was started, she crossed the road. The motorcycle again stalled while crossing the roadway. Defendant then duck-walked the motorcycle across the road next to the male driver. Defendant had difficulty putting the kickstand down, but she provided an explanation as to the problems she had been having with it. Deputy Chessher then told Defendant to go ahead and get her driver's license since she was on scene with her. Defendant provided her license without difficulty. Defendant smelled of alcohol.

Defendant asked Deputy Chessher whether she needed her vehicle registration, and Deputy Chessher said, "That would be great, if you have it." Deputy Chessher then walked back to her patrol vehicle with both drivers' information and documents. After Deputy Chessher had ran Defendant's driver's license information, but prior to returning to her, Deputy Chessher handed her information to Deputy Binder to perform a DUI investigation.

Deputy Binder approached, while holding Defendant to discuss the concern about her ability to drive with only the vehicle registration in hand. After introducing himself to Defendant, Deputy Binder inquired as to how much alcohol that she had consumed. She admitted to having consumed two alcoholic beverages. Deputy Binder asked Defendant whether she would be okay with him checking her eyes before sending her on her way to which Defendant responded in the affirmative although with some protest. Deputy Binder then proceeded to perform the horizontal-gaze nystagmus exercise and then proceeded into other field sobriety exercises. Following completion of these exercises, Defendant was placed under arrest.

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]. "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]).

I. THE TIME AT WHICH DEFENDANT WAS SEIZED

"The United States Supreme Court has determined that the Fourth Amendment requires legal 'seizures' of a person to be based upon reasonable, objective justification, usually expressed in Fourth Amendment jurisprudence as a reasonable articulable suspicion that the individual seized is engaged in criminal activity." *G.M. v. State,* 19 So. 3d 973, 977 (Fla. 2009) [34 Fla. L. Weekly S568a] (citing *Terry v. Ohio,* 392 U.S. 1, 21 (1968)). "However, every encounter between law enforcement and a citizen does not automatically constitute a seizure in the constitutional context." *Id.* Florida law

> has described three levels of police-citizen encounters: (1) a consensual encounter involving minimal contact during which the citizen is free to leave; (2) an investigatory stop or detention which requires a well-founded suspicion of criminal activity; and (3) an arrest supported by probable cause that a crime has been committed, or is being committed."

Smith v. State, 87 So. 3d 84, 86 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D970a] (citing *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993)). "In distinguishing between a consensual encounter and a seizure, courts review whether, under the totality of the circumstances, a 'reasonable person would feel free to disregard the police and go

about his business." *Smith,* 87 So. 3d at 87 (citing *State v. R.H.,* 900 So. 2d 689, 692 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1021a]). Said another way, "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [it be concluded] that a 'seizure' has occurred." *G.M.*, So. 3d at 977 (quoting *Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968)). "[A] police inquiry regarding an individual's identity and accompanying request for identification has not typically constituted a 'seizure' for Fourth Amendment purposes, as long as the police have not communicated the message that compliance with their inquiries is required." *Golphin v. State,* 945 So. 2d 1174, 1184 (Fla. 2006) [31 Fla. L. Weekly S845a] (citing *Florida v. Bostick,* 501 U.S. 429 (1991)).

In the case at hand, Defendant was seized at the time she was summoned to Deputy Chessher. Deputy Chessher executing a traffic stop with emergency equipment activated at the time she told Defendant to get out of the road; however, she did not merely instruct Defendant to exit the roadway—she called Defendant over using a hand motion. Once on scene, Deputy Chessher requested Defendant's driver's license, "since she was on scene with her." The show of authority through the activated emergency lights, the hand-motion summoning Defendant to the traffic stop, and the request for Defendant's driver's license would have caused a reasonable person to believe she was not free to go. Additionally, even if Defendant was not seized at the time of being summoned, the continued retention of Defendant's driver's license at the time of being asked to perform field sobriety exercises would have elevated the encounter to a seizure. *See Home v. State,* 113 So. 3d 158, 161 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D1155a] ("[u]nder the totality of the instant circumstances, the officer's asking to search [the defendant] without returning her license outweighs the fact that she initially voluntarily spoke with the officer and consented to the warrants check"); *see also Golphin,* 945 So. 2d at 1185 ("[w]hile noncompulsory request for an individual's identification has been unlikely to implicate the Fourth Amendment in isolation, the retention of identification during the course of further interrogation or search certainly factors into whether a seizure has occurred").

II. WHETHER DEFENDANT'S DETENTION WAS LAWFUL

"Generally, a traffic stop is reasonable under the Fourth Amendment 'where the police have probable cause to believe that a traffic violation has occurred.' " *State v. Wimberly,* 988 So. 2d 116, 119 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a] (citing *Whren v. U.S.,* 517 U.S. 806, 810 (1996)). Additionally, "law enforcement. . .may stop and temporarily detain an individual, if the officer has a founded or reasonable suspicion that the person has committed or is about to commit a crime." *Bailey v. State,* 717 So. 2d 1096, 1097 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2154a] (citing *Hunter v. State,* 660 So. 2d 244 (Fla. 1995) [20 Fla. L. Weekly S251a]). "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State,* 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]). "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." *State v. Wilson,* 268 So. 3d 927, 928 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1007a].

In the case at hand, law enforcement lacked a reasonable suspicion to detain Defendant. At the time of the seizure, Defendant had exhibited no signs of impairment in her driving pattern. The observed change in speed appeared natural to any driver. Defendant appeared to decrease her speed to remain close to the male driver when the two would become separated. However, if one were to find that the seizure occurred at the time of the continued retention of Defendant's driver's license, law enforcement still lacked a reasonable suspicion to detain Defendant. Although Defendant had the odor of alcohol, neither the body-camera footage nor the dash-camera footage revealed any staggering, swaying, or difficulty with getting off of her motorcycle. *Wiggins v. Florida Department of Highway Safety and Motor Vehicles,* 209 So. 3d 1165, 1166 (Fla. 2017) [42 Fla. L. Weekly S85a]; *Santiago v. State,* 133 So. 3d 1159 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D452a] (the courts "have required more than the odor of alcohol to establish reasonable suspicion for an investigatory stop") (citing *State v. Castaneda,* 79 So. 3d 41 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b]; *State v. Ameqrane,* 39 So. 3d 339 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]; *Origi v. State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]; *State v. Jimoh,* 67 So. 3d 240, 241 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2469a]; *State v. Taylor,* 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b]). In evaluating the totality of the circumstances, law enforcement lacked a reasonable suspicion that Defendant's normal faculties were impaired.

CONCLUSION

On July 30, 2020, Deputy Chessher executed a traffic stop on a motorcycle with a male driver for speeding. Following this traffic stop, Defendant returned to the location of the stop when Deputy Chessher told her to get out of the roadway and summoned her using a hand motion to the location of the stop. Once at that location, Deputy Chessher obtained Defendant's driver's license resulting in Defendant's seizure. Defendant's driving included no swerving, weaving, or any other indication that her normal faculties were impaired. Therefore, at the time of Defendant's seizure, law enforcement lacked reasonable suspicion to detain her.

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

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Activation of emergency lights—Under the totality of the circumstances, deputy seized defendant without reasonable suspicion where defendant was legally parked on residential street, and no reasonable person would have felt free to drive away after deputy activated emergency lights and used spotlight to illuminate parked vehicle—Community caretaking doctrine is not applicable where deputy received no communication or indication that defendant was in need of assistance—Motion to suppress is granted

STATE OF FLORIDA, v. NOAH NATHANIEL KARNES, Defendant. County Court, 5th Judicial Circuit in and for Lake County. Case No. 2020-CT-004597. May 18, 2021. Jason J. Nimeth, Judge. Counsel: Gennady Gusak, Office of the State Attorney, Tavares, for State. Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS CAUSE came before the Court on Defendant's Amended Motion to Suppress Evidence, and the Court having held a hearing on March 26, 2021, where the parties were present, reviewed the testimonial and media evidence, considered the arguments of the parties, and reviewed the applicable law, finds as follows.

FACTS

On September 12, 2020, at approximately 12:30 AM, Deputy Matthew Laios of the Lake County Sheriff's Office was driving home from the airport where he works in the aviation unit. When he entered his neighborhood, he observed a vehicle parked on the side of the road in front of his neighbor's residence. The vehicle was legally parked with no lights on inside or outside. Deputy Laios thought the vehicle appeared suspicious based on his understanding that the residents of the house had been traveling. Deputy Laios knew the residents only through observations, and he had no personal knowledge of specific travel plans.

After driving past the vehicle, Deputy Laios turned his unmarked patrol-car around towards the vehicle. He activated his emergency lights which consisted of four separate light sources and pulled alongside the vehicle, so that both driver's side doors were facing each other. Deputy Laios approached the vehicle and pointed his flashlight through the window aimed at the driver's seat. Deputy Laios directed the driver to roll down the window, so he could make contact. Instead, the driver slowly opened the driver's side door. The driver was later identified as Noah Karnes (hereinafter "Defendant"). Deputy Laios subsequently contacted Deputy Chessher who would conduct a driving under the influence investigation.

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]. "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]).

I. WHETHER DEFENDANT WAS SEIZED WHEN DEPUTY LAIOS MADE CONTACT

"The United States Supreme Court has determined that the Fourth Amendment requires legal 'seizures' of a person to be based upon reasonable, objective justification, usually expressed in Fourth Amendment jurisprudence as a reasonable articulable suspicion that the individual seized is engaged in criminal activity." *G.M. v. State,* 19 So. 3d 973, 977 (Fla. 2009) [34 Fla. L. Weekly S568a] (citing *Terry v. Ohio,* 392 U.S. 1, 21 (1968)). "However, every encounter between law enforcement and a citizen does not automatically constitute a seizure in the constitutional context." *Id*. Florida law

> has described three levels of police-citizen encounters: (1) a consensual encounter involving minimal contact during which the citizen is free to leave; (2) an investigatory stop or detention which requires a well-founded suspicion of criminal activity; and (3) an arrest supported by probable cause that a crime has been committed, or is being committed."

Smith v. State, 87 So. 3d 84, 86 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D970a] (citing *Popple v. State,* 626 So. 2d 185, 186 (Fla. 1993)). "In distinguishing between a consensual encounter and a seizure, courts review whether, under the totality of the circumstances, a 'reasonable person would feel free to disregard the police and go about his business." *Smith*, 87 So. 3d at 87 (citing *State v. R.H.,* 900 So. 2d 689, 692 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1021a]); *accord G. M.,* 19 So. 3d at 979 ("the activation of police lights is one important factor to be considered in a totality-based analysis as to whether a seizure has occurred") (emphasis removed).

This case is analogous to *Smith v. State,* 87 So. 84 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D970a]. "At around 2:30 a.m., the deputy was driving on a residential street when he noticed an occupied SUV parked in front of a vacant open field" and ". . .its interior lights, headlights, and taillights were all turned off." *Smith*, 87 So. 3d at 85. "The deputy pulled in front of the SUV and parked 'almost catty corner' to where the SUV was parked" and ". . .activated his overhead emergency lights." *Id*. The deputy also "illuminated his spotlight to see the occupant of the vehicle." *Id*. Similarly, Deputy Laios observed Defendant's vehicle legally parked on a residential street in the grass with the interior and exterior lights off during the early hours of the morning. Thus, similar to the defendant in *Smith*, Defendant was seized since

> [u]nder the totality of the circumstances, where. . . [a defendant] was legally parked on a residential street and did not give any indication that he might be in need of police assistance, no reasonable person would have felt free to drive away after an officer activated his emergency lights and used a spotlight to illuminate the person's parked vehicle.

Id. at 88 (citing *G.M.,* 19 So. 3d at 980).

II. WHETHER DEFENDANT LAWFULLY DETAINED

"Generally, a traffic stop is reasonable under the Fourth Amendment 'where the police have probable cause to believe that a traffic violation has occurred.' " *State v. Wimberly,* 988 So. 2d 116, 119 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a] (citing *Whren v. U.S.,* 517 U.S. 806, 810 (1996)). Additionally, "law enforcement. . .may stop and temporarily detain an individual, if the officer has a founded or reasonable suspicion that the person has committed or is about to commit a crime." *Bailey v. State,* 717 So. 2d 1096, 1097 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2154a] (citing *Hunter v. State,* 660 So. 2d 244 (Fla. 1995) [20 Fla. L. Weekly S251a]). Finally, when law enforcement is engaging in community caretaking functions, seizures of individuals are allowable "in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity." *Castella v. State,* 959 So. 2d 1285, 1292 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1784a] (citing *Samuelson v. City of New Ulm,* 455 F. 3d 871, 877 (8th Cir. 2006)); *see also Ortiz v. State,* 24 So. 3d 596, 600 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D2311a] ("[s]earches undertaken by a law enforcement officer in fulfilling his or her community caretaking functions focus on 'concern for the safety of the general public' ") (quoting *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973)). "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State,* 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]). "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." *State v. Wilson,* 268 So. 3d 927, 928 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1007a].

This case is also analogous to *State v. Taylor,* 826 So. 2d 399 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1669a]. Law enforcement

> was on routine patrol at 4:30 a.m. in Miami Lakes, an affluent, predominately white area of northern Miami-Dade County. Officer Malone drove by a car that was legally parked on the swale. Officer Male turned around to check out the vehicle. Upon passing the vehicle a second time, Officer Malone noticed a gentleman in the vehicle. Officer Malone parked her patrol car and approached the gentleman. Officer Male asked him to get out of the vehicle and step away from the car.

State v. Taylor, 826 So. 2d 399, 400 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1669a]. The Third District Court of Appeal held that the officer "stopped to investigate [the defendant] because it was unusual to see a car parked on the swale at the hour[wich] is nothing more than mere suspicion, and 'mere suspicion is not enough to support a stop.' " *Id*. at 405 (citing *Popple,* 626 So. 2d at 186). Similarly, Deputy Laios acted to investigate a suspicious vehicle; however, it is not enough to justify Defendant's seizure. *See also Smith,* 87 So. 3d at 88-89. Additionally, " '[i]t has long been recognized in [Florida] that being out on the public street during late and unusual hours cannot constitute a valid basis to temporarily detain' a defendant." *Taylor,* 826 So. 2d at 405 (citing *Levin v. State,* 449 So. 2d 288, 289 (Fla. 3d DCA 1983); *A.H. v. State,* 693 So. 2d 89 (Fla. 3d DCA 1997) [22 Fla. L. Weekly

D1128a]; *Phillips v. State,* 781 So. 2d 477, 477 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D720a]). Therefore, Defendant's detention was unlawful under the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution.

The State argues that the seizure is justified under the community caretaking doctrine and is analogous to *State v. Webber,* Lake County Case Number 2019-CT-005039. "Welfare checks fall under the so-called 'community caretaking doctrine,' which is a judicial creation that carves out an exception to the Fourth Amendment's warrant requirement by allowing police officers to engage in a seizure or search of a person or property solely for safety reasons." *State v. Brumelow,* 289 So. 3d 955, 956 (Fla. 1st DCA December 20, 2019) [44 Fla. L. Weekly D3025a] (citing *Tracy Batement Farrell, et. al.,* Exigent or Emergency Circumstances Exception for Warrantless Search, generally, 14A Fla. Jur 2d Criminal Law—Procedure § 771 (2019); *State v. Johnson,* 208 So. 3d 843 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D281b]). "Searches and seizures conducted under the community caretaker doctrine are solely for safety reasons and must be 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' " *Brumelow,* 289 So. at 956 (citing *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973); *Johnson,* 208 So. 3d at 844.

In the case at hand, Deputy Laios received no communication or indication that Defendant was in need of assistance. *See Smith*, 87 So. 3d at 88 (the defendant "was not parked in an emergency lane of a highway or some other place that would give an objective indication that appellant needed assistance; [r]ather, [the defendant] was legally parked on the side of a residential street, [and w]e acknowledge that if a person is parked on the shoulder of a highway, or otherwise gives some indication to a police officer that he might be in need of assistance on the roadway, a reasonable person in such circumstances would not necessarily perceive the officer's use of emergency lights as a show of authority") (citing *State v. Seymour,* 72 So. 3d 320, 322-23 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2352b]). *Webber* is distinguishable in that law enforcement had observed the defendant's vehicle perpendicularly parked across a residential vehicle in front of a closed gate after having been summoned by a 911 caller who just observed the same vehicle parked in their yard. Additionally, in *Webber,* law enforcement solely activated the rear light-bar to alert oncoming traffic. In the case at hand, as in *Smith,* "there was no objective indication that appellant was in need of aid, nor did appellant exhibit any conduct to indicate that he sought police assistance." *Id.* Therefore, the community caretaking doctrine is inapplicable to the case at hand.

CONCLUSION

On September 12, 2020, when Deputy Laios was driving home he observed a legally parked vehicle in front of a residence which he believed to be suspicious. After turning his vehicle around, Deputy Laios activated his emergency equipment, approached the driver's window, and aimed his activated flashlight onto the driver. When Deputy Laios seized Defendant, he lacked reasonable suspicion to believe a crime was being committed or about to be committed—his suspicion was based solely on his personal observations of the residents' travel patterns. However, mere suspicion is insufficient to support a seizure under the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution.

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

* * *

Landlord-tenant—Eviction—Failure to deposit rent into court registry—Section 83.60(2), which requires tenant interposing any defense other than payment to deposit rent into court registry and provides for entry of default if tenant fails to do so, is not applicable to eviction proceeding based on hold-over tenancy, not nonpayment of rent

FAOUD A. NARINE and FAZIL HASSAN, Plaintiffs, v. BARBARA GRIFFIN and BRANDON GRIFFIN, Defendants. County Court, 5th Judicial Circuit in and for Lake County. Case No. 2021-CC-002646. June 14, 2021. Jason J. Nimeth, Judge.

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' PLEADING AND FOR ENTRY OF DEFAULT

THIS CAUSE, came before the Court on Plaintiffs' Motion to Strike Defendants' Pleading and for Entry of Default, and the Court having reviewed the pleadings, reviewed the applicable case law, and otherwise been fully informed in the premises, the Court finds as follows.

On May 11, 2021, Plaintiffs filed a complaint seeking to evict Defendant from possession of certain residential property based upon termination of Defendant's lease. On May 19, 2021, Defendants filed a response. On May 28, 2021, Plaintiffs filed this motion arguing that Defendant's failure to pay money into the court registry required an entry of default under section 83.60(2), Florida Statutes.

Section 83.60(2), Florida Statutes, provides that "the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent that accrues during the pendency of the proceeding, when due." *See also First Hanover v. Vazquez,* 848 So. 2d 1188, 1190 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1319b] ("[u]nder this provision, tenants in actions for possession for non-payment of rent are obligated to pay rent as a condition to remaining in possession irrespective of their defenses and counterclaims"). The issue before the Court is whether this requirement applies to eviction proceedings other than non-payment of rent such as a hold-over eviction as in this case. The Court is unable to locate an appellate opinion addressing this issue.

"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)). Legislative intent "is derived primarily from a statute's text; therefore, 'to discern that intent courts must look first the language of the statute and its plain meaning.' " *Surf Works, L.L.C. v. City of Jacksonville Beach,* 230 So. 3d 925, 930 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2398a] (quoting *Hill v. Davis,* 70 So. 3d 572, 575 (Fla. 2011) [36 Fla. L. Weekly S487a]). Additionally, "[t]he words of the [statute] must be given their 'plain and ordinary meaning,' and 'courts generally may not insert words or phrases. . .to express intentions which do not appear, unless it is clear the omission was inadvertent. . . .' " *Surf Works, L.L.C.,* 230 So. 3d at 930 (citing *Rinker Materials Corp. v. City of N. Miami,* 286 So. 2d 552, 553-54 (Fla. 1973)). Additionally, when a statute contains multiple subsections, these sections must be read together. *State v. Riley,* 638 So. 2d 507, 508 (Fla. 1994) (citing *State v. Riley,* 625 So. 2d 1261, 1261 (Fla. 5th DCA 1993)); *Okeechobee Health Care v. Collins,* 726 So. 2d 775, 776 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2274c] ("[e]specially when enacted into law simultaneously, subsections of the same statute must be construed *in pari materia*") (citing *Wiggins v. B & L Servs., Inc.,* 701 So. 2d 570 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2159c]).

Section 83.60(1)(a) limits its application to "an action by the landlord for possession of a dwelling unit based upon nonpayment of rent or. . .an action by landlord under section 83.55 seeking to recover unpaid rent. . . ." The remainder of subsection addresses the ability to raise defenses to the action for possession. § 83.60(1)(a). Subsection (1) goes on to discuss "[t]he defense of material noncompliance with s. 83.51(1)" as it relates to the action for possession and the conditions precedent for said defense. § 83(1)(b). Subsection (2) does not use the phrase "based upon nonpayment of rent" as subsection (1); however,

it again lays out the conditions precedent necessary for a tenant to raise a defense in the action for possession. § 83.60(2). Reading the subsections together, the plain language indicates that section 83.60(1) applies to those proceedings for possession based upon the nonpayment of rent and actions brought under section 83.55 for damages; however, section 83.60(2) only applies to those actions for possession based on nonpayment.

This reading is consistent with the language of section 83.60(2). The reference to "the defense of a defective 3-day notice" is consistent with the requirements for actions based on nonpayment in that section 83.56(3), Florida Statutes, provides "[i]f the tenant fails to pay rent when due and the default continues for 3 days. . .after delivery of written demand by the landlord for payment of the rent or possession of the premises, the landlord may terminate the rental agreement." Whereas, evictions based on the material non-compliance of or the holdover residency of a tenant require notices of at least seven days. *See* §§83.56(1), (2); 83.57. Additionally, the phrase "shall pay into the registry of the court the accrued rent as alleged in the complaint" can only contemplate a complaint based upon the nonpayment of rent. Plaintiff argues that inclusion of "the rent that accrues during the pendency of the proceeding, when due" applies to all actions for possession; however, this reading would require the phrase to be read in isolation from the remaining portions of this sentence. Looking at the entire sentence for context, the parallel structure of the sentence requires that "the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint. . . .and [shall pay] the rent that accrues during the pendency of the proceeding." The use of the phrase "shall pay" into the registry of the court is an adverbial phrase, meaning it modifies the verb(s) in a sentence, thus creating two conditions precedent to allow the tenant to exercise a defense in an action for nonpayment.

This reading is also consistent with other portions of chapter 83. An eviction is a statutory cause of action. *See Investment & Income Realty, Inc. v. Bentley,* 480 So. 2d 219, 220 (Fla. 5th DCA 1985) (citing *Perry-Morse Seed Co. v. Hitchcock,* 426 So. 2d 958 (Fla. 1983)). Section 83.58 provides that "[i]f the tenant holds over and continues in possession of the dwelling unit or any part thereof after the expiration of the rental agreement without the permission of the landlord, the landlord may recover possession of the dwelling unit in the manner provided for in s. 83.59." Section 83.59 addressing the recovery of possession of the dwelling unit; however, it neither references nor contains a provision similar to section 83.60(2).

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiffs' Motion to strike Defendants' Pleading and for Entry of Default is DENIED.

* * *

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Janice Jenkins, Plaintiff, v. FEDNAT INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020-SC-000138. July 23, 2020. Andrea Totten, Judge. Counsel: Hans Kennon, Orlando, for Plaintiff. Benjamin J. Zimmern, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION TO DISMISS

THIS CAUSE having come before the Court for hearing on Defendant's Amended Motion to Dismiss (certificate date May 6, 2020), and the Court having heard argument of counsel and otherwise being fully advised in the premises, it is hereby

ORDERED and ADJUDGED that

1. Defendant's Amended Motion to Dismiss is DENIED.

2. This Court find that the Defendant's operative insurance policy is deemed a part of the Plaintiff's Complaint; Plaintiff has standing to pursue the claim based on the plain terms of the Plaintiff's AOB; and this Court further finds that the Plaintiff states a cause of action and that the arguments raised by Defendant against Plaintiff's Complaint are not suitable for resolution in a motion to dismiss.

3. Defendant shall have 20 days from the date of this Order to serve its response to Plaintiff's Complaint.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Deputies had reasonable suspicion to detain defendant for DUI investigation where defendant was at-fault driver in crash and had odor of alcohol and glassy, bloodshot eyes—Arrest—However, where video evidence refutes deputies' testimony about other indicia of impairment, deputies did not have probable cause for arrest—Where defendant told deputies that she would not take field sobriety exercises because she had no equilibrium, and deputies did not inquire further about equilibrium problem or advise defendant that there would be adverse consequences to refusing exercises, defendant's refusal to perform exercises should not be considered as evidence, or alternatively, should be given little to no weight—Statements of defendant and other evidence obtained after arrest are suppressed

STATE OF FLORIDA v. KRISTINE M. SCHOTT, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 100906 MMDL. January 25, 2021. Robert A. Sanders Jr., Judge. Counsel: Boone Forkner, Office of the State Attorney, DeLand, for Plaintiff. Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS AND GRANTING DEFENDANT'S MOTION IN LIMINE

THIS CAUSE came before the Court on December 28, 2020 for a hearing on Defendant's Motion to Suppress and Motion in Limine. The Court, having heard the testimony of Deputy Cameron Godenzi and Deputy Jimmie Stone of the Volusia County Sheriff's Office, having reviewed video footage from Deputy Godenzi's body worn camera, and having heard the arguments of counsel, and having reviewed the applicable case law, makes the following findings upon which it enters this order:

FACTS

On February 21, 2020, sometime between the hours of 5:00 PM and 6:00 PM, Deputy Jimmie Stone responded to a motor vehicle crash involving two vehicles. Upon conducting a crash investigation, Deputy Stone determined that the Defendant, Kristine Schott, was at fault for the crash. Deputy Stone testified that he observed the Defendant to exhibit strange behavior outside the norm of how someone would act during a crash investigation, exhibited orbital sway while standing, slurred speech, and had glassy, bloodshot eyes. Deputy Stone further testified that he did not notice an odor of alcohol initially, but did notice the odor of alcohol emanating from the Defendant once he spoke to the Defendant after they had moved inside of a nearby store. Deputy Stone explained that he believed he was unable to detect the odor of alcohol from the Defendant while they were outdoors due to strong wind that was present at the time, which was no longer a factor once the Defendant was inside the store. Deputy Stone testified that Deputy Cameron Godenzi responded to the scene at some point during the crash investigation, and that he conveyed his observations to Deputy Godenzi.

Deputy Godenzi testified that he observed the same indicators of impairment that were observed by Deputy Stone. Deputy Godenzi further testified that he detected a slight odor of alcohol emanating from the Defendant while she was outside, but that the odor was much more intense once he encountered the Defendant inside the store. After informing the Defendant that the crash investigation was complete and that a DUI investigation was beginning, and reading the Defendant a *Miranda* warning, the Defendant was asked to perform field sobriety exercises. Upon Defendant advising she would not participate in Field Sobriety Exercises, Deputy Godenzi placed the Defendant under arrest for DUI.

A copy of the body camera video of Deputy Godenzi from this incident was introduced into evidence and provided to the Court for review. The parties stipulated that the Court may consider a portion of said video approximately five minutes in length beginning with the Defendant's entrance into the store and ending when the Defendant was placed under arrest.

After reviewing Deputy Godenzi's body camera footage from inside the store, this Court noted the following discrepancies between the video footage and the deputies' testimony. The Defendant is observed on the video speaking clearly, and the alleged slurred speech is barely noticeable or non-existent. The deputies appear to have no issues understanding the Defendant's speech, which included her telling Deputy Stone he had made a mistake in his paperwork regarding Defendant's phone number. Further, this Court did not observe any strange behavior exhibited by Defendant on the video footage.

Deputy Godenzi's body camera footage from inside the store also captures the request for Defendant to perform Field Sobriety Exercises. Deputy Stone advises "we are going to ask you to submit to Field Sobriety Exercises to determine basically . . . .", when Defendant interrupts, stating "First off, I don't have equilibrium because of my ears, and I'm not going to blow." Deputy Stone then asks Defendant "Will you participate in Field Sobriety Exercises to determine if you're safe to drive?" Defendant replies "No." Deputy Godenzi then places Defendant under arrest. This Court did observe slight swaying by Defendant while in the store. However, this Court notes that neither deputy followed up on Defendant's statement that she had problems with equilibrium prior to her arrest.

ANALYSIS

Law enforcement detention of a person for a DUI investigation requires the presence of reasonable suspicion that the person was driving under the influence to the extent that their normal faculties are impaired. *See State v. Taylor*, 648 So.2d 701, 703-04 (Fla.1995) [20 Fla. L. Weekly S6b]. Reasonable suspicion requires a totality of the circumstances analysis "which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience." *Origi v. State*, 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a].

There exist numerous prior decisions regarding the issue of what is sufficient to amount to reasonable suspicion to conduct a DUI investigation. Many of the decisions in these cases differ in their conclusion, even when the general facts are similar. *See State v. Ramirez*, 23 Fla. L. Weekly Supp. 259a (Volusia Cty. Ct. 2015)(no reasonable suspicion when defendant was speeding and exhibited odor of alcohol); *State v. McCommons*, 22 Fla. L. Weekly Supp. 1076a (Volusia Cty. Ct. 2015)(no reasonable suspicion when defendant rear ended another vehicle and exhibited odor of alcohol); *State v. Castaneda*, 79 So. 3d 41 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (there was reasonable suspicion when defendant was speeding, exhibited odor of alcohol, and had watery eyes); *Origi v. State*, 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (there was reasonable suspicion when defendant was speeding, exhibited odor of alcohol, and had bloodshot eyes); *State v. Ameqrane*, 39 So. 3d 339, 340 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b] (there was reasonable suspicion when defendant was speeding, exhibited odor of alcohol, and had bloodshot, glassy eyes). A reasonable suspicion analysis is fact intensive and must consider all aspects of the situation.

The State relied upon the following indicators of impairment to argue there was reasonable suspicion to detain the Defendant and conduct a DUI investigation: (1) The crash and Defendant's fault in it, (2) The Defendant's strange behavior during the crash investigation, (3) Slurred speech, (4) Odor of alcohol coming from the Defendant's person, (5) The Defendant's glassy eyes, and (6) The Defendant swaying while standing. Based on the sworn testimony of the witnesses at the motion to suppress hearing, and review of Deputy Godenzi's body camera footage from inside the store, this Court finds that law enforcement had reasonable suspicion to detain the Defendant and conduct a DUI investigation. However, based on the limited evidence gathered from the DUI investigation, which consisted solely of the Defendant's refusal to perform field sobriety exercises and her statement about not having equilibrium, this Court finds that the deputies' reasonable suspicion should have lessened and should not have risen to probable cause.

It is clear that there is no evidence regarding the facts and circumstances that led to the crash. There was no testimony of poor or erratic driving, nor any testimony linking the operation of the car to any diminished capacity or judgment of the defendant or that she exhibited indicators of impairment, "ill, tired or impaired." *See Carder v. Dep't of Highway Saftey & Motor Vehicles,* 15 Fla. L. Weekly Supp. 547a n. 2 (Fla. 9th Cir. Ct. 2007).

The video footage of Defendant's interaction inside the store with deputies is the best evidence as to whether or not the deputies' observations of Defendant gave rise to reasonable suspicion of impairment. The Court may disregard the deputies' testimony regarding their observations of the Defendant. *Sunby v. State*, 845 So.2d 1006, 1007 (Fla 5th DCA 2003) [28 Fla. L. Weekly D1255b] ("The county court as the fact-finder in this proceeding is free to ignore or to place less emphasis on certain testimony, based on credibility determinations.").

The video footage from inside the store does not show any strange behavior by Defendant. On the video Defendant is speaking clearly, and the alleged slurred speech is barely noticeable or non-existent. The video footage does not clearly support or conflict with the deputies' observations regarding Defendant's eyes.

In *State v. Carroll*, 17 Fla. L. Weekly Supp. 210c (Fla. 15th Cir. 2009), upon being asked to perform field sobriety exercises, Defendant advised "that she would not perform these exercises because she suffers from Meniere's disease, which caused inner ear problems that diminish her equilibrium." In response, the deputy "accepted Defendant's reasoning for declining these exercises and did not advise Defendant that there would be any adverse consequence because of her refusal." Accordingly, the Court held "Defendant's refusal cannot be held against her and cannot be admitted into evidence." *Carroll* at 210 citing *State v. Taylor*, 648 So. 2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b].

Regarding the alleged refusal to perform field sobriety excersises in the instant case, the Defendant advised the deputies she had no equilibrium. The video footage from inside the store shows the Defendant was not asked any questions regarding her equilibrium problem, and the deputies did not advise Defendant there would be any adverse consequences to refusing the exercises. Thus, Defendant's refusal to perform field sobriety exercises should not be considered as evidence by this Court, or alternatively this evidence should be given little to no weight. See *Godwin v. State*, 9 Fla. L. Weekly Supp. 725b (Fla. 4th Cir. 2002)(holding that appellant's argument that "one could not tell if the manner of his performance on those exercises was due to alcohol consumption or medical conditions" goes to the weight to be attributed to, rather than the admissibility of, the exercises.)

In sum, based on this Court's review of the evidence, deputies had reasonable suspicion to believe Defendant was impaired based upon Defendant causing the accident, the odor of alcohol, and her eyes. However, the DUI investigation conducted on video and viewed by this Court does not support a finding of probable cause to believe defendant's normal faculties were impaired in a material respect. This Court finds the totality of evidence does not support a finding of

probable cause to arrest Defendant for Driving Under the Influence.

Accordingly, for the foregoing reasons, it is:

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is GRANTED, and all statements by Defendant, observations of Defendant, and other evidence obtained subsequent to Defendant being arrested are hereby suppressed.

REGARDING THE DEFENDANT'S MOTION IN LIMINE, by stipulation of the parties, the following is EXCLUDED AS EVIDENCE AT TRIAL:

1. The Defendant's statements elicited by law enforcement during the crash investigation.

2. The Defendant's refusal to perform field sobriety exercises.

3. The penalties for refusing the breath test.

4. The State will refrain from arguing that an innocent person would have taken the breath test.

5. The State and State's witnesses may not refer to the Defendant as drunk, impaired, or the like.

* * *

Insurance—Homeowners—Standing—Assignment—Motion to dismiss for failure of assignment of benefits to meet certain requirements of section 627.7152 is denied—Statute does not apply to preparation of indoor environmental assessment

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Jennifer Bowie, Plaintiff, v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 36781 COCI, Division 82. April 5, 2021. Wesley Heidt, Judge. Counsel: Hans Kennon, for Plaintiff. Cristina P. Cambo, for Defendant.

ORDER DENYING THE DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be heard upon Defendant's filing of a Motion to Dismiss Plaintiff's Complaint (Doc 12) filed September 8, 2020. A hearing was conducted on March 4, 2021. The Court having heard the argument of counsel, having reviewed the controlling law, and having reviewed the court file, makes the following findings in support of its order.

FACTS

1. The insured allege damage to their home as a result of Hurricane Irma with the damages occurring on September 11, 2017.

2. The home was insured by United Property.

3. Plaintiff (hereafter referred to as AQA) submits that on November 4, 2019, the insured executed an assignment of benefits (AOB) in favor of AQA.

4. On August 6, 2020, AQA filed a complaint (Doc 2) seeking compensation from the Defendant (hereafter United Property) for preparation of an indoor environmental assessment. AQA brought the action as an assignee of Jennifer Bowie.

ANALYSIS

United Property has filed a Motion to Dismiss the Complaint based on the fact the AOB fails to comply with section 627.7152, Florida Statutes. There are several specific provisions set out in the statute which United Property submits were not met; thus, rendering the AOB invalid and depriving AQA of standing.

Air Quality Assessors filed a response (Doc 23) on February 23, 2021, essentially arguing that the AOB requirements of section 627.7152 only apply to instruments related to "services to protect, repair, restore, or replace property or to mitigate against further damage to the property;" whereas, the assessment at issue did not fall under this limitation. *See* sections 627.7152(1)(b); 627.7152(2)(a)5, Florida Statutes. Air Quality Assessors further argued that the AOB agreement, therefore, was valid as an assigned right under common law.

After review of the pleadings, exhibits, argument of parties, and controlling law, it is

ORDERED AND ADJUDGED:

1. United Property's Motion to Dismiss is **DENIED**.

2. Defendant—United Property—shall file an Answer to the Complaint with twenty (20) days of the date of this Order.

* * *

Insurance—Homeowners—Standing—Assignment—Motion to dismiss for failure of assignment of benefits to meet certain requirements of section 627.7152 is denied —Statute does not apply to preparation of water damage assessment

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Bryan Berger, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for St. Johns County. Case No. CC20-0926. October 15, 2020. Charles J. Tinlin, Judge. Counsel: Hans Kennon, for Plaintiff. Kara K. Cosse, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the Court for hearing on Defendant's Motion To Dismiss (certificate date May 28, 2020), it is Ordered and Adjudged as follows:

STANDARD ON MOTION TO DISMISS BY THE TRIAL COURT

"A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." *Roberts v. Children's Med. Servs.,* 751 So. 2d 672, 673 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D169c]. And, on a motion to dismiss, " 'the trial court is limited to consideration of the allegations contained within the four corners of the complaint.' " *Swope Rodante,* 85 So. 3d at 509 (quoting *Al-Hakim v. Holder,* 787 So. 2d 939, 941 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1380d]).

FACTUAL POSTURE

1. Plaintiff obtained an Assignment of Benefits dated November 25, 2019 under Policy Number 80CD23412. The Plaintiff acknowledges that the assignment of benefits was executed after July 1, 2019, which was the effective date of Section 627.7152 (2019).

2. Plaintiff provided water damage assessment services on or about November 25, 2019. The AOB states by its own terms the following: "I understand that this non-emergency indoor environmental assessment in no way is meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to property."

3. Defendant's Motion argues that Plaintiff's assignment of benefits fails to comply with Section 627.7152. Plaintiff agrees that the Assignment of Benefits is not compliant with Section 627.7152 because the services provided are not within the enumerated statutory services governed by the statute.

ANALYSIS OF FLORIDA STATUTE SECTION 627.7152

4. Section 627.7152 describes with specificity the types of services that are governed by the statute and this Court must apply this definition strictly. The class of occupations governed by this new statute clearly encompasses water remediation and other emergency services by the very terms of the statute, but does not cite to or reference in any way the use of measurement, testing, or observation services such as those provided by Plaintiff. The statute states in pertinent part:

627.7152 Assignment agreements.—

(1) As used in this section, the term:

(a) "Assignee" means a person who is assigned post-loss benefits through an assignment agreement.

(b) "Assignment agreement" means any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person *providing services to protect, repair, restore, or replace property or to mitigate against further*

damage to the property.

1. Section 627.7152 further states:

(2)(a) An assignment agreement must:

5. Relate only to work to be performed by the assignee for services to *protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.*

5. Section 627.7152 (13) states:

This section applies to assignment agreement (sic) executed on or after July 1, 2019.

6. The Assignment of Benefits received by Plaintiff provides only for the "visual inspection of the subject property which may include destructive testing and non-destructive testing to determine reparability, scope, and/or categorization of water damage . . . ."

7. The Plaintiff by virtue of providing water damage assessment services, and only those services, argues that it did not itself provide any: 1—services to protect the property; 2—services to repair the property, 3—services to restore the property; 4—services to replace property; or 5—provide services to mitigate against further damage.

8. Plaintiff argues that its services might be in support of others who provide services directly implicated under Section 627.7152, but argues that this Court must construe the statute narrowly.

9. The Defendant argues that in order to provide services that are payable by an insurer, such as the Defendant, that the services provider such as the Plaintiff must be in compliance with Section 627.7152 and that there are no services outside the statute. Any attempt otherwise, such as by the Plaintiff, is seeking a "loophole" around the statute. All assignment of benefit services are governed by the statute.

LAW OF ASSIGNMENT

10. In *State Farm Fire And Casualty Company v. Ray,* 556 So.2d 811, 813 (Fla. 5th DCA 1990.), the 5th DCA held:

> An assignee may enforce payments or the performance of an obligation due under an assigned contract. *Boulevard National Bank, supra.* Because an unqualified assignment transfers to the assignee all the interest of the assignor under the assigned contract, the assignor has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the assignee. 4 Fla.Jur.2d, *Assignments* § 23 (1978); *see also Howard v. Pensacola & A.R. Company,* 24 Fla. 560, 5 So. 356 (1886).

11. The right to assign a contractual benefit is found in the common law. An assignee of that right has a common law right to sue on a breach of contract claim. If the Legislature passes a statute that is in derogation of the common law it must be strictly construed by this Court. See *Accident Cleaners, Inc., v. Universal Ins. Co.,* 186 So. 3d 1, 3 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D862a]; and *Humana Health Plans v. Lawton,* 675 So. 2d 1382 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1299g].

12. In this case, there is no defect in the assignment of benefits sufficient to divest standing to bring the lawsuit from any common law analysis of assignment. Defendant's only basis for a defective assignment is the argument that it does not comply with Section 627.7152.

CONCLUSION AND RULING ON DEFENDANT'S MOTION TO DISMISS

Based on the facts and analysis as set out above, this Court DENIES the Defendant's Motion to Dismiss. This Court finds that the Plaintiff has stated a viable cause of action and reserves further ruling until a Motion for Summary Judgment properly presented is brought before this Court.

* * *

Landlord-tenant—Eviction—Breach of settlement agreement—Trial court lacks jurisdiction to enforce terms of settlement agreement that was entered into by landlord and tenant to resolve eviction case and allegedly breached by tenant where agreement was not presented to court for adoption or future enforcement prior to entry of clerk's default after alleged breach—Further, by accepting first rent payment due under agreement, landlord waived right to proceed with eviction action—Writ of possession, final judgment of possession, and clerk's default are vacated and complaint is dismissed

PARADIGM PROPERTIES MANAGEMENT TEAM, INC. (ARBOR PARK APARTMENTS), Plaintiff, v. CASSANDRA ROBINSON, Defendant. County Court, 8th Judicial Circuit in and for Alachua County. Case No. 01-2021-CC-001354, County Civil Division IV. July 6, 2021. Meshon T. Rawls, Judge. Counsel: John Stinson, Scruggs, Carmichael & Wershow, P.A., Gainesville, for Plaintiff. Mikel Bradley, Three Rivers Legal Services, Inc., Gainesville, for Defendant.

ORDER ON DEFENDANT'S MOTION TO VACATE AND/OR SET ASIDE WRIT OF POSSESSION AND PLAINTIFF'S MOTION TO SET ASIDE STAY

THIS CAUSE came before the Court for a Hearing on June 8, 2021, on the Defendant's Emergency Motion to Vacate and/or Set Aside Writ of Possession and Plaintiff's Motion to Set Aside this Court's Stay of Execution of said Writ of Possession and the Court having considered the said motions, heard the arguments of the parties, reviewed the court file and being otherwise fully advised in the premises, **FINDS** as follows:

A. Plaintiff's Complaint for Eviction was filed with the Court on April 20, 2021.

B. Plaintiff and Defendant then entered into negotiations resulting in a settlement agreement dated May 5, 2021, requiring payment of $1,800 on May 5, 2021.

C. Defendant made the first payment under the settlement agreement of $1,800 directly to counsel for Plaintiff on May 5, 2021.

D. Defendant, subsequently, did not make the next payment on May 11, 2021, as required under the settlement agreement.

E. Plaintiff sought relief by way of a Motion for Clerk's Default and separate Motion for Attorney's Fees and Costs on May 13, 2021.

F. Default was issued by the Clerk on May 13, 2021.

G. A Judgment for Possession was entered by the Court on May 18, 2021 along with a Writ of Possession.

H. Defendant filed a Motion to Vacate and/or Set Aside Writ of Possession on May 25, 2021.

I. The Court stayed the execution of the writ of possession and scheduled a hearing on the Motion to Vacate and/or Set Aside Writ of Possession.

J. Plaintiff, subsequently, filed a Motion to Set Aside this Court's Stay of Execution of said Writ of Possession; attached to Plaintiff's Motion was an Affidavit of Violation and an Agreement executed by Plaintiff's Counsel and the Defendant (Pro Se).

K. The settlement agreement of May 5, 2021 was not filed with the Court for ratification prior to the filing of the Motion for Default on May 13, 2021.

L. According to *Paulucci v. General Dynamics Corp,* 842 So.2d 797 (2003) [28 Fla. L. Weekly S235a], when a court incorporates a settlement agreement into a final judgment or approves a settlement agreement by order and retains jurisdiction to enforce the terms, the court has jurisdiction to enforce the terms of the agreement . . . However, the extent of a court's continuing jurisdiction to enforce the terms of a settlement agreement is circumscribed by the terms of the agreement.

M. Thus, as the settlement agreement of May 5, 2021 was not presented to this Court for adoption or future enforcement prior to the entrance of a default, the Court does not have jurisdiction to enforce its terms.

N. In addition, by accepting the rent amount of $1,800 on May 5, 2021, the Plaintiff has waived the right to proceed with this eviction action.

It is therefore, ORDERED AND ADJUDGED as follows:

1. The Plaintiff's Motion to Set Aside the Stay of Execution of Writ of Possession is hereby DENIED;

2. The Defendant's Motion to Vacate the Writ of Possession is hereby GRANTED;

3. Furthermore the Clerk's Default is hereby VACATED and the Final Judgment of Possession entered by the Court and dated May 18, 2021 is hereby VACATED and of no further force nor effect and

4. The Plaintiff's Complaint for Eviction is hereby DISMISSED.

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose criminal record—Insurer's motion for summary judgment based on wife's alleged failure to disclose husband's felony conviction on insurance application is denied where application is not attached to complaint or affidavit, and affidavit is deficient and fails to meet insurer's burden to show material misrepresentation—Waiver—Where insurer accepted premium payments from insured after learning of alleged misrepresentation, insurer waived right to rescind policy—Post-claim underwriting—Further, where insurer failed to investigate criminal history of insured's husband available on public website despite conducting in-depth investigation into other aspects of his background, insurer is charged with knowledge of husband's criminal history—Insured's motion for summary judgment is granted, and insurer is prohibited from rescinding policy

MICHAEL COLLINS, Plaintiff, v. INTEGON PREFERRED INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CC-002279-O. June 29, 2021. Amy J. Carter, Judge. Counsel: Dave T. Sooklal, Anthony-Smith Law, P.A., Orlando, for Plaintiff. Eric Nelsestuen, Savage Villoch Law, Tampa, for Defendant.

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

This matter came before the Court on Plaintiff's and Defendant's competing Motions for Summary Judgment. After having reviewed both Motions and having heard argument of counsel, this Court hereby grants Plaintiff's Motion and denies Defendant's Motion for the reasons set forth below.

FACTUAL BACKGROUND

The following are the material facts in this matter which are not in dispute. The Defendant issued a policy of insurance to Michael Collins on August 18, 2018, which included Comprehensive and Collision coverage for a 2018 Chevy Equinox ("Insured Vehicle"). Mr. Collins applied for the policy of insurance in person on August 18, 2018. At that time, Mr. Collins put the Defendant on notice of his criminal history by disclosing to the Defendant's Insurance Agent of his prior arrest. The Insurance Agent then filled in the information included in the application. After submission of the application, the Defendant accepted insurance premium payments for this policy on a monthly basis from August 18, 2018, through December 16, 2019. The Defendant did not file any evidence in opposition to the above-mentioned facts.

Mr. Collins was involved in a motor vehicle accident while in the Insured Vehicle on December 12, 2019, wherein the Insured Vehicle sustained property damage. Thereafter, Mr. Collins submitted a claim to the Defendant for the damage to the Insured Vehicle on December 13, 2019. Specifically, Mr. Collins called the Defendant to report the claim. At that time, the Defendant took a recorded statement of Mr. Collins wherein the Defendant questioned Mr. Collins regarding his criminal history. In addition, on December 13, 2019, the Defendant investigated Mr. Collins' criminal background by obtaining a "TLO" report and accessing the Orange County Clerk's website, which confirmed that Mr. Collins pled guilty to a prior felony charge. Thereafter, Defendant accepted an additional premium payment from Mr. Collins for this policy on December, 16, 2019.

Ultimately, the Defendant rescinded the subject policy of insurance and denied Mr. Collins' claim and alleged that Mr. Collins made a misrepresentation on his application for insurance by failing to disclose his prior felony on the application for insurance. In support of its position, the Defendant filed the Affidavit of Rose Chrustic. The Affidavit purports to attach a copy of the subject insurance application as Exhibit "B" though there is no Exhibit "B" or insurance application attached to the Affidavit. Also, the Affidavit claims that the "Named Insured" failed to disclose a "felony conviction for the Plaintiff on the Application" but does not include any substantiation as to who the "Named Insured" is, how Ms. Chrustic is competent to testify that the "Named Insured" completed the application, or what the "Named Insured" did or did not disclose on the application. Also, the Affidavit does not include an allegation that it is Defendant's regular practice to make the document purportedly attached as Exhibit "B."

ARGUMENT BY THE PARTIES

Plaintiff argues that: 1) Mr. Collins did not make a misrepresentation because he disclosed his prior criminal history to the Defendant or at the very least put the Defendant on notice of his criminal history; 2) even if there was a material misrepresentation, the Defendant waived its right to rescind the policy by continuing to collect insurance premiums from Mr. Collins after having knowledge of the misrepresentation; and, 3) the Defendant improperly engaged in post-loss underwriting in rescinding the subject policy. In response, Defendant alleges that Mr. Collins made a material misrepresentation in failing to list his prior felony conviction on the application for insurance whereby warranting the policy be rescinded.

LEGAL STANDARD

Summary judgment shall be awarded in favor of the moving party "if there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). "Summary judgment is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings, and summary judgment is appropriate where, as a matter of law, it is apparent from the pleadings, depositions, affidavits, or other evidence that there is no genuine issue of material fact and that the moving party is entitled to relief as a matter of law." *Florida Bar v. Greene,* 926 So.2d 1195, 1200 (Fla. 2006) [31 Fla. L. Weekly S212a].

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

ANALYSIS

The issues before this Court on summary judgment are: 1) whether there was a material misrepresentation made on the application for insurance warranting rescission of the subject policy of insurance; and, 2) whether Defendant waived its right to rescind the policy and/or

improperly engaged in post-loss underwriting whereby rendering the rescission improper.

First, the Court must determine whether there was a material misrepresentation made on the subject application for insurance. Defendant argues that Sabrina Hayles ("Hayles") completed the subject application for insurance and made a misrepresentation therein by failing to list her spouse, Michael Collins' prior felony conviction. The evidentiary support cited by Defendant for this allegation is the Application attached to the Complaint, or the Affidavit of Rose Chrustic. There is no such Application attached to Complaint or Affidavit. Thus, there is no evidentiary support for Defendant's allegation. This is fatal to Defendant's Motion because the party seeking summary judgment will bear the initial burden of proof in informing the court of the basis for the motion and identifying evidence demonstrating that there is no genuine issue of material fact. *See Kitchen v. Ebonite Rec. Ctrs., Inc.,* 856 So. 2d 1083, 1085 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2401a], (*citing Fisel v. Wynns,* 667 So. 2d 761, 764 (Fla.1996) [21 Fla. L. Weekly S59a]).

Also, the Court notes that even if there was an Application attached to the Affidavit, it would be inadmissible because the Affidavit fails to meet the business record exemption to the hearsay rule as there is no allegation included in the Affidavit that it is the regular business practice of Defendant to make the records attached thereto. *See* §Fla. Stat. 90.803(6)(a). In addition, the crucial allegation in the Affidavit alleges that, "The Named Insured failed to disclose a felony conviction for the Plaintiff on the Application," but fails to list who the "Named Insured" is, or how Ms. Chrustic is competent to attest that the "Named Insured" made representations on the subject application.

Fla. R. Civ. P. 1.510(4) mandates that affidavits be made on personal knowledge and set out facts that would be admissible in evidence and show that the affiant is competent to testify to the matters stated. *See* Fla. R. Civ. P. 1.510(4). The purpose of the personal knowledge requirement for a summary judgment affidavit is to present the trial court from relying on hearsay when ruling on a motion for summary judgment and ensure that there is an admissible evidentiary basis as opposed to mere supposition or belief. *Florida Dept of Financial Services v. Associated Industries Ins. Co., Inc.,* 868 So.2d 600, 602 (Fla. 1DCA 2004) [29 Fla. L. Weekly D568a]. Moreover, affidavits containing conclusory statements of ultimate fact are insufficient to sustain the movant's summary judgment burden. *Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc.,* 793 So.2d 978, 980 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D356c]. Here, the seminal allegation in Ms. Chrustic's Affidavit that, "The Named Insured failed to disclose a felony conviction for the Plaintiff on the Application," is conclusory as there is no substantiation provided for this statement in the Affidavit as to how Ms. Chrustic knows who the Named Insured is or that this individual actually filled out the application. Thus, the Affidavit is deficient and fails to establish Defendant's burden that there was a material misrepresentation made on the subject application for insurance.

Turning to Plaintiff's contention that the Defendant waived its right to rescind the subject policy. Plaintiff asserts that Defendant waived its right to rescind the subject policy because it continued to accept premium payments from Mr. Collins after being aware of the alleged misrepresentation i.e. his failure to list a prior felony conviction. In support of its position, Plaintiff relies on the Affidavit of Mr. Collins wherein he attests that during the application process on August 18, 2018, he informed Defendant's Insurance Agent that he was previously arrested, as well as Defendant's testimony that on December 13, 2018, Defendant conducted an additional investigation into Mr. Collins' background by means of accessing Mr. Collins' criminal history through the Orange County Clerk's website and a "TLO" report that confirmed Mr. Collins' prior criminal history. Also, it is undisputed that Defendant accepted premium payments from Mr. Collins beginning on August 17, 2018, through December 16, 2018.

As a general rule in Florida, forfeitures of insurance policies are not favored, especially when the event that gives rise to the insurer's liability has occurred. *LeMaster v. USAA Life Ins. Co.,* 922 F. Supp. 581, 585 (M.D. Fla. 1996) (*citing Johnson v. Life Ins. Co.,* 52 So.2d 813, 815 (Fla. 1951)); *see also Boca Raton Cmty. Hosp. v. Brucker,* 695 So.2d 911, 912-13 (Fla. 4th DCA. 1997) [22 Fla. L. Weekly D1527b] (holding that forfeiture of insurance policies is disfavored especially when the event that gives rise to the insurer's liability has occurred). Thus, an insurer's rescission of a policy of insurance is susceptible to waiver and estoppel. *LeMaster v. USAA Life Ins. Co.,* 922 F. Supp. 581, 585 (M.D. Fla. 1996); *Fresh Supermarket Foods, Inc. v. Allstate Ins. Co.,* 829 So.2d 1000 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2477c] (forfeiture of an insurance policy is improper where the insured's agent had knowledge of the alleged misrepresentation giving rise to the forfeiture at the inception of the policy).

In particular, the Florida Supreme Court held that an insurer can waive its forfeiture of an insurance policy, where the insurer, by its acts, recognized the policy as valid, with full knowledge of the facts giving rise to the forfeiture. *Queen Ins. Co. v. Patterson Drug Co.,* 73 Fla. 665, 673, (Fla. 1917). For example, an insurer will be deemed to have waived its right to rescind a policy of insurance where there is an unequivocal act which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, at a time when the insurer has knowledge of the existence of facts justifying a forfeiture of the policy. *Johnson v. Life Ins. Co.,* 52 So.2d 813, 815 (Fla. 1951). The *Johnson* Court reasoned that an insurance company should not be permitted to lull the assured into a false sense of security by accepting premiums after knowledge, ***either actual or constructive,*** of facts sufficient to avoid the policy, and then when the risk eventuates assert as a basis for escape from liability the existence of facts or conditions of which they were, ***or should have been, previously aware.*** *Id.*

In addition, if the insured gives truthful answers to questions contained in the insurance application and the company's agent, either through fraud or mistake, inserts answers in the application which do not accord with the information given, the insurer cannot insist on breach of warranty, but is estopped from making such defense. *See Columbian Nat. Life Ins. Co. v. Lanigan,* 154 Fla. 760, 766-67 (1944).

In this case, the record evidence is unrefuted that Mr. Collins put the Defendant on notice of his criminal history as of August 17, 2018, and certainly Defendant had actual knowledge of Mr. Collins' criminal history as of December 13, 2018, through its continued investigation into Mr. Collins' background. As such, if the Defendant conducted itself in a manner consistent with the policy being in full force and effect after August 17, 2018, and certainly after December 13, 2018, then the Defendant waived its right to rescind the subject policy. *See Johnson,* 52 So.2d at 815. That is what transpired in this case as the Defendant accepted a premium payment from Mr. Collins on December 16, 2018, and every prior month dating back to August of 2018, without protest. Moreover, the Defendant did not file any record evidence to refute Mr. Collins' Affidavit that he disclosed his criminal history to the Defendant on August 17, 2018. Thus, Mr. Collins' unrefuted Affidavit establishes that he did not make a misrepresentation because he disclosed his criminal history to the Defendant, and at the very least put the Defendant on constructive notice of his criminal history.

In response, Defendant contends that it is entitled to rely on the representations in the application without further investigation and cites a Third DCA case for the proposition that, "an insurance company has the right to rely on an applicant's representations in an application for insurance and is under no duty to inquire further," *See N. Miami Gen. Hosp. v. Cent. Nat. Life Ins. Co.,* 419 So. 2d 800, 802 (Fla. 3d DCA 1982). However, Defendant failed to include the

additional text at the end of the sentence it quoted which includes the following exception to the above stated rule that applies in this case, ". . .unless it has ***actual or constructive knowledge*** that such representations are incorrect or untrue." *Id.* In this case, it is undisputed that Defendant had constructive and actual knowledge regarding the alleged misrepresentations. Accordingly, the Defendant waived its right to rescind the subject policy of insurance by continuing to accept premiums after having constructive knowledge of the misrepresentation. *See Sec. Life & Tr. Co. v. Jones,* 202 So.2d 906, 908-09 (Fla. 2d DCA 1967) ("The acceptance and collection of premiums with ***constructive*** notice of the facts relied on as a defense is certainly an unequivocal act which recognizes the continued existence of the policy and which is wholly inconsistent with a forfeiture. . .").

Plaintiff also contends that the Defendant engaged in post-loss underwriting by postponing investigating insurability while collecting premiums and concurrently retaining its right to rescind after a claim is made. Through this practice, Plaintiff asserts that the Defendant never took the risk that is inherent to the business of insurance of the possibility of remuneration when this policy was issued because if the insurer truly intended to abide by the policy, it would have adequately assessed its risk in order to actually convey the assurance of security and protection bargained for by their insured.

Insurance companies are engaged in the business of running risks for pay, bluntly stated, they gamble with fate for an agreed remuneration; when they issue a policy they import and intend to import to the insured a sense of security as to the risk insured against and when they accept premiums they mean thereby to convey to the insured continued assurance of the security afforded by the protective provisions of the policy. *Total Health Care of Florida v. United Auto Ins. Co.* 14 Fla. L. Weekly Supp. 570a (Miami Dade Cty. Ct. 2007), *citing Guardian Life Ins. Co. v. Weiser,* 51 N.Y.S.2d 771, 773 (Sup. Ct. 1941). But, if an insurer can postpone the investigation of insurability and concurrently retain its right to rescind until after a claim is made, then an insurer can accept premiums, deal with the insured as if there is coverage, lead the insured to believe that he is covered, and never take on the risk that is inherent to the business of insurance. *Id.* In addressing this issue, the Fifth DCA held that the law should not provide an escape hatch for an insurer whose investigation is so inept, or whose underwriting procedures are so ill conceived, that the decision so insure actually rests on its own negligent or greedy shoulders rather than on any representation made by the applicant. *Vega, etc. v. Independent Fire Ins. Co.,* 651 So.2d 743, 746 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D556a].

Here, the Defendant requested and was granted permission to obtain endless information regarding Mr. Collins' background including but not limited to non-public information such as his social security number and driving history, information from consumer reporting agencies, insurance agencies, state motor vehicle departments, and even his computer hardware and software including his IP address and activity on his home computer. Needless to say, it is much less onerous to obtain Mr. Collins' criminal history than the above information as it is a matter of public record, yet still Defendant claims it didn't do so at the inception of the policy. However, the fact that Defendant ultimately obtained Mr. Collins' criminal history confirms that Defendant could attain that information during its initial underwriting of the policy but made a conscious choice not to do so. Also of note, and somewhat suspicious is the fact that the Defendant questioned Mr. Collins regarding his criminal history when he called to report the accident, though his criminal history has absolutely no bearing on determining whether to afford coverage for the damage to the Insured Vehicle from the accident. This further evidences Defendant's post-loss underwriting of the subject policy. Under these circumstances the insurer should be charged with knowledge it might have obtained had it pursued its investigation with reasonable diligence and completeness which necessarily includes Mr. Collins' criminal history.

This is the conclusion reached by the Florida Supreme Court which held that an insurer is charged with all the knowledge it might have obtained had it pursued the inquiry to the end with reasonable diligence and completeness. *Columbian Nat'l Life Ins. Co. v. Lanigan,* 154 Fla. 760, 768 (1944); *see also Fecht v. Makowski,* 172 So.2d 468, 471 (Fla. 3d DCA 1965). The Defendant conducted an in-depth investigation of Mr. Collins' background prior to issuing this policy by obtaining reports from consumer reporting agencies as well as his driving record which are far more invasive that simply obtaining his criminal history which is available on the Orange County Clerk of Court's website. We know that his criminal history is readily available to the Defendant because Defendant's Corporate Representative admitted that the Defendant obtained Mr. Collins' criminal history through the Orange County Clerk's website as well as through a "TLO Report." Thus, the Defendant should be charged with knowledge of Mr. Collins' criminal history because it obtained private information that required much more effort to obtain than his criminal history which the Defendant could easily access. Accordingly, this Court must rule consistent with *Lanigan* and prohibit the Defendant from rescinding this policy and benefitting from its post claim underwriting by waiting to fully underwrite the policy after the loss was reported as opposed to fully underwriting the policy at its inception.

CONCLUSION

Based on the foregoing, it is **ORDERED** and **ADJUDGED** that Plaintiff's Motion for Final Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED**.

* * *

Criminal law—Driving under influence—Search and seizure—Stop—Speeding—Where officer testified that he saw lights from defendant's vehicle traveling at high rate of speed, but there is no record evidence of officer's training or knowledge on determining speed or how he clocked defendant's speed, there was no reasonable suspicion for stop—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. ARON JAMES PHILLIPS, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CT270-A-E, Division 82. January 21, 2021. Eric DuBois, Judge. Counsel: William Guerilus, Office of the State Attorney, Orlando, for Plaintiff. Joe Easton, Leppard Law, Orlando, for Defendant.

ORDER ON MOTION TO SUPPRESS

THIS CAUSE, having come on to be heard before me upon the Defendant's Motion To Suppress and the Court having reviewed the Pleading the Court File and after hearing testimony and argument of the parties and being otherwise duly advised in the premises, hereby finds as follows:

On March 11, 2020, the Defendant, Aron James Philips, was stopped for speeding and subsequently arrested and charged with Driving under the Influence. The record evidence shows that the Defendant was pulled into a parallel parking spot on an angle and already out of the vehicle when the Officer approached the vehicle.

FACTS

On March 11, 2020 at roughly 12:45 am, Maitland Park Police Officer Gary Andrews approached the vehicle driven by the Defendant. The body camera video shows the Defendant out of the vehicle and standing at the rear of the vehicle. The Officer asked the Defendant to submit to field sobriety exercises, to which the Defendant agreed. During the initial portion of the video the Defendant was permitted to go back into his vehicle, obtain paperwork out of the car and explained to the officer that the reason he parked the way he did was because his girlfriend was feeling sick and he didn't want her to throw up. The Officer waited to conduct field sobriety exercises until such time as the Mother of the girlfriend came to get her and remove

her from the area.

The officer testified that he saw the vehicle being driven by the Defendant traveling at a high rate of speed, but did not testify as to how he came to guess the speed or what manner in which he "clocked" the vehicle driven by the Defendant.

CONCLUSION

The Court first looks at the stop of the Defendant. The Officer testified that he saw the vehicle lights traveling at a high rate of speed, but there is no record evidence of how the Office came to these conclusions, what training he had in determining speed, or how he clocked the speed of the vehicle driven by the Defendant. The Court in *State v. Davis,* held that a reasonable suspicion "is one which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience. 849 So.2d 398, 400 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1477a]. In the case before the Court, there is ***no*** record evidence of the officer's training or knowledge on determining speed. The officer was not asked about "pace-clocking" the Defendant how any other manner in which he determined speed.

The Court relies on the holding in *Brown v. State,* that found in order to justify a warrantless stop an office must have an articulable, reasonable suspicion that a violation of the law has occurred. 719 So.2d 1243, 1245(Fla. 5th DCA 1998) [23 Fla. L. Weekly D2295a].

IT IS THEREFORE **ORDERED AND ADJUDGED** AS FOLLOWS:

The Defendant's Motion to Suppress is **GRANTED.**

The Defendant's Motion to Suppress Breath Test Results is **GRANTED.**

* * *

Civil procedure—Discovery—Depositions—Deponent's failure to notify other party of need for certified translator is tantamount to failure to appear for deposition—Sanctions

MARIA DIAZ PIZZARO, et al., Plaintiffs, v. MATRIX AUTO SALES INC., et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-003942-CC-23, Section ND05. July 11, 2021. Chiaka Ihekwaba, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hallandale, and Darren R. Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiffs. Juan C. Perez, for Defendant Matrix Auto Sales, Inc. Brittani R. Cole, McRae & Metcalf, P.A., Tampa, for Defendant Hudson Insurance Co.

ORDER AWARDING ATTORNEY FEES AND COSTS

THIS MATTER, having come before the Court on the Plaintiffs' Motion for Fees and Costs and the Court having reviewed the file and hearing argument of counsel, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiffs' Motion is **GRANTED**.

2. Pursuant to Fla. R. Civ. Pro, 1.1380(d) a Court has authority to grant sanctions for a party's failure to appear at a dully noticed deposition. In the event a deponent or its counsel fails to notify the other party of the need for a certified translator, resulting in the termination of the deposition, such a result is tantamount to the deponent failing to appear at all for the deposition.

3. Considering the Defendant's failure to advise Plaintiffs of the need for a certified translator, resulting in termination of the deposition of Defendant's corporate representative, sanctions are warranted in this instance.

4. This Court awards Attorney Joshua Feygin the total sum of $500.00 at an hourly rate of $300.00/hour.

5. This Court further awards Attorney Darren Newhart the total sum of $600.00 at an hourly rate of $400.00/hr.

6. This Court further awards the Plaintiffs their hard costs in the amount of $150.00.

7. In total, this Court awards $1,250.00 to the Plaintiffs.

8. The Court reserves ruling on the balance of the fees sought by Plaintiffs in their Motion upon final adjudication of this matter.

9. Defendant Matrix Auto Sales, Inc. is required to deliver said sum to Joshua Feygin, PLLC at 1800 E. Hallandale Beach Blvd. #85293, Hallandale, FL 33009 no later than FOURTEEN (14) days of the date of this Order.

* * *

Insurance—Property—Coverage—Forensic engineering report—Summary judgment—Factual issues

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-034310-SP-25, Section CG04. April 4, 2021. Scott M. Janowitz, Judge. Counsel: Leo Manon, III and Robert F. Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Brandon John Crane, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court on March 30, 2021 on Defendant's Motion for Summary Judgment. Having reviewed the court file, heard argument of the parties, and been advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1) Defendant moves for summary judgment that the Forensic Engineering Report is a service not covered under the policy.

2) Notably, Defendant cites *Celotex Corp. v. Catrell,* 477 US 317, 322 (1986) and also argues that "Plaintiff has failed to present any sworn evidence to suggest that payment for their services is due and owed under the Subject Policy." (Motion at Page 7). However, that is not the present standard.

3) "A movant is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mobley v. Homestead Hosp., Inc.,* 291 So. 3d 987, 990 (Fla. 3d DCA 2019) [45 Fla. L. Weekly D2a].

4) The Court finds the Defendant has not met its burden that the service is not a covered service.

5) Accordingly, the Court denies Defendant's Motion

* * *

Insurance—Dismissal—Failure to prosecute—Case is dismissed for lack of prosecution where medical provider failed to create record activity within one-year period and failed to show good cause—Notice of trial filed outside of one-year period does not preclude dismissal

BACUS CHIROPRACTIC, INC., d/b/a PALM AIRE, et al., a/a/o Markenson Valcin, Plaintiff, v. ALLSTATE INDEMNITY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001637-SP-24, Section MB01. June 28, 2021. Stephanie Silver, Judge. Counsel: Richard Patino, Patino Law Firm, Hialeah, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER DISMISSING CASE FOR LACK OF PROSECUTION

THIS CAUSE, having come before the Court on June 7 and 15, 2021 on this Court's Fla. R. Civ. P. 1.420(e) Notice of Lack of Prosecution, the Court having heard argument of counsel, and being otherwise fully advised in the premises, this Court finds as follows:

FACTS

1. Plaintiff filed this lawsuit on May 4, 2018. On October 1, 2018, this Court invoked the Florida Rules of Civil Procedure, including Rule 1.420(e), governing dismissal for lack of prosecution.

2. On November 2, 2018, June 14, 2019 and May 14, 2020, Plaintiff filed Notices of Trial.

3. There being no record activity for 10 months, on March 26, 2021, the Court noticed the case for dismissal for lack of prosecution ("Notice").

4. The Notice indicated that there was no record activity for a period of 10 months preceding and set a hearing on lack of prosecution to take place on June 7, 2021, more than 2 months from the date of the Notice.

5. More than 60 days elapsed with no record activity following the Court's Notice.

6. The parties appeared before the Court on June 7 and 15, 2021 for the Court to consider Defendant's argument that the Court was obligated to dismiss this case on June 7, 2021.

7. Plaintiff did not file any Notice of Good Cause at least five (5) days before the June 7, 2021 hearing. After the hearing, on June 10, 2021, Plaintiff filed discovery requests and discovery motions.

CONCLUSIONS OF LAW

Third District Court of Appeal case law construing Rule 1.420(e) mandates a two-step analysis for dismissal for lack of prosecution. First, the Court must determine whether there was Record Activity in the 10 months preceding and the 2 months following the Notice of Lack of Prosecution. Second, if there is no Record Activity during this one-year period, the Court must determine whether the Plaintiff has shown sufficient Good Cause. *Sebree v. Schantz, Schatzman, Aaronson & Perlman,* 963 So. 2d 842, 845 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1878a] ("*Sebree*"). In conformance with the "bright-line" tests set forth by the Supreme Court for analyzing record activity in the 10 months preceding the notice[1] and the 2 months following the Notice of Lack of Prosecution,[2] the first step of the analysis clearly favors the Plaintiff. *See Sebree* at 846 ("there is either activity on the record or there is not") (quoting *Wilson v. Salamon*, 923 So.2d 363, 368 (Fla. 2005) [30 Fla. L. Weekly S701c] ("*Wilson*")). Plaintiff, in this case, failed to create record activity in the 10 months preceding and the 2 months following the March 26, 2021 Notice of Lack of Prosecution.

There being insufficient record activity during the one-year period, the Court passes to the second step of the analysis. The second step favors the party seeking dismissal: "Our high court has made clear that the burden on the plaintiff at this juncture is indisputably "high". . . . [and] unsworn allegations or argument of counsel. . . will not satisfy the plaintiff's burden on a second-step analysis." *Sebree* at 846-47 (internal citations omitted). Plaintiff, in this case, failed to meet its heavy burden of establishing Good Cause. Plaintiff did not file any written, sworn Good Cause five days before Lack of Prosecution hearing.

Where a party fails to create record activity within the one-year period and fails to show Good Cause, the Court lacks the discretion to keep the case open. *Havens v. Chambliss,* 906 So. 2d 318, 319 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1518a] ("*Havens*"); *Burdeshaw v. Bank of New York Mellon*, 148 So.3d 819, 826-827 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2145a]; *Richards v. Sheriff of Palm Beach Cty*., 925 So.2d 1166, 1167-1168 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1153b].

Plaintiff would have the Court keep this case open because the Plaintiff filed a Notice of Trial on May 14, 2020, more than ten (10) months before this Court's Notice of Lack of Prosecution. The Court declines Plaintiff's invitation to rewrite Rule 1.420(e) and count as record activity filings outside of the one-year period. *See A-1 Presto Roofing Corp. v. Espinosa,* 51 So. 3d 566, 568 (Fla. 3d DCA 2010) [36 Fla. L. Weekly D4a] (holding that Plaintiff cannot have the court "create a fourth way to keep a case from being dismissed . . . by filing a paper after the sixty days have elapsed") ("*A-1 Presto*"). The Plaintiff cites to *Mikos v. Sarasota Cattle Company,* 453 So.3d 402, 403 (Fla. 1984) to support the Court's denial of the Defendant's Motion to Dismiss. In *Mikos*, the Florida Supreme Court stated that a Plaintiff had no obligation to do anything further on the case once a notice of trial had been filed. It is undisputed that the Plaintiff filed nothing after filing its Notice of Trial until the FWOP hearing.

The Plaintiff's reliance on *Mikos v. Sarasota Cattle Co.*, 453 So.2d 402 (Fla. 1984) ("*Mikos*") and *Fishe & Kleeman, Inc. v. Aquarius Condo. Assoc., Inc.*, 524 So.2d 1012 (Fla. 1988) to support the proposition that a Notice of Trial outside of the one-year period precludes dismissal for lack of prosecution is misplaced. *Mikos* and *Fishe & Kleeman, Inc.* were decided in the 1980's under the old *Gulf Appliance Distributors, Inc. v. Long*, 53 So.2d 706 (Fla. 1951) ("*Gulf Appliance*") standard for analyzing record activity rejected by the Supreme Court in 2006 and 2011, respectively in *Wilson* and *Chemrock*. In *Wilson*, the Florida Supreme Court decided "it is time we reexamine the intentions of this Court when we initially adopted this rule . . . *at 367. The *Wilson* Court determined "we recede from our prior interpretations [of the Rule] insofar as those interpretations require a trial court to look behind the face of the record to subjectively determine whether the activity of record is merely passive, and therefore insufficient to preclude dismissal under the rule, or active, and therefore designed to hasten the suit to a conclusion on the merits. . .we return to the plain meaning of the rule."

The *Wilson/Chemrock* standard requires the Court to apply a bright-line test to record activity. "[The language of the rule is clear—if a review of the face of the record does not reflect any activity in the preceding year the action shall be dismissed, unless a party shows good cause." *Wilson*, 923 So.2d at 368. Conversely, "a dismissal could not be obtained for inactivity alone unless there is no record activity for a period of at least one year. We would like to say that our meaning could not have been clearer." *Id*. at. 366. "[T]here is either activity on the record or there is not." *Wilson* at 368. This bright line rule by and large benefits the Plaintiff. It neither allows the Court to analyze filings within the one-year period to determine whether they are sufficient under the *Gulf Appliance* standard nor does it allow the Court to analyze filings outside of the one-year period as the Plaintiff asks the Court to do.

Both the Third District Court of Appeal in *A-1 Presto, supra,* and the Supreme Court in *Wilson* reaffirmed the bright-line rule even in the presence of a pending Notice of Trial outside of the year period. *See A-1 Presto* at 568; and *Wilson* at 366-67 (*quoting Metropolitan Dade County v. Hall,* 784 So.2d 1087, 1090 (Fla. 2001) [26 Fla. L. Weekly S267a]. Thus, the old *Mikos* and *Fishe & Kleeman, Inc.* exception to proceeding with lack of prosecution when there is a pending Notice of Trial was not only overwritten by the new bright-line standard applied to record activity under *Wilson* and *Chemrock*, but the specific fact of a Notice of Trial pending outside of the one-year period was specifically and explicitly contemplated and rejected as sufficient prosecution by both the Supreme Court and the Third District Court of Appeal.

Dismissals for lack of prosecution are without prejudice to the Plaintiff to re-file the lawsuit. However, Plaintiff requested the Court to add another exception to the lack of prosecution analysis set forth hereinabove; the proposed exception being where the underlying claim is outside of the Statute of Limitations. The Court is mindful of the harsh result here, but is bound by the mandatory proscription in Rule 1.420. Where a party fails to create record activity within the one-year period and fails to show Good Cause, the Court lacks the discretion to keep the case open even if the underlying claim is time-barred.

> The rule is mandatory; "[u]nless a party can satisfy the exceptions for in the rule, it specifically states 'shall dismiss,' and there is no discretion on the trial court's part if it is demonstrated to the trial court that no action toward prosecution has been taken within a year. . . ." We recognize the harsh result here, but just as we concluded in *F.M.C. Corp v. Chatham*, 368 So.2d 1307, 1308 (Fla. 4th DCA 1979), where the rule required dismissal and the statute of limitations had run, "[w]e have every sympathy for such a dire happening, but we are convinced that this is not the kind of good cause the rule envisages. . . ." We recognize that the rule, in this context, is inconsistent with the

conflicting public policy that litigation should be resolved on the merits and that clients should not lose their day in court for the faults of counsel. Nevertheless, as to the application of this rule, our hands, like the trial court's, are tied.

Havens at 319; *see also Burdeshaw*, 148 So.3d at 826-827 (the Rule is mandatory and the trial Court lacks discretion to keep the case open where there is insufficient record activity and good cause); *accord Richards*, 925 So.2d at 1167-1168.

For the foregoing reasons, it is ORDERED and ADJUDGED that the above case is hereby dismissed without prejudice. The trial order for August 2, 2021, is hereby vacated.

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[1]*Wilson v. Salamon*, 923 So. 2d 363, 367 n. 2 (Fla. 2005) [30 Fla. L. Weekly S701c] ("*Wilson*")

[2]*Chemrock Corp. v. Tampa Elec. Co.*, 71 So. 3d 786 (Fla. 2011) [36 Fla. L. Weekly S318a] ("*Chemrock*") (applying the *Wilson* bright line test to the 2 month period following the Notice of Lack of Prosecution).

* * *

Insurance—Property—Standing—Assignment—Validity—Section 627.7152, which establishes mandatory requirements for post-loss assignments of insurance benefits, is not applicable to policy that was in existence prior to effective date of statute—Further, assignee's services do not fall within services contemplated by statute

INDUSTRY STANDARD EXPERTS, LLC, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-012530-SP-25, Section CG03. July 4, 2021. Patricia Marino Pedraza, Judge. Counsel: Leo Manon, III and Robert F. Gonzalez, for Plaintiff. Ian M. Alperstein and Olivia Hansen, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS ON REHEARING

THIS CAUSE came on to be heard upon a Rehearing of Defendant's Motion to Dismiss, and the Court having reviewed the Motion, Plaintiff's Response and having considered arguments of counsel for both parties and the Court otherwise being advised in the premises, it is hereupon:

ORDERED AND ADJUDGED AS FOLLOWS:

Defendant's Motion to Dismiss is DENIED.

The Defendant argues that the Plaintiff's Complaint should be dismissed with prejudice because the assignment of benefits involved in this matter allegedly fails to comply with Florida Statute Section 627.7152 (2019). The Plaintiff responds that because the policy was in existence prior to the effective date of the statute, the statute does not apply to the policy in this case. The Court agrees with the Plaintiff.

The Court finds that both the pre-suit requirements and attorney's fees and costs are substantive rights pursuant to *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b]. The Court notes that the law that was in effect when the Policy went into effect would apply to the assignment of benefits contract at issue in this litigation. The Policy in this litigation went into effect on December 28, 2018, as evidenced by Exhibit A of Defendant's Motion to Dismiss. As such, Fla. Stat. 627.7152 is not applicable to the assignment of benefits contract attached to Plaintiff's Statement of Claim.

The Court also notes that even if *Menendez* did not apply to this action, that Fla. Stat. 627.7152 is specific as to the services it intends to govern over. Plaintiff's services do not fall within the services contemplated by the Florida legislature when enacting Fla. Stat. 627.7152. As such, Plaintiff is not obligated to comply with the requirements of Fla. Stat. 627.7152.

Defendant shall file an Answer to Plaintiff's Statement of Claim within twenty (20) days of the entry of this Order.

Defendant shall file responses to all outstanding discovery within forty-five (45) days of the entry of the Order.

* * *

Insurance—Discovery—Failure to comply—Sanctions

UNIVERSAL X RAYS CORP., 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. 2019-016150-SP-23, Section ND03. June 28, 2021. Linda Singer Stein, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Karen E. Trefzger, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM MAY 14, 2020 DISCOVERY ORDER AND GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS CAUSE came before the court on June 15, 2021, upon Defendant's Motion to Grant Relief from Court Order Dated May 14, 2020 and Plaintiff's Motion for Sanctions, and the Court having considered the motions, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Defendant's Motion to Grant Relief from Court Order Dated May 14, 2020 is DENIED and Plaintiff's Motion for Sanctions is GRANTED, for the following reasons:

Plaintiff propounded its First Request for Production on November 12, 2019 (the "document request"). As a result of Defendant's failure to respond, object or request an extension of time to respond to the document request, on May 1, 2020, Plaintiff filed its Ex Parte Motion to Compel. By Order dated May 14, 2020, this Court granted Plaintiff's Ex Parte Motion to Compel (the "Discovery Order"). On June 10, 2020, Plaintiff filed its Motion to Enforce the Discovery Order. On March 12, 2021, Defendant filed its response to the document request and produced responsive documents.

The Court finds the above described timeline to be not excusable. Pursuant to Rule 1.380(b)(2), Fla.R.Civ.P., the Court awards sanctions against the Defendant in the amount of $700.00, payment to be made within thirty (30) days from the date of the entry of this Order.

* * *

Insurance—Personal injury protection—Default—Vacation—Motion to vacate default is denied—Supporting affidavit is legally insufficient, insurer's answer alleging factual defense is not verified, and insurer did not act with due diligence, having failed to defend action for over three years

PAN AM DIAGNOSTIC SERVICES, INC., d/b/a WIDE OPEN MRI, a/a/o Dana Guillaume, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-003062-SP-21, Section HI01. June 17, 2021. Milena Abreu, Judge. Counsel: David S. Kuczenski, Schrier Law Group, Miami, for Plaintiff. Alberto Torres, Law Offices of Haydee de la Rosa-Tolgyesi, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SET ASIDE/VACATE DEFAULT

Comes now, the Court, after hearing on Defendant's Motion to To Set Aside the Order of Default, and after a review of the case history, relevant and applicable statutory authority, case law and arguments of both parties, the Court hereby rules as follows:

CASE HISTORY

1) A complaint for PIP benefits was filed by Plaintiff against Defendant on November 28, 2018.

2) The case was set for pretrial conference February 14, 2019, wherein defense counsel appeared on behalf of Defendant insurance company. At that time, the parties invoked the rules of civil procedure.

3) For the next two years, there was no activity on the case until a Default was entered by the Court on January 22, 2021 for Defendant's failure to file an Answer, Affirmative Defenses or otherwise defend the case in anyway.

4) Two months after the Default was entered, Defendant filed an Answer on March 17, 2021.

5) A Motion to Set Aside the Default was also filed by the Defendant on the same date.

6) The hearing on Defendant's Motion was set for June 2, 2021.

7) On the *same* day of the hearing, Defense counsel filed an Affidavit of attorney Albert Torres in support of Defendant's Motion to Set Aside the Default.

LEGAL ANALYSIS

Florida Rule of Civil Procedure 1.540(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect. . . .

the motion shall be made within a reasonable time, and for reasons 1, 2, and 3 and not more than one year after the judgment, decree, order or proceeding was entered or taken."

Additionally, the Courts of this state are generally liberal in setting aside default judgments, in order to permit a trial on the merits. *Cunningham v. White*, 390 So.2d 467, 468 (Fla. 3d DCA 1980). Therefore, the Court must decide whether 1) the defendant has demonstrated excusable neglect in failing to respond; 2) whether the defendant has demonstrated a meritorious defense; and 3) whether the defendant, subsequent to learning of the default, has demonstrated due diligence in requesting relief. The Defendant asserts in its Motion, that due to clerical error the assignment of this case was "misrouted" in sofar that Defendant believed the case had already been assigned to Geico Staff Counsel in another office. At the time of the filing of Defendant's Motion, there was no accompanying affidavit.

Florida law requires excusable neglect/mistake/inadvertence to be proven by sworn statements or affidavits. *Halpern v. Houser*, 949 So.2d 1155 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D599a]. The late filed Affidavit is filed by a *different* attorney who was not present at the original pretrial conference of February 14, 2019. (Attorney Claudia Mejides appeared on behalf of Defendant at the February 14, 2019 pretrial conference). The affiant also attests to the affidavit "to the best of his knowledge."

Although courts favor the disposition of cases on the merits, a trial court abuses its discretion when it set aside a default judgment that is a legally insufficient motion to vacate. See *Geer v. Jacobsen*, 880 So. 2d 717 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a]; *Church of Christ Written in Heaven of Georgia, Inc. v. Church of Christ Written in Heaven of Miami, Inc.*, 947 So.2d 557, 559 (Fla. 3d DCA 2006) [32 Fla. L. Weekly D106b].

The Court finds the Affidavit defective and legally insufficient for several reasons: 1) the affiant has no personal knowledge of how the case was "misrouted" as the date of the pretrial conference was held before the affiant was even a licensed attorney; 2) affiant/attorney subsequent review of any documents in this case is speculative at best and based on hearsay; 3) the affidavit fails to set out any factual basis to support the claim of excusable neglect or mistake in how the case was "misrouted"—(ie, who misrouted, when, what is the normal procedure for assigning cases, etc) 4) the attestation is faulty in that it twice proffers the affiant's testimony "to the best of his knowledge". See *State v. Rodriguez*, 523 So.2d 1141 (Fla. 1988); *State v. Socarras*, 502 So.2d 31; *Carter v. Cessna Finance Corp.*, 498 So.2d 1319 (Fla. 4th DCA 1986); *Garwood v. Equitable Life Assurance Society of U.S.*, 299 So.2d 163 (Fla. 3d DCA 1974); cert. denied 321 So.2d 553 (Fla. 1975).

With regards to the claim of a meritorious defense, the Defendant has the burden of establishing via affidavit or pleading, the existence of a meritorious defense. While Defendant has filed an Answer in this case, the Answer is not a verified answer. Defendant has asserted a *factual* Affirmative defense in this case. Specifically, Defendant has asserted the claimant does not qualify for PIP coverage for the date of loss as the claimant was not occupying a vehicle insured under the subject policy and the alleged car accident occurred outside the state of Florida; such a factual defense requires a verified Answer. See *Westinghouse Elevator Co., a Div. of Westinghouse Elec. Corp. v. DFS Constr. Co.*, 438 So.2d 125 (Fla. 2nd DCA 1983), holding "it is impermissible to allege that a meritorious defense exists without presenting ultimate facts to support that conclusion". *Id* at 127.

Lastly, the Court notes the Defendant did not act with due diligence in this case. Defendant appeared at the pretrial hearing in February of 2019 and had 20 days to respond. Thereafter, Defendant failed to respond to the properly served complaint, discovery requests or file an Answer not within 20 days, 3 months or even a year; Defendant has failed to defend this action in anyway for over a ***three*** year period. As such, Defendant's motion fails to meet the legal elements required for vacating a default.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Motion to Set Aside the Default is ***denied.***

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—Where insured twice advised that he was unavailable on unilaterally set EUO dates and requested that EUO be coordinated with his counsel, but insurer unilaterally scheduled third EUO, summary judgment is precluded by genuine issues of material fact as to whether insured willfully and materially breached policy by failing to appear for EUO—If jury finds material breach, insured would have opportunity to demonstrate that insurer was not prejudiced by breach

J & C IMAGING INC., a/a/o Anielo Vigo, Plaintiff, v. IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-023552-SP-25, Section CG03. July 9, 2021. Patricia Marino Pedraza, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Kristina A. Davis, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO ITS 'EUO NO-SHOW' DEFENSE

This matter having come before the Court on June 30, 2021, on Defendant Imperial Fire & Casualty Insurance Company's Motion for Summary Judgment as to its third affirmative defense regarding the insured patient's alleged failure to attend an Examination Under Oath (EUO), and the Court having heard argument of counsel and being otherwise fully advised therein, finds as follows:

BACKGROUND & UNDISPUTED FACTS

1. This is an action for damages seeking to recover unpaid PIP benefits, and for declaratory relief in which Plaintiff seeks a declaration that Defendant should be prohibited from unilaterally setting an EUO; and that Defendant is required to act reasonably towards its insureds relative to scheduling EUO's, etc.

2. On July 3, 2017, the insured purchased an insurance policy from Defendant, which included coverage for Personal Injury Protection benefits.

3. According to the pleadings, the insured was injured in an auto accident on May 2, 2018, (i.e., during the policy period), and sought medical care from Plaintiff. The Plaintiff's medical bills were submitted to Defendant for payment, but Defendant declined to remit payment because—according to Defendant—the insured failed to submit to an EUO.

4. When Plaintiff's pre-suit demand failed to trigger a payment from Defendant, this action followed.

5. In its Answer and Affirmative Defenses, Defendant alleged that the insured, failed to cooperate by failing to submit to an EUO requested by Defendant, and as a result, neither the insured nor the Plaintiff are entitled to receive PIP benefits.

6. Section 627.736(6)(g), Fla. Stat. (2013) states, in pertinent part:

(g) An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. . . .

Compliance with this paragraph is a condition precedent to receiving benefits. . . .

See, F.S., §627.736(6)(g), Fla. Stat. (2013).

7. Imperial's policy partially tracks the statute and it provides, in relevant part:

F. EXAMINATION UNDER OATH (EUO)

"You" and any "insured" making a claim, must submit to an examination under oath separately and apart from others, by any person named by "us" when or as often as "we" may reasonably require. This examination shall be at a place designated by "us" and may be recorded in video and/or audio format at "our" option.

. . .

Compliance with this section is a condition precedent to receiving benefits. If an "insured", omnibus insured, or any other person or organization making claim or seeking payment refuses to submit to or fails to appear at an EUO, "we" will not be liable for personal injury protection benefits.

(See, Policy at 16 attached to Defendant's Motion for Summary Judgment).

8. Defendant claims it noticed the insured's EUO three times:

Notice dated 7-12-18 for an EUO to commence on 7-19-18;
Notice dated 7-31-18 for an EUO to commence on 8-10-18;
Notice dated 8-14-18 for an EUO to commence on 8-31-18.

9. Defendant contends, and Plaintiff agrees, that each of these EUO notices were sent to the insured's personal counsel.

10. In opposition to Defendant's motion, Plaintiff submitted the Affidavit of Janet Gorguis, Esq., personal counsel for the insured.

11. According to the Gorguis affidavit, a written notice was sent to the Defendant on May 11, 2018, advising Defendant that she represented the insured.

12. Upon receipt of Defendant's first EUO request dated July 12, 2018 for a July 19, 2018, EUO, Ms. Gorguis sent a written notice to the Defendant advising that the insured was unavailable to attend the July 19, 2018, EUO because he was out of the country, and further requested that all future EUO requests be mutually coordinated with her office.

13. Ms. Gorguis further testified that she received a second EUO notice dated July 31, 2018 demanding that the insured submit to an EUO on August 10, 2018. This second request was also unilaterally scheduled, despite Ms. Gorguis' prior written request that the EUO be coordinated.

14. In response, Ms. Gorguis again wrote to the Defendant to advise that the insured was not available to attend the August 10, 2018, EUO because he was out of the country; and further requested (again) that all future EUO's be mutually coordinated with her office.

15. Despite its receipt of two written requests that the EUO be coordinated, Defendant proceeded to send a third unilateral EUO notice to the insured on August 14, 2018 requesting that the insured submit to an EUO on August 31, 2018. Defendant made no effort to coordinate the third EUO.

16. When the insured failed to appear for the EUO, Defendant issued a written notice dated September 12, 2018 formally denying the claim based on the insured's failure to submit to an EUO.

17. In her affidavit, Ms. Gorguis testified that the insured has always been ready, willing, and able to submit to an EUO, and simply asked that the date and time of the EUO be coordinated.

18. It is undisputed that Defendant never responded to any of the insured's written requests that the EUO be coordinated, and Defendant has not proffered any explanation for its failure or refusal to do so.

19. Defendant submits that the insured's failure to submit to the EUO in and of itself supports entry of summary judgment in its favor, and that the insured's explanation(s) for his failure to attend is/are irrelevant.

ANALYSIS

20. Under Florida law, an insurer's request for an insured to submit to an EUO is a post-loss obligation, which means that it is an obligation that arises after the policy is in effect, and after there has been a loss and a claim for policy benefits. See, *Nunez v. Universal Property & Cas. Ins. Co.*, __ So. 3d __ (Fla. 3rd DCA 2021) [46 Fla. L. Weekly D528a], 2021 WL 898179 (Fla. 3rd DCA). See also, *American Integrity Ins. Co. v. Estrada* , 276 So. 3d 905 (Fla. 3rd DCA 2019) [44 Fla. L. Weekly D1639a].

21. In *Estrada*, supra, the Court held that ". . .for an insurer to successfully establish a coverage defense based upon an insured's failure to satisfy post-loss obligations such that an insured forfeits coverage under a policy, the insurer must plead and prove that the insured has materially breached a post-loss policy provision. If the insurer establishes such a material breach by the insured, the burden then shifts to the insured to prove that any breach did not prejudice the insurer."

22. The *Estrada* court spent considerable time analyzing Florida law relative to cases involving an insured's failure to satisfy post-loss obligations and determined that Florida law "abhors" forfeiture of insurance coverage. See, *Axis Surplus Ins. Co. v. Caribbean Beach Club Ass'n, Inc.*, 164 So. 3d 684, 687 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1350c]. "Moreover, '[p]olicy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy . . . .' " *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 223 (Fla. 3d DCA 2006) [32 Fla. L. Weekly D2907a] (quoting *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744 (Fla. 2002) [27 Fla. L. Weekly S499a]).

23. "With these basic principles in mind, it is, unsurprisingly, well settled that, for there to be a total forfeiture of coverage under an insurance policy for failure to comply with post-loss obligations (i.e., conditions precedent to suit), the insured's breach must be *material*. See, *Amica Mutual v. Drummond*, 970 So. 2d 456 (Fla. 2nd DCA 2007) [32 Fla. L. Weekly D2907a] (concluding that the insured's failure to comply with a post-loss obligation "was a *material* breach of a condition precedent to [the insurer's] duty to provide coverage under the policy"); *Starling v. Allstate Floridian*, 956 So. 2d 511 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1100a] ("[A] *material* breach of an insured's duty to comply with a policy's condition precedent relieves the insurer of its obligations under the contract."). *Estrada* at 914.

24. If the insurer is able to demonstrate that the breach was material, then a further finding must also be made that the insured's non-compliance caused prejudice to the insurer. *Id*. But, if the insured's failure to submit to an EUO or satisfy other post-loss obligations was not a material breach of the policy, then it follows that an insured need not prove the absence of prejudice.

25. In *Lewis v. Liberty Mutual Ins. Co*., 121 So. 3d 1136 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1928a], the insurer requested that the insured submit to an EUO. The insured's counsel agreed to submit to an EUO, but only if the EUO was conducted at his office, or via telephone. The insurer refused to reset the EUO, and the claimant refused to appear unless it was conducted in the office of his counsel. The trial court entered summary judgment for the insurer based on the insured's refusal to submit to the EUO. In reversing the summary judgment for the insurer, the 4th DCA found that there was a genuine issue of material fact regarding whether the insured's refusal to attend the EUO under the conditions required by the insurer was '*unreasonable*' which served to preclude summary judgment for the insurer.

26. In *Himmel v. Avatar Property & Cas. Inc*. Co., 257 So. 3d 488

(Fla. 4th DCA 2018) [43 Fla. L. Weekly D2351b], a case eerily similar to the instant case, the insurer sought summary judgment based on the insured's failure to submit to a pre-suit EUO. The insured retained counsel who contacted the insurer and asked that the EUO be rescheduled. The insurer refused and then denied the claim when the insured failed to appear for the unilaterally scheduled EUO.

27. The trial court in *Himmel,* supra*,* found that the insured's failure to appear for the unilaterally scheduled EUO was a material breach of the policy.

28. But the 4th DCA in *Himmel* stated: "We begin our analysis by addressing the trial court's finding that Appellant [insured] breached the policy by failing to submit to an EUO. "An insured's refusal to comply with a demand for an [EUO] is a willful and material breach of an insurance contract which precludes the insured from recovery under the policy." *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300, 303 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a]. "If, however, the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented for resolution by a jury." *Haiman v. Fed. Ins. Co.*, 798 So.2d 811, 812 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a] (quoting *Diamonds & Denims, Inc. v. First of Ga. Ins. Co.*, 203 Ga.App. 681, 417 S.E.2d 440, 442 (Ga. Ct. App. 1992))."

29. The *Himmel* court went on to state: "Here, although it is undisputed that Appellant [insured] failed to appear for the scheduled EUO, the record evidence reflects that Appellant's counsel repeatedly requested to reschedule the EUO to a mutually convenient date and time due to unavailability. Appellant attached to his response in opposition to Avatar's motions for summary judgment evidence showing the efforts made to reschedule the EUO. Accordingly, Appellant presented evidence showing that he cooperated to some degree and/or provided an explanation for his noncompliance, which in turn created a question of fact as to whether there was a willful and material breach of the EUO provision, thus precluding entry of summary judgment.

30. The *Himmel* court concluded by holding that there was a material issue of fact as to whether the insured materially breached the provision of the insurance policy requiring him to submit to an EUO, which precluded summary judgment for the defendant insurer where the insured presented evidence showing that he cooperated to some degree and/or provided an explanation for his noncompliance with the policy provision (i.e., a written request that the EUO be rescheduled, etc.).

31. The courts in both *Himmel*, and *Lewis*, supra, cite to and rely upon the decision in *Haiman v. Federal Insurance Co*., 798 So. 2d 811 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a], which held that if the insured cooperates to some degree or provides an explanation for his noncompliance, then an issue of fact is presented for resolution by a jury and summary judgment is inappropriate.

32. Although a total failure to comply with a condition precedent can preclude an insured from recovering, if an insured cooperates to some extent, a fact question remains as to whether the condition is breached to the extent of denying the insured any recovery under the policy. See, *Solano v. State Farm* 155 So. 3d 367 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2068a], citing to *Haiman*. The *Solano* court cites to *Goldman, supra,* as an example of a 'total failure to comply'—unlike the instant case before the court.

CONCLUSION

33. The case before this court does not present a situation where there was a total failure to comply with the insurer's request to satisfy a post-loss obligation (i.e., an EUO).

34. Rather, the case before the court illustrates that the insured acknowledged the Defendant's request for an EUO and simply asked (twice) that the EUO be coordinated so that everyone involved could attend, but Defendant apparently refused to make any accommodation for this request.

35. While the court acknowledges that the insured's obligation to submit to an EUO is a post-loss obligation under the terms of the subject insurance policy, this court finds that there are genuine issues of material fact as to whether the insured willfully and materially breached the EUO policy provision where it is undisputed that the insured herein cooperated to some degree and/or provided an explanation for his noncompliance, and those issues must be decided by a jury. See, *Himmel (*genuine issue of fact as to whether the insured willfully breached the EUO provision where the insured asked that the EUO be coordinated / rescheduled and therefore cooperated to some degree or offered an explanation for his noncompliance*), Lewis (*genuine issue of fact regarding whether the insured 's failure to submit to the EUO was 'unreasonable' where the insured agreed to submit to an EUO if it were conducted at the office of his attorney*)*, and *Haiman (*if the insured cooperates to some degree or provides an explanation for his noncompliance, then a fact question is presented for the jury*)*, supra.

If the jury should find that there was a material breach of the EUO policy provision, then the insured would have the opportunity to demonstrate that the insurer was not prejudiced by his noncompliance. See, *Estrada*, and *Nunez*, supra. Accordingly, Defendant's motion for summary judgment regarding its EUO no-show defense is hereby DENIED.

* * *

Insurance—Personal injury protection—Motion to strike or exclude unpled or waived issues is granted—Bar to injection of new claim or theory subsequent to a recent Florida Supreme Court ruling that undermined the original claim or theory

RIGHT CHOICE MEDICAL & REHAB CORP., a/a/o Evelyn Martinez, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2013-123-SP-24 (01). December 14, 2018. Diana Gonzalez-Whyte, Judge. Counsel: Ryan Peterson, Patino Law Firm, Hialeah, for Plaintiff. Manuel Negron and Raul L. Tano, Shutts & Bowen LLP, Miami, for Defendant.

[Affirmed: Right Choice Medical & Rehab Corp. v. Allstate Fire and Casualty Insurance Company, Case No. 3D21-105 (Fla. 3d DCA, July 14, 2021)]

ORDER GRANTING ALLSTATE'S MOTION TO EXCLUDE/STRIKE ISSUES WAIVED AND/OR NOT PLED BY THE PLAINTIFF IN ITS COMPLAINT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED REPLY

THIS CAUSE, having come before the Court on September 11, 2018 on Defendant's Motion to Exclude/Strike Issues Waived and/or Not Pled by the Plaintiff and Plaintiff's Motion for Leave to File Amended Reply, the Court having reviewed Defendant's Motion, Plaintiff's Motion, heard argument of counsel, and being otherwise fully advised on the premises, this Court makes the following findings of fact and conclusions of law:

Material Facts

On January 17, 2013, the Plaintiff filed a three-count Complaint for PIP benefits payments in connection with an automobile accident. The Complaint specifically alleges that "the amount in controversy is $4,412.66[1], plus interest, penalty, and postage, if applicable." Count II of the Complaint, titled "Declaration of Rights against Defendant on Behalf of Plaintiff Related to Fee Schedules," asserted that the controversy at issue was "whether the Defendant may limit reimbursement to the fee schedules in Fla. Stat. 627.736(5)(a)(2) in light of the language in the policy form at issue here, which states that the Defendant shall pay a 'reasonable fee.' " The Plaintiff took the position, as articulated in its Complaint, that "the Defendant may not utilize the fee schedules in this case, as the language of Florida Statute

§627.736(5)(a)(2) is permissive in that an insurer 'may limit' reimbursement to the applicable Medicare and Worker's Compensation fee schedules" because "the insurer in this case did not exercise the option to limit reimbursement at the applicable fee schedules because it did not make clear that it would do so under the terms of the insurance policy issued."

On March 14, 2013, Allstate answered the Complaint by asserting only one defense, wherein Allstate quoted the language in its policy and asserted that Allstate's policy expressly elected reimbursement based on the fee schedule limitations authorized by the Florida PIP statute. Thereafter, the Plaintiff timely filed a Reply wherein it specifically asserted that "the fee schedule does not apply as the insurance policy in this case does not permit the insurer to pay pursuant to the fee schedule at issue." The Plaintiff further reiterated its position that it was seeking 80% of its bills, reasserting that "the Plaintiff submitted bills which were reasonable in price, and the Defendant is obligated to pay those bills." Notably, at no point did Plaintiff allege in its pleadings that Defendant miscalculated or misapplied the fee schedules.

On January 26, 2017, in *Allstate Insurance Company v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] (the "*Serridge* decision"), the Florida Supreme Court held that the policy language at issue in this case provides "legally sufficient notice" of Allstate's election to reimburse based on the fee schedule limitations. Following the *Serridge* decision, the Plaintiff allowed this case to lie fallow for approximately seven months. Thereafter, Plaintiff engaged in a flurry of record activity, including additional discovery and deposition requests, notices for trial, and a motion *in limine.* Critically, at no point in these filings did Plaintiff identify a new litigable issue.

It was not until July 12, 2018 that Plaintiff filed its "Motion for Leave to Amend to File Plaintiff's Amended Reply" in which Plaintiff attempted to raise new claims (hereinafter "*Unpled Issues*").[2] It was not until after the Florida Supreme Court issued its ruling in *Serridge* that Plaintiff first alluded to a different theory of recovery. Specifically, in its proposed Amended Reply, the Plaintiff alleged for the first time that Defendant misapplied the deductible, and that "the Defendant utilized the incorrect methods of calculating the reimbursement and/or fee schedules and has not paid at the schedule of maximum charges in the No Fault Act."

Legal Standard and Conclusions of Law

I. Unpled Issues

Florida law is well established that a party is bound by the issues as framed by its own pleadings, and the Complaint must be pled with sufficient particularity to permit the Defendant to prepare its defense. *See Assad v. Mendell,* 550 So. 2d 52, 53 (Fla. 3d DCA 1989). Inherent in that statement is the notion that a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings. *See, e.g., Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.,* 537 So. 2d 561, 563 (Fla. 1988) (if a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim); *Bank of Am. v. Asbury,* 165 So. 3d 808, 809 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1230a] ("Litigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are"). Furthermore, the law is clear that a judgment must be based on a claim or defense that was either properly pled or tried by consent of the parties. *See Goldschmidt v. Holman*, 571 So. 2d 422, 423 (Fla. 1990), This principle is so grounded in the law that the Florida Supreme Court has held that where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.,* 537 So. 2d at 563.

The Florida Supreme Court case of *Arky, Freed* is the seminal case holding that unpled claims and issues may not be tried. Relying on *Arky, Freed,* the Third District Court of Appeal has consistently held that parties are precluded from recovery on unpled claims tried without the consent of the parties. *See Sunbeam Television Corp. v. Mitzel,* 83 So. 3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] ("when a plaintiff pleads one claim but tries to prove another, it is error for a trial court to allow the plaintiffs to argue the unpled issue at trial"); *Bloom v. Dorta-Duque,* 743 So, 2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] ("[i]t is well settled that a defendant cannot be found liable under a theory that was not specifically pled"); *Robbins v. Newhall,* 692 So. 2d 947, 949 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D945b] (reversing final judgment where plaintiff had alleged three specific acts of negligence, but tried the case on a fourth alleged act that was never pled). Many other Florida courts have held that it is error for a trial court to allow a plaintiff to argue an unpled theory or cause of action at trial. *See E.I. Du Pont De Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A.,* 857 So. 2d 925, 930 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2171a]; *see also Straub v. Muir-Villas Homeowners Ass'n, Inc.,* 128 So. 3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (relying on *Arky, Freed* and *Du Pont* to find error in trial court's consideration of an unpled defense). *See also Cioffe v. Morris,* 676 F.2d 539, 543 n. 8 (11th Cir. 1982) (confirming that unpled issues tried without consent deny due process).

Numerous cases have followed *Arky Freed* to bar the injection of new claims or theories into an action, including in cases where the new claim or theory was devised to evade a recent ruling that undermined the original claim or theory. For example, in *Noble v. Martin Memorial Hospital Association, Inc.,* 710 So. 2d 567 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a], after nearly five years of litigation defending against a claim for money damages, defendant hospital filed a motion for summary judgment based on a newly decided federal case which would entitle the hospital to immunity. *Id.* at 568. Shortly after defendant's summary judgment motion was filed, the plaintiff filed a motion to amend its complaint to seek injunctive relief. *Id.* The trial court denied leave to amend and granted summary judgment to the defendant, and the Fourth District Court of Appeal affirmed. In affirming, the Fourth District reasoned that the "claim for monetary damages stood alone for over four years. This . . . is a case where [plaintiff] did not want injunctive relief until it appeared that his quest for monetary damages had come to an end." *Id.* The Fourth District held that the trial court properly exercised its discretion to deny leave to amend where it was clear the plaintiff "only wanted injunctive relief if his request for monetary relief was to be denied." *Id.* at 569.

II. Amendment of Pleadings

Leave to amend may be denied "if allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *State Farm Fire & Cas. Co. v. Fleet Fin. Corp.,* 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998) [24 Fla. L. Weekly D56b] (citations omitted). Under Rule 1.190, the test of prejudice to the nonmoving party is the primary consideration in determining whether a motion to amend should be granted or denied. *Lasar Mfg. Co., Inc. v. Bachanov,* 436 So. 2d 236, 238 (Fla. 3d DCA 1983). Florida law is clear that leave to amend is properly denied when there is a sufficient showing of prejudice to the opposing party in preparing for the "new issue." *See Designers Title Int'l Corp. v. Capitol C. Corp.,* 499 So. 2d 4, 5 (Fla. 3d DCA 1986) (trial court committed reversible error when it allowed plaintiff to amend its pleading at the end of trial to plead a new cause of action, "a material change which under the facts of this case greatly prejudiced the defendants").

Further, while as a general proposition leave to amend is freely granted, that general proposition diminishes as trial approaches and does not apply at all where prejudice would result. The trial court is "vested with the discretion to deny such motions where appropriate." *Noble,* 710 So. 2d at 567, 568.

It is well established Florida law that there comes a point in litigation where each party is entitled to some finality, and the rule of liberality gradually diminishes as the case progresses to trial, *Levine v. United Cos. Life Ins. Co.,* 659 So. 2d 265, 266-67 (Fla. 1995) [20 Fla. L. Weekly S444c] ("*Levine*"); *Alvarez v. DeAuguirre,* 395 So. 2d 213, 216 (Fla. 3d DCA 1981) (stating that "a trial judge may deny further amendments where a case has progressed to a point that liberality ordinarily to be indulged has diminished"); *Versen v. Versen,* 347 So. 2d 1047, 1050 (Fla. 3d DCA 1977) ("this rule of liberality does not authorize a party to state a new and different cause of action under the guise of an amendment, or if it will change the issue, introduce new issues, or materially vary the grounds of relief. . ."); *Ruden v. Medalie,* 294 So. 2d 403, 406 (Fla. 3d DCA 1974) ("a trial judge in the exercise of sound discretion may deny an amendment where the same materially varies from the relief initially sought, or where a case has progressed to a point that the liberality ordinarily to be indulged has diminished"); *U.S. v. State,* 179 So. 2d 890 (Fla. 3d DCA 1965) ("such amendments are not allowable if they would change the issue, or introduce new issues, or materially vary the grounds for relief" (emphasis omitted).

Moreover, an amendment must be denied where the amendment seeks to raise an issue that is inconsistent with the original pleading. *Warfield v. Drawdy,* 41 So. 2d 877 (Fla. 1949) ("We have discovered no case which authorizes such an amendment inconsistent with the allegations of the original bill") *see Bailey v. State Farm Mut. Auto. Ins. Co.,* 789 So. 2d 1181, 1182 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1739b] (affirming the trial court's order granting insurer's motion for summary judgment where the Plaintiff took inconsistent positions in parallel actions); *Salcedo v. Asociacion Cubana, Inc.,* 368 So. 2d 1337 (Fla. 3d DCA 1979) ("the universal rule which forbids the successful assertion of inconsistent positions in litigation precludes the acceptance of any such result").

Courts separately have held that leave to amend should not be granted where a party knew or should have known of the matter to be pled early in litigation, but declined to do so. *See U.S. v. State,* 179 So. 2d at 892-893; *Watkins v. Watkins,* 123 Fla. 267, 274 (1936) (" 'It is also held that applications to amend should be made promptly after the necessity for the amendment has been discovered' ") (quoting *Griffin v. Societe Anonyme La Floridienne J. Buttgenbach & Co.,* 53 Fla. 801, 830) (1907)); *San Martin v. Dadeland Dodge, Inc.,* 508 So. 2d 497, 498 (Fla. 3d DCA 1987) (affirming denial of leave to amend where "plaintiff, in the exercise of due diligence, should have been aware of the alleged basis for the proposed fraud count long before he sought to amend his complaint"); *U.S. v. State,* 179 So. 2d 890 (affirming denial of leave to amend where party knew of relevant facts two years before seeking leave to amend); see also *Tampa Bay Water v. HDR Engineering, Inc.,* 731 F.3d 1171, 1186 (11th Cir. 2013) [24 Fla. L. Weekly Fed. C672a] ("A district court may find undue delay when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings"); *Soltys v. Costello,* 520 F.3d 737, 743 (7th Cir. 2008) ("Eleventh hour additions . . . [are] bound to produce delays that burden not only the parties to the litigation but also the judicial system and other litigants.") (quoting *Perrian v. O'Grady,* 958 F.2d 192, 195 (7th Cir. 1992)); *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 72 (2nd Cir. 1990) (a trial court may "deny leave to amend where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant. . . The burden is on the party who wishes to amend to provide a satisfactory explanation for the delay").[3]

Courts have also separately held that a party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment. *Inman v. Club on Sailboat Key, Inc.,* 342 So. 2d 1069, 1070 (Fla. 3d DCA 1977); see also *Noble,* 710 So. 2d at 568 (holding a party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment). Moreover, a party may not defeat a summary judgment by altering previously filed pleadings, especially when the matters it seeks to present were available prior to summary judgment. *Boyd v. Int'l Fid. Ins. Co.,* 412 So. 2d 944, 945 (Fla. 3d DCA 1982).

Conclusions of Law

A party is bound by the issues as framed by its own pleadings, and the Complaint must be pled with sufficient particularity to permit the Defendant to prepare its defense. *Assad,* 550 So. 2d at 53; *see also Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.,* 537 So. 2d. at 563 (holding that claims must be pled with sufficient particularity at the outset of a suit for the concession that the insurer **did** properly elected to limit reimbursement to the schedule of maximum charges. In essence, Plaintiff now takes a position which is wholly inconsistent with the position that it vigorously litigated over the past five years of litigation.

Plaintiff was on notice of how the Defendant paid Plaintiff's bills before the instant lawsuit was filed and could have alleged the facts supporting this new alleged underpayment and the deductible issue in its original Complaint or even the original Reply, both before the Supreme Court decided that Defendant's policy properly elected the Fee Schedules.

Allowing the Plaintiff to amend its Complaint to raise new and inconsistent theories of recovery over five years into litigation, and after Defendant prevailed at the Florida Supreme Court on the sole issue pled and litigated in this case, would unfairly prejudice the Defendant. Defendant will also sustain prejudice because, consistent with the sole issue Plaintiff litigated being whether Defendant's policy properly elected the Fee Schedules, Defendant conceded numerous other defenses, including, as potentially applicable in this case, deficient demand.

As held by the Florida Supreme Court in *Levine, supra,* Defendant is entitled to finality in this five-year-old case. The prejudice to Defendant in having to litigate an entirely new issue which Plaintiff knew about before it filed the Complaint as well as the original Reply overrides Plaintiff's need to raise this issue five years after the inception of this lawsuit, and only after the Supreme Court ruled against Plaintiff on the sole dispositive issue litigated by the parties during the course of this litigation. It is clear that up until the finalization of the Florida Supreme Court's ruling in *Orthopedic Specialists* in favor of Allstate on the issue of policy language as to application of fee schedule, Plaintiff's position was that the *Serridge Issue* was the sole issue presented by this litigation and as such, *Orthopedic Specialists* is case-dispositive in this matter. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion to Strike/Exclude Issues Waived and/or not Pled by Plaintiff is GRANTED. Plaintiff's Motion for Leave to Amend its Reply is DENIED.

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[1]In its Complaint, the Plaintiff alleged that it submitted medical bills in the amount of $12,695.00 to the Defendant, and that Defendant had paid $5,587.34 for those bills. The amount alleged to be due from Defendant is equal to policy limits of $10,000.00 minus payments made by Defendant.

[2]Plaintiff's Motion alleges that the Plaintiff was seeking leave to file an Amended Reply to remedy "clerical mistake." The Court rejects Plaintiff's assertion that the changes in the proposed Amended Reply are merely clerical, and specifically finds that the new Reply raises new material issues not previously encompassed within the original pleadings.

[3]Decisions of the Federal courts construing federal rules of civil procedure identical

to Florida's rules of procedure have been held to be in point as to the proper construction of the Florida Rules. *U.S. v. State,* 179 So.2d 890 (1965); *Carson v. City of Fort Lauderdale,* 173 So.2d 743 (Fla. 2d DCA 1965).

* * *

Contracts—Motor vehicle sale—Arbitration—Where buyers signed and initialed every blank in sales agreement except arbitration provision, validity of arbitration provision has not been established—Motion to compel arbitration is denied

SUZANNE GIOVINAZZO and AUSTIN GULASH, Plaintiffs, v. SRQ AUTO, LLC, WELLS FARGO BANK, N.A., and HUDSON INSURANCE CO., Defendants. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 20 CC 6253. June 20, 2021. Renee Inman, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hallandale; and Darren Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. John P. Fleck, Jr., Bradenton, for Defendant SRQ Auto, LLC. James S. Myers, McElroy, Deutsch, Mulvaney & Carpenter, LLP, Tampa, for Defendant Hudson Insurance Co.

ORDER ON DEFENDANT SRQ AUTO'S (1) MOTION TO STRIKE THE PLAINTIFFS' RESPONSE TO THE DEFENDANT'S MOTION TO COMPEL ARBITRATION, AND (2) MOTION TO COMPEL ARBITRATION

This matter came before the Court for hearing on June 30, 2021 on the Defendant SRQ Auto's Motion to Compel Arbitration, filed by Defendant SRQ Auto (hereinafter "SRQ") on February 16, 2021, and SRQ's Motion to Strike the Plaintiffs' Response thereto, filed on April 15, 2021. Present at the hearing was counsel for all parties. Having heard the parties' presentations, reviewed the court file and being otherwise duly advised in the premises, the Court finds and rules as follows.

1. SRQ's Motion to Strike the Plaintiff's Response is **DENIED**.

2. The Court did not consider the affidavit of Austin Gulash.

3. This action pertains to the sale of an automobile in or about January 2020. As part of the sale, the Plaintiffs and SRQ signed a Retail Installment Contract and Security Agreement ("RICSA"), which provided, in pertinent part:

> PLEASE READ CAREFULLY! By agreeing to this Arbitration Provision you are giving up your right to go to court for claims and disputes arising from this Contract:
>
> • EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND US DECIDED BY ARBITRATION, AND NOT BY A COURT OR BY JURY TRIAL.
>
> • YOU GIVE UP ANY RIGHT THAT YOU MAY HAVE TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER IN ANY CLASS ACTION OR CLASS ARBITRATION AGAINST US IF A DISPUTE IS ARBITRATED.
>
> • IN ARBITRATION, DISCOVERY AND RIGHTS TO APPEAL ARE GENERALLY MORE LIMITED THAN IN A JUDICIAL PROCEEDING, AND OTHER RIGHTS THAT YOU WOULD HAVE IN COURT MAY NOT BE AVAILABLE.
>
> You or we (including any assignee) may elect to resolve any Claim by neutral, binding arbitration and not by a court action. "Claim" means any claim, dispute or controversy between you and us or our employees, agents, successors, assigns or affiliates arising from or relating to I the credit application, 2 the purchase of the Property, 3 the condition of the Property, 4 this Contract, 5 any insurance, maintenance, service or other contracts you purchased in connection with this Contract, or 6 any related transaction, occurrence or relationship. ***
>
> If either party elects to resolve a Claim through arbitration, you and we agree that no trial by jury or other judicial proceeding will take place. Instead, the Claim will be arbitrated on an individual basis and not on a class or representative basis.
>
> ***
>
> PROCESS TO REJECT THIS ARBITRATION PROVISION You may reconsider and reject your approval of this Arbitration Provision by sending a written notice to the Assignee . . . or if there is no Assignee, then to Seller. The notice must be postmarked within 30 days of the date you signed this Contract. It simply needs to state your decision to reject the Arbitration Provision in this Contract and include your signature. *** Rejecting this Arbitration Provision will NOT affect the terms under which we will finance and sell the Property to you or any other terms of this Contract, except that the Arbitration Provision will not apply.
>
> CAUTION: It is important that you read this Arbitration Provision thoroughly before you sign this Contract. By signing this Contract, you acknowledge that you read, understand and agree to this Arbitration Provision. If you do not understand this Arbitration Provision, do not sign this Contract; instead ask your lawyer. If you approve this Arbitration Provision, you have an additional 30 days after signing to reconsider and reject your approval, as described above. If you use that process to reject, this Arbitration Provision will not be a part of this Contract, but the rest of this Contract will still be binding and effective.
>
> ***

4. On the last page of the contract was the following:

> This Contract contains an Arbitration Provision that **affects your rights**. By signing this Contract, you agree that either of us may request and require the other to resolve disputes or claims through arbitration instead of a lawsuit. The Arbitration Provision includes a process you can follow in the next 30 days if you reconsider and want to reject the Arbitration Provision.
>
> By initialing this section, you confirm that you read, understand and agree to the Arbitration Provision in this Contract, including the process to reject it.
>
> Buyer initials _____ _____ _____
>
> Entire Agreement. Your and our entire agreement is contained in this Contract. There are no unwritten agreements regarding this Contract. Any change to this Contract must be in writing and signed by you and us.
>
> /s/ Suzanne Giovinazzo
> /s/ Austin Gulash
>
> Notice to Buyer a Do not sign this Contract before you read it or if it contains any blank spaces b You are entitled to an exact copy of the Contract you sign. Keep it to protect your legal rights.
>
> By signing below, you agree to the terms of this Contract. You received a copy of this Contract and had a chance to read and review it before you signed it.
>
> Buyer
>
> /s/ Suzanne Giovinazzo
> /s/ Austin William Gunnar Gulash

There is no dispute it was the Plaintiffs that purchased the vehicle and signed this agreement, and that neither Plaintiff initialed in the space immediately below the arbitration provision.

5. SRQ now moves to compel arbitration under the contract. *See* § 682.03(1)(b), Fla. Stat.

6. The Plaintiffs argue that they did not initial the arbitration clause, and thus did not agree to it and should not be compelled to arbitrate.

7. There are three elements the Court must consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *See Hobby Lobby Stores, Inc. v. Cole,* 287 So. 3d 1272 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D58a]; *Krol v. FCA US, LLC,* 273 So. 3d 198, 200-201 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1255a].

8. The threshold dispute presented here is whether there is a valid written agreement to arbitrate, "which must be decided by the trial court." *CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc.,* 201 So. 3d 85, 91-92 (Fla. 3rd DCA 2015) [40 Fla. L. Weekly D2110a]. *See* §§ 682.02(2), 682.03(2), Fla. Stat.

9. While generally, arbitration provisions are favored by the courts and all doubts should be resolved in favor of arbitration,"no such

presumption exists when the parties dispute whether they agreed to arbitrate." *UATP Mgmt., LLC v. Barnes,* __ So. 3d __, 2021 WL 1431617, *4 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D875a].

10. "Where a motion to compel arbitration has been filed and the arbitration agreement is valid on its face, it is the burden of the party seeking to avoid arbitration to demonstrate that the agreement is invalid." *4927 Voorhees Rd., LLC v. Mallard,* 163 So. 3d 632, 635 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D977a]. However, when there is a question as to the validity of the arbitration agreement, the burden is on the party seeking arbitration. *See UATP Mgmt.,* at *4; *Palm Garden of Healthcare Holdings, LLC v. Haydu,* 209 So. 3d 636, 638-639 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D215a]. *See also DeMello E. Silva v. Citibank N.A.,* 2020 WL 8115993, *3 (S.D. Fla.) ("[u]nder Florida law, the proponent of arbitration bears the burden to establish the existence of an agreement to arbitrate"); *Gustave v. SBE ENT Holdings, LLC,* 2020 WL 5819847, *3 (S.D. Fla.) (same).

11. The critical facts are not in dispute. The Plaintiffs purchased a vehicle from SRQ, and signed the RICSA, Buyer's Order and Buyers Guide that was admitted into evidence as SRQ's Composite Exhibit A. On the RICSA, the Plaintiffs initialed every page, and signed every signature spot (for "Single Interest Insurance," "Additional Protections," "Entire Agreement," and "Notice to Buyer"), *except* the initial spots for the arbitration provision.

The Plaintiffs rely on *Bevel v. Marine Grp., LLC,* 231 So. 3d 1074 (Ala. 2017) in support of their contention that this fact is "compelling indication" of an intention not to agree to arbitration. *Id.* at 1079. This Court agrees that, in this case, the fact that the Plaintiffs signed and initialed every spot *except* the arbitration provision is a compelling indication of their intention not to agree to arbitration. While there are portions of the contract that suggest that the Plaintiffs' signing of the contract was an agreement to the entire contract (including the arbitration provision), the area entitled "Arbitration Provision and Process to Remove" (where the Plaintiffs would have initialed) specifically states that "*[b]y initialing this section, you confirm that you* read, understand and *agree* to the Arbitration Provision in this Contract, including the process to reject it." (Emphasis added). This Court does not find that the validity of the arbitration provision has been established.

It is therefore **ORDERED AND ADJUDGED** that SRQ's Motion to Compel Arbitration is **DENIED**.

* * *

Insurance—Personal injury protection—Venue—Forum selection clause—Defendant's motion to dismiss based on improper venue is denied as it relates to policy's venue selection clause—Motion to dismiss for improper venue based on statute governing actions against domestic corporations is also denied, as defendant has not established that venue is improper under that statute

BAYSIDE REHAB CLINIC, INC., DONTAVIUS OAKLEY, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 20-CC-061233, Division K. August 30, 2021. Jessica G. Costello, Judge. Counsel: Timothy Allen Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Marsha Maria Moses, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR REHEARING AND ORDER DENYING "DEFENDANT'S MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051"

[Original Opinion at 29 Fla. L. Weekly D145c]

THIS MATTER came before this Court on August 10, 2021, on Plaintiff's Motion for Reconsideration and/or Rehearing filed May 10, 2021. Having reviewed and considered Plaintiff's Motion, Defendant's Opposition to Plaintiff's Motion filed August 2, 2021, argument of counsel for the parties, the court file, relevant case law, and being otherwise fully advised, the Court finds:

1. On February 16, 2021, this Court considered "Defendant's Motion to Dismiss re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051" filed January 7, 2021 ("Motion to Dismiss"). On March 29, 2021, this Court entered an Order granting Defendant's Motion to Dismiss in part based on the policy's venue selection clause, but denying the Motion to Dismiss as to Florida Statutes section 47.051.

2. On May 10, 2021, Plaintiff filed its Motion for Reconsideration and/or Rehearing seeking relief based on a ruling from the First District Court of Appeal in *Robles v. United Automobile Insurance Company*, __ So. 3d __, 2021 WL 1743606, 46 Fla. L. Weekly D1009a (Fla. 1 DCA May 4, 2021) relative to Defendant's policy's venue selection clause.

3. On August 2, 2021, Defendant filed its Opposition to Plaintiff's Motion for Reconsideration and/or Rehearing. Defendant argues that Plaintiff did not timely transfer this case pursuant to this Court's Order, and as such, seeks to have the matter dismissed. In the alternative, Defendant seeks sanctions against Plaintiff for causing delay in this matter. In addition, Defendant does not argue that *Robles* does not apply to this case, but does reassert its previous position that, independent of the venue selection clause, Florida Statutes 47.051 requires that this matter be filed and litigated in Miami-Dade County.

4. At the outset, the Court notes that although Plaintiff's Motion for Reconsideration asserts that "it appears that the Court overlooked or misapplied certain controlling principles of law in ruling upon Defendant's Motion to Dismiss," the binding First District Court of Appeal decision cited to by Plaintiff in its Motion had not been issued when this matter was previously before this Court. The Court also notes that in its opposition filed on February 10, 2021, Plaintiff did not include any argument addressing the forum selection clause, and certainly did not advance the argument raised in the *Robles* case.

5. However, this action has not yet been transferred and the Court does have inherent authority to reconsider any of its interlocutory rulings prior to final judgment. *See Seigler v. Bell*, 148 So. 3d 473, 478 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2012c] (stating "[m]otions for 'reconsideration' apply to nonfinal, interlocutory orders, and are based on a trial court's 'inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action' " (citations omitted)); *Helmich v. Wells Fargo Bank, N.A.*, 136 So. 3d 763, 765-766 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D882a]; *Hunter v. Dennies Contracting Co., Inc.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D796b], *rejected on other grounds Planned Parenthood of Greater Orlando, Inc. v. MMB Properties*, 211 So. 3d 918 (Fla. 2017) [42 Fla. L. Weekly S204a]. The Court does so and grants reconsideration of this matter.

6. Based on the First District Court of Appeal's decision in *Robles v. United Automobile Insurance Company*, __ So. 3d __, 2021 WL 1743606, 46 Fla. L. Weekly D1009a (Fla. 1 DCA May 4, 2021), "Defendant's Motion to Dismiss re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051" should be denied as it relates to the transfer of the action pursuant to the policy's venue selection clause.

7. In its Opposition, Defendant reasserts its position that transfer is required because venue is not proper under Florida Statutes section 47.051. The Court previously addressed Defendant's argument on this basis in its March 29, 2021 Order. Defendant has not presented anything that was not previously considered by the Court to meet its "burden of clearly proving that the venue selected by the plaintiff is

improper" and demonstrating where proper venue is. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.*, 238 So. 2d 665, 667 (Fla. 4th DCA 1970).

8. As the Court found in its previous order, although Defendant has established that venue is not proper in Hillsborough County and would be proper in Miami-Dade County based on the first venue option for domestic corporations in section 47.051,[1] the statute also provides two other alternatives for bringing action against a domestic corporation.

9. It is not sufficient for Defendant show venue is improper under one of the alternatives. Plaintiff has the option of bringing action against the Defendant in any county that meets one of the three venue possibilities set forth in section 47.051. *See Williams v. Union Nat'l Ins. Co.*, 528 So. 2d 454, 456 (Fla. 1st DCA 1988) (stating "[t]he plaintiff has the prerogative of selecting venue; and so long as the selection is one of the statutory alternatives, it will not be disturbed"). Defendant has not met its burden to establish venue is improper in Hillsborough County and proper in Miami-Dade County under the other venue possibilities for actions against domestic corporations.

10. As to the second venue alternative, although Defendant asserts in its Opposition that "the breach occurred in Miami-Dade County where payment is to be made," *see* Def.'s Opp'n at ¶ 17, the Court finds that the cited Affidavit of Defendant's corporate representative does not support that payment in this matter was to be made in Miami-Dade County.

11. As such, based on the information before the Court, Defendant has not established that transfer to Miami-Dade County is required pursuant to section 47.051, and Defendant's Motion to Dismiss should also be denied on this basis.

12. Further, the Court finds that the sanctions sought by Defendant against Plaintiff in its Opposition are not warranted.

Based on the foregoing it is therefore **ORDERED AND ADJUDGED**:

A. Plaintiff's Motion for Reconsideration and/or Rehearing filed May 10, 2021 is hereby **GRANTED**.

B. Defendant's Motion to Dismiss re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 filed January 7, 2021 is hereby **DENIED**. The action shall not be transferred and shall remain pending in Hillsborough County.

[1]Florida Statutes section 47.051 provides:
Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located.

* * *

Criminal law—Driving under influence—Search and seizure—Arrest—Fellow officer rule—Because fellow officer rule is applicable to warrantless arrests under section 316.645, "personal investigation" of arresting officer includes any information communicated by other officers who are active participants in accident investigation—Warrantless arrest of defendant at scene of single vehicle accident was lawful where arresting officer observed multiple indicia of impairment exhibited by defendant during DUI investigation and was told by fellow officer that eyewitnesses identified defendant as driver of crashed vehicle—Motion to suppress is denied

STATE OF FLORIDA, v. MARIELLE ROSE HIGGINBOTHOM, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Criminal Division. Case No. 20-CT-004123, Division E. July 8, 2021. John N. Conrad, Judge. Counsel: Andrew H. Warren, State Attorney, and Timothy Byrnes, Assistant State Attorney, Office of the State Attorney, Tampa, for State. Barry K. Taracks, Barry Taracks, P.A., Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come before the Court for hearing on May 20, 2021, pursuant to the Motion to Suppress filed by Defendant, Marielle Rose Higginbothom, and the Court having considered the testimony and evidence presented at the hearing, as well as the legal authority and argument presented by counsel for the State and Defendant, and being otherwise fully advised in this matter, hereby **FINDS** and **ORDERS** as follows:

FACTUAL BACKGROUND

Defendant is charged in this case with the crime of Driving Under the Influence ("DUI"). On March 15, 2020, around 3:55 a.m., Defendant was involved in a single-car accident when the vehicle she was operating crashed into the side of a building. Following the accident, three officers from the Tampa Police Department ("TPD") responded to the scene and conducted separate aspects of the investigation. All three officers testified at the hearing. At the time these officers arrived, Defendant had already exited the vehicle. Officer Jessica Martin indicated she responded to the location at the request of Officer James Wilcher who needed additional help processing the scene. Officer Martin took sworn statements from two eyewitness (Mr. Henry and Ms. Love) who saw the crash occur. These witnesses told Officer Martin they helped remove Defendant from the driver's seat of the vehicle following the crash and that Defendant was the sole occupant of the vehicle. Both eyewitnesses also identified Defendant, who was still at the scene, as the driver of the vehicle. Officer Martin communicated the details of her interview with these eyewitnesses, including their identification of Defendant as the driver of the vehicle involved in the crash, to the other two officers involved in the investigation—Officer James Wilcher and Officer Andrew Visser.

Officer Wilcher performed the traffic crash investigation and spoke directly with Defendant. While speaking with Defendant, Officer Wilcher observed Defendant to have the odor of alcohol emitting from her breath; glassy, bloodshot eyes; and slurred speech. Defendant admitted driving the vehicle involved in the crash and also told Officer Wilcher that she had been at a bar in Ybor City and "had a few shots."[1] Because there were a number of people yelling at each other following the crash, Officer Wilcher assigned Officer Martin the responsibility to interview any witnesses. Officer Wilcher described the scene as chaotic. Officer Wilcher communicated his interaction and personal observations of Defendant (odor of alcohol; glassy, bloodshot eyes; and slurred speech)[2] to Officer Visser. Officer Wilcher believed Defendant was impaired at the time.

Officer Visser testified that he is currently a traffic homicide investigator with TPD and was on the DUI enforcement squad for 8 years prior to this assignment. He was still assigned to the DUI squad on the date of this incident. Officer Visser also testified that he is a Drug Recognition Expert ("DRE"). After meeting with Officer Wilcher and learning of his observations regarding Defendant, as well as speaking directly with Officer Martin, Officer Visser initiated a DUI investigation of Defendant. Upon making contact with Defendant, Officer Visser also observed Defendant to have an odor of alcoholic beverages from her breath; glassy and bloodshot eyes; and slurred speech. Officer Visser asked Defendant if she would submit to Field Sobriety Exercises ("FSEs") and Defendant agreed. Officer Visser administered the following FSEs: the Horizontal Gaze Nystagmus ("HGN"); the Walk and Turn; and the One-Legged Stand. During the performance of HGN, Officer Visser stated that Defendant exhibited all 6 clues of impairment—3 in each eye. On the Walk and Turn exercise, Defendant exhibited 8 clues of impairment. On the One-Legged Stand, Defendant displayed 3 clues of impairment.[3] Based upon the totality of these physical observations of Defendant, as well as the information he received from Officer Martin that two

eyewitnesses observed Defendant operating the motor vehicle involved in the crash, Officer Visser arrested Defendant for DUI.

LEGAL ANALYSIS

Defendant's Motion to Suppress raises the legal argument that the warrantless arrest in this case was unlawful because none of the officers involved in this investigation personally observed Defendant in actual, physical control of the vehicle. Specifically, § 901.15(5), Fla. Stat., provides that an officer may arrest a person without a warrant when a "violation of chapter 316 has been committed in the presence of the officer." In the context of a DUI case, this statute has been construed to require the officer to personally observe all elements of the offense being committed in the officer's presence, including observing the defendant in actual, physical control of a vehicle. *See Sawyer v. State*, 905 So. 2d 232, 234 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1466c] (discussing circumstances for misdemeanor DUI arrest, including that " 'the officer witnesses each element of a prima facie case' . . .") (citation omitted).[4] In this case, the facts are undisputed that none of the investigating officers observed Defendant in actual physical control of a vehicle, and therefore, the Court finds § 901.15(5), Fla. Stat., cannot be used as a legal basis to justify Defendant's arrest in this case.

Alternatively, the parties addressed the application of § 316.645, Fla. Stat. (2020), as a legal justification for Defendant's warrantless arrest in this case. In order to determine whether this statute provides a legal basis to justify Defendant's arrest, the Court must properly construe the meaning and intent of this statute and further determine whether the "fellow officer rule" is applicable to an officer's "personal investigation", as required by the statute.

I. The Statute

Section 316.645, Fla. Stat., states the following:

> **Arrest authority of officer at scene of a traffic crash.**—A police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in the crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash.

It is important to note that the focus of this statute is solely on crimes committed under Chapters 316, 320, and 322, which would include DUI offenses. Rather than creating an exception to § 901.15(5), the Court believes this statute creates an extension of legislative authority to expand those circumstances under which a law enforcement officer could make a warrantless arrest, and more specifically, a DUI arrest. The clear language of § 316.645 authorizes a warrantless arrest if these delineated requirements are met: 1) the person arrested is involved in a traffic crash; 2) the arresting officer makes an investigation at the scene of the crash; 3) the arresting officer develops reasonable and probable grounds to believe that the person involved in the traffic crash has committed an offense under Chapters 316, 320, or 322; and 4) the basis for developing reasonable and probable grounds is based upon the ""personal investigation" of the arresting officer. Unlike § 901.15(5), this statute does not expressly require that all elements of the offense be committed in the presence of the arresting officer.

The facts in this case clearly establish that Defendant was involved in a traffic crash and that Officer Visser, who was the arresting officer, responded to the scene of the crash and conducted a DUI investigation. The Court finds that Officer Visser's physical observations of Defendant (odor of alcohol; glassy, bloodshot eyes; and slurred speech), coupled with his observation of multiple clues of impairment exhibited by Defendant during her performance of FSEs, constitute reasonable and probable grounds to believe Defendant was impaired at the time of the alleged offense. However, in analyzing whether the statutory requirements imposed under § 316.645 have been satisfied in this case, the Court must also consider whether Officer Visser's "personal investigation" revealed that Defendant was in actual, physical control of the vehicle that crashed. As previously stated, none of the officers observed Defendant in actual, physical control of the vehicle during their investigation and Officer Visser did not directly interview any witness who observed Defendant driving the vehicle. The evidence indicating Defendant was driving the vehicle that crashed was discovered through Officer Martin's interview of the two eyewitnesses who witnessed the crash and assisted Defendant in getting out of the driver's seat of the vehicle. The record is clear that Officer Martin communicated this information directly to Officer Visser, thereby providing Officer Visser with knowledge that Defendant was driving the vehicle involved in the traffic crash.

In order to determine whether Officer Visser's arrest of Defendant was justified under § 316.645, the Court must decide whether Officer Visser's "personal investigation" can include information provided directly to him by other investigating officers at the scene under the "Fellow Officer" rule. This would include the eyewitness testimony obtained by Officer Martin establishing that Defendant was in actual, physical control of a vehicle, a necessary element in arresting someone for DUI. Defendant argues that the phrase "personal investigation" must be narrowly construed and requires the Court to conclude that in any case where a defendant is no longer in the vehicle when the arresting officer arrives, the arresting officer must personally interview any witness who observed the defendant driving prior to the crash in order to make an arrest for DUI. Without conducting these interviews, Defendant argues that the "personal investigation" of the arresting officer would be missing the necessary element that the person arrested was in actual, physical control of a vehicle. In this case, because Officer Visser did not interview any of the eyewitnesses, Defendant argues that his "personal investigation" did not include evidence that she was driving a vehicle at the time of the alleged offense, and therefore, her arrest was unlawful.[5] This strict interpretation of the statute effectively prohibits the application of the fellow officer rule to investigations conducted under § 316.645.

On the other hand, the State argues that the fellow officer rule should apply in construing this statute. If applied, the State argues that Officer Visser's "personal investigation" would include the information obtained by Officer Martin that Defendant was the driver of the vehicle involved in the traffic crash. With this additional knowledge, all of the requirements imposed by § 316.645 would be satisfied by Officer Visser's "personal investigation" at the scene of the traffic crash, and therefore, Defendant's arrest was lawful. Furthermore, because there is no express language in the statute requiring the arresting officer to observe all elements of the criminal offense be committed in the officer's presence, the proper construction and intent of the statute is satisfied by applying the long-standing, fellow officer rule in assessing the scope of an officer's "personal investigation" under the statute.

II. The Fellow Officer Rule

The fellow officer rule has been an integral part of Fourth Amendment jurisprudence for decades. It was first recognized by the U.S. Supreme Court in *Whiteley v. Warden, Wyo. State Penitentiary,* 401 U.S. 560 (1971). In this case, the Supreme Court recognized the principle that "police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial determination of probable cause." *Id.* at 568. The fellow officer rule has been accepted and applied in Florida as justification for an arrest when information generated by one officer during the course of an investigation is communicated directly to another officer and relied upon by that other officer in establishing probable cause to make an arrest. The Florida Supreme Court explained the fellow officer rule in *State v. Bowers,* 87 So. 3d

704, 709 (Fla. 2012) [37 Fla. L. Weekly S136a] as follows:

> Accordingly, as applied in Florida, the fellow officer rule provides that if an officer relies on a chain of evidence to formulate the existence of probable cause for an arrest or a search and seizure, the rule does not require the officer to possess personal knowledge of each link in the chain of information if the collective knowledge of all the officers supports a finding of probable cause. The rule allows an officer to testify to a previous link in the chain for purpose of justifying his or her *own* conduct.

(citations omitted) (emphasis in original); *see* also *Smith v. State*, 719 So. 2d 1018 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2444a].

In *State v. Evans*, 692 So. 2d 216, 218 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D912a], the Court considered the propriety of information provided to an officer from a dispatcher who received a 911 call from a manager at a McDonald's restaurant. The Court included this analysis of the fellow officer rule: "In this case, it is difficult to see how Ms. Steele can be deemed an 'anonymous' caller: she provided her name, location, and occupation to the police. The ample information in the hands of the dispatcher regarding Ms. Steele's identity is constructively imputed to Officer Hall because Florida courts apply the 'fellow officer rule,' which operates to impute the knowledge of one officer in the chain of investigation to another." *Id.* (footnote omitted). Florida courts have applied the fellow officer rule to a variety of factual circumstances,[6] and have limited its application in other cases.[7] However, none of the cited cases limiting the application of the fellow officer rule involved a criminal investigation resulting from a traffic crash.

After conducting extensive research, this Court could not find a Florida Supreme Court or District Court of Appeal case that expressly states the fellow officer rule does, or does not, specifically apply to § 316.645 in establishing facts that constitute the "personal investigation" of an arresting officer in making an arrest under Chapter 316. The parties have provided this Court with various circuit and county court cases[8] that address this issue, but none of these cases are binding upon the Court and only use an interpretive analysis of the statute to justify the lower court's decision. Despite the lack of cases containing direct and explicit language applying the fellow officer rule to § 316.645, the Court finds the Florida Supreme Court decision in *Montes-Valeton v. State*, 216 So. 3d 475 (Fla. 2017) [42 Fla. L. Weekly S210a], to be very instructive.

In *Montes-Valeton*, the Florida Supreme Court considered "whether a blood draw after a traffic accident was constitutionally permissible under the fellow officer rule." The case involved a single-vehicle crash with a fatality. The first officer responding the scene, Sergeant Tejera, "observed Montes-Valeton's vehicle rolled over on its side and surrounded by a number of people." *Id.* at 477. Upon speaking with Montes-Valeton, Sergeant Tejera observed him to be "worried, disoriented, confused, and that he emitted an odor of alcohol about his breath." *Id.* These observations led Sergeant Tejera to be concerned that Montes-Valeton may have been under the influence of alcohol. Sergeant Tejera then delegated the role of lead traffic crash investigator to Trooper Molina and the two engaged in "general communications"; however, the record provided no indication "that Sergeant Tejera communicated his concerns about Montes-Valeton's possible intoxication to Trooper Molina or to any other law enforcement officer." *Id.*

Trooper Molina conducted a routine investigation at the crash scene, including examining physical evidence and speaking with witnesses and Montes-Valeton. "After this initial encounter, Trooper Molina asked if Montes-Valeton would consent to a blood draw. Trooper Molina then read the implied consent warnings that came with the blood draw kit to Montes-Valeton. Thereafter, Montes-Valeton agreed to the blood draw by signing a written consent form provided by Trooper Molina that stated, 'I have granted permission for blood samples to be taken.' Trooper Molina oversaw the blood draw performed by fire rescue and determined that Montes-Valeton was at fault for the traffic crash." *Id.* At trial, Trooper Molina testified that, while speaking to Montes-Valeton, "he did not detect the odor of alcohol" and "could not recall whether Montes-Valeton appeared to be under the influence." *Id.* Montes-Valeton appealed his conviction arguing that the blood test results should not have been admitted because Trooper Molina lacked probable cause to require him to submit to the blood draw under section 316.1933(1)(a).[9]

The primary question addressed in *Montes-Valeton* was whether the fellow officer rule allowed the combined knowledge and observations made by both Trooper Molina and Sergeant Tejera to establish probable cause that Montes-Valeton committed the crime of DUI even though the officers did not communicate this knowledge to one another. In discussing the fellow officer rule, the Court noted that "[t]he primary purpose of the fellow officer rule is 'to assist officers investigating in the field to make arrests and conduct searches' because 'an officer in the field may need to act immediately *based on what he or she is told by a fellow officer.*' " *Id.* at 478 (quoting *State v. Bowers*, 87 So. 3d 704, 707-08 (Fla. 2012) [37 Fla. L. Weekly S136a]) (emphasis in original). The Court reaffirmed its holding in *Voorhees v. State* emphasizing that the rule allows an assumption of probable cause when information has been supplied by another officer, but "does not allow an officer to assume probable cause for an arrest or a search and seizure from uncommunicated information known solely by other officers." *Id.* at 479 (quoting *Voorhees*, 699 So. 2d 602, 609 (Fla. 1997) [22 Fla. L. Weekly S357a]). Because nothing in the record indicated that "Sergeant Tejera or any other officer involved in the investigation directed Trooper Molina to take a blood draw from Montes-Valeton, gave any indication that probable cause existed for such a blood draw, or communicated anything regarding Montes-Valeton to Trooper Molina," the Court found that "the predicate for application of the fellow officer rule [was] lacking" and Trooper Molina "lacked imputed probable cause knowledge of Montes-Valeton's intoxication under the fellow officer rule." *Id.* at 479. As such, the Court concluded that the fellow officer rule was impermissibly relied upon "when there had been no communication concerning the suspect from the officer possessing probable cause to the officer effecting the search." *Id.* at 476.

The importance of *Montes-Valeton* is that the Florida Supreme Court considered the applicability of the fellow officer rule to a traffic crash investigation that involved an individual suspected of committing a DUI. It is clear from this decision that had Sergeant Tejera communicated his observations and concerns about the defendant's intoxication to Trooper Molina, the Court would have applied the fellow officer rule in imputing this knowledge to Trooper Molina, thereby giving Trooper Molina sufficient, probable cause to request a blood draw from the defendant.

CONCLUSION

In light of the *Montes-Valeton* decision, the Court concludes that the fellow officer rule would apply to criminal investigations conducted under § 316.645, and as such, the "personal investigation" of the arresting officer would include any information communicated to this officer by other officers who are active participants in the investigation which occurs at the scene of a traffic crash. This "common sense" interpretation of the statute recognizes the realities of traffic crash investigations where, as in this case, the scene was "chaotic" and there was a need for multiple officers to be involved in order to conduct both the traffic crash investigation and the DUI investigation. It also addresses the real-world scenario where potential eyewitnesses have already been interviewed by other officers and left the scene before the DUI/arresting officer arrives.

This construction of the statute further recognizes the specific legislative intent reflected in § 316.645 to address the commission of

crimes under Chapters 316, 320, and 322, that are associated with traffic crashes. The Court believes the narrow, statutory interpretation argued by Defendant would subvert the express authority this statute extends to law enforcement officers to arrest individuals committing criminal offenses that are discovered through traffic crash investigations, including DUIs. This limitation on the scope of "personal investigation" would effectively authorize a DUI arrest only if the arresting officer interviewed every witness to the traffic crash, including any eyewitnesses who observed the defendant driving, but would not allow the DUI arrest if the arresting officer relied upon another officer's interview of those same eyewitnesses. The Court believes this construction of the statute would be arbitrary and capricious and would undermine the practical purpose behind the fellow officer rule in facilitating criminal investigations.

Accordingly, the Court finds that the "personal investigation" conducted by Officer Visser included the information communicated directly to him by Officer Martin and Officer Wilcher. In particular, this included the information obtained by Officer Martin from her interview of two eyewitnesses who identified Defendant as the driver of the vehicle involved in the traffic crash. As such, Officer Visser's "personal investigation' contained specific knowledge that Defendant was in actual, physical control of a vehicle at the time of the offense. This knowledge, when combined with Officer Visser's observations of Defendant's physical appearance and her performance on field sobriety exercises, provided Officer Visser with sufficient facts to establish reasonable and probable grounds to believe Defendant had committed a DUI offense under § 316.193. Therefore, the Court finds that Defendant's arrest in this case was lawful under § 316.645 and Defendant's Motion to Suppress is hereby **Denied.**

[1]Because of the accident report privilege, the Court is not relying upon Defendant's admissions to Officer Wilcher that she had been driving and had consumed alcohol that evening in determining whether Officer Visser had probable cause to arrest Defendant.

[2]See *State v. Cino*, 931 So. 2d 164 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1353a].

[3]During his testimony, Officer Visser explained in detail the specific clues of impairment Defendant exhibited during her performance of each FSE.

[4]In *Sawyer*, the Court further acknowledges the authority of an officer to make a DUI arrest when the officer is investigating an accident and develops probable cause to charge DUI. In reaching its conclusion, the Court states:

> "Here, the arresting officer never observed Sawyer in control of a vehicle, and there was no accident." *Id*. This statement suggests that if Sawyer had been in involved in an accident, the Court may have upheld the arrest based on the eyewitness testimony that Sawyer was driving, even though the officer did not observe Sawyer in control of a vehicle.

[5]During the hearing on the Motion, defense counsel conceded that had Officer Visser personally interviewed the two eyewitnesses who observed Defendant driving the vehicle, his arrest of Defendant would be legally justified under § 316.645.

[6]*See State v. Boatman*, 901 So. 2d 222 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D961a] (fellow officer rule applies to misdemeanor cases); *State v. Maynard*, 783 So. 2d 226 (Fla. 2001) [26 Fla. L. Weekly S182b], and *Pasha v. State*, 225 So. 3d 688 (Fla. 2017) [42 Fla. L. Weekly S569a] (fellow officer rule applies to information provided by police dispatcher who received the information from a 911 caller); and *Huebner v. State*, 731 So. 2d 40 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D718a] (fellow officer rule applies to information supplied by an off-duty officer to the arresting officer);

[7]*See M.W. v. State*, 51 So. 3d 1220 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D111c] (fellow officer rule does not apply to information provided by a school administrator to law enforcement); and *Steiner v. State*, 690 So. 2d 706 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D850a] (private security guard's knowledge cannot be imputed to an officer under the fellow officer rule).

[8]*Sisois v. State, Dept. of Highway Safety and Motor Vehicles*, 22 Fla. L. Weekly Supp. 872a (Fla. 6th Cir. Ct. (appellate) March 5, 2015); *State v. Mazurak*, 17 Fla. L. Weekly Supp. 825a (Fla. Orange Cty. Ct. June 1, 2010); *Janney v. State*, 6 Fla. L. Weekly Supp. 4a (Fla. 9th Cir. Ct. (appellate) Sept. 24, 1998); *State v. Fonte*, 3 Fla. L. Weekly Supp. 363a (Fla. Hillsborough Cty. Ct. July 28, 1995).

[9]Section 316.1933(1)(a) states the following: "If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages, any chemical substances, or any controlled substances has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving or in actual physical control of the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances as set forth in s. *877.111* or any substance controlled under chapter 893." This probable cause standard would be analogous to the "probable grounds" standard required in § 316.645.

* * *

Insurance—Property—Coverage—Summary judgment—Factual issues—Insurer's motion for summary judgment on ground that forensic engineering report is not covered service under policy is denied—Reasonable jury could return verdict in favor of plaintiff since there is no language in policy that specifically excludes coverage for report

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Robert Compton, Plaintiff, v. FEDNAT INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 20-28-SC. June 25, 2021. E. William Dyer, Judge. Counsel: Leo Manon III, and Robert Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Rebecca D. Gilliland, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JIDGMENT

THIS CAUSE having come before the Court for hearing on the Defendant's Motion for Summary Judgment and having heard the argument of counsel and reviewed the file and being fully advised in the premises finds and orders as follows:

Defendant issued a Policy of Insurance to Robert Compton for his residence located at [Editor's note: address redacted], Panama City, Bay County, Florida. This policy provided coverage from April 30, 2018 to April 30, 2019. During this coverage period Hurricane Michael struck Bay County, Florida casing damage to the above referenced residence. As a result of this damage, the Defendant issued payment to the insured for damages determined to be covered under the Policy of Insurance.

On December 11, 2018, Robert Compton executed an assignment of benefits (AOB) to the Plaintiff to assess and identify damage to the subject property caused by Hurricane Michael. On December 26, 2018, Plaintiff performed a "forensic engineering inspection" of the subject property and subsequently issued a report. Plaintiff invoiced the Defendant the amount of $3,500.00 for services relating to the inspection. This invoice was denied by the Defendant asserting the forensic engineering report was not covered property damage under the Policy of Insurance.

Defendant requests its Motion for Summary Judgment be granted on the grounds that there is no genuine issue of material fact and that there is no coverage under the Policy of Insurance for the forensic engineering inspection. Under the new Amendment to the Florida Rule of Civil Procedure 1.510, the correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In this case, it is undisputed that Hurricane Michael caused a direct physical loss to the subject property during the coverage period. There is no language contained in the Policy of Insurance that would specifically exclude coverage for the forensic engineering inspection.

Defendant asserts the engineering report is reasonable and necessary to identify the cause and origin of losses and to determine the steps necessary to repair the subject residence. Plaintiff relies upon the deposition testimony of the Defendant's Corporate Representative and the affidavit of a general contractor in support of its theory that the forensic engineering report reasonable and is covered under the Policy of Insurance.

Based on the facts presented to this court, the question of whether the forensic engineering report is a covered service under the Policy of Insurance is a genuine issue of material fact. This Court is unable to determine that a reasonable jury could not return a verdict in favor of the Plaintiff concerning this issue. Therefore, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is **DENIED**.

* * *

Insurance—Property—Standing—Assignment—In ruling on motion to dismiss on grounds that assignment was invalid and that policy does not provide coverage for services provided, court must not go beyond four corners of complaint to interpret insurance policy or assignment contract—Motion to dismiss is denied

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o John Milford, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY, d/b/a FRONTLINE INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 19-4907 SC. November 17, 2020. Timothy C. Campbell, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Giselle Maranges, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE having come before the Court October 15, 2020 on Defendant's Motion to Dismiss. Defendant filed its Motion to Dismiss Plaintiff's complaint based on several grounds. Plaintiff filed its Amended Statement of Claim which corrected the name of Defendant and attached a copy of the assignment contract between Plaintiff and the insured John Milford. On the day of the hearing Plaintiff filed a copy of the insurance policy as well as the invoice for services rendered to the homeowner. The correct defendant is now listed as a party. The Amended Statement of Claim lists a claim number and states "Defendant acknowledged the loss." The loss referred to is damage caused by hurricane-force winds on October 10, 2018. The complaint alleges a cause of action for breach of contract. The correct defendant has been brought before the jurisdiction of the Court. It is a finding of the Court that the required documents were incorporated by reference in the complaint according to Florida Rule of Civil Procedure 1.130. At this stage, a dismissal for failure to attach a document to the complaint would necessarily be "with leave to amend" to allow the document (which is already within the court file) to be attached and filed. Such a dismissal would be an unnecessary delay. The Court in a Small Claims case has the prerogative to invoke additional Rules of Civil Procedure on "the court's own motion." Fla. Small Cl. Rule 7.020. Many of these hurricane-related cases have been delayed enough because of damage to our courthouse by Hurricane Michael and because of procedures mandated by our governor and the Florida Supreme Court because of COVID-19. The Court therefore finds it necessary to invoke Fla. Rule of Civil Procedure 1.130. That rule allows documents on which an action may be brought *to be incorporated* in or attached to the pleading. The rule also states "no document shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instruments." Subsection (b) states "statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion." Fla. Rule of Civil Procedure 1.130 (Jan. 2017). The amended complaint sufficiently refers to the insurance policy. Counsel for both parties seem to be working with the same policy.

Defendant requests the Court to dismiss the Amended Statement of Claim because 1)Since the Assignment of Benefits is invalid and unenforceable, the claim fails to state a cause of action, 2) The insurance policy does not provide coverage for the service allegedly provided to the homeowner and 3) Plaintiff failed to attach to the complaint a policy of insurance or the invoice or other document showing scope of services provided or to be provided, and a price agreed between Plaintiff and the homeowner. The assertion that the assignment is invalid and not enforceable alleges two subparts—that it was totally nonbinding since the condition precedent set forth had not yet occurred, and that fundamentally a contract was not formed because the assignment did not contain sufficiently specified language as to the scope of work or the price to be paid for the work.

The formation of a contract issue involves the contract between Plaintiff and the homeowner, to wit, the assignment. There is no argument whether the policy of insurance is a valid contract. The fact that a dollar figure for services to be performed by the contractor is not a specific written amount in the assignment is not dispositive of the issue about formation of a valid contract. Contingency fee contracts are common between attorneys and their clients as to certain types of services. Florida law does not prohibit assignment of claims on an insurance policy. See *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.,* 165 So.3d 749,752-753 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]. Courts in Florida have held "whenever possible a contract should receive such construction as will uphold it rather than render it invalid." *Hunt v. First National Bank of Tampa,* 381 So2nd 1194 (Fla. 2nd DCA 1980). Plaintiff argues the assignment contract provided a quid pro quo in that the homeowner "contracted for services in exchange for the assignment." Consideration for a contract may be provided in many different forms. Refraining from enforcing a legal right may constitute valid consideration for a contract. See *Loper v. Weather Shield Manuf., Inc.,* 203 So. 3d 898 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1492a]. As Plaintiff points out, the price for Plaintiff's services were not left to the determination of the insurance company. "A contract may be supported by any act of the plaintiff from which the defendant derives a benefit, or it may be supported by any labor, detriment, or inconvenience, however small, sustained by the plaintiff, if such act as performed or inconvenience suffered is by the consent express or implied of defendant." *Tampa N. R.R. Co. v. City of Tampa,* 140 So. 311, 313 (Fla. 1932). The question in this case is the formation of a contract not with the defendant, but between the insured and the plaintiff. Plaintiff alleges in the Amended Statement of Claim that the services contracted for were performed by Plaintiff. Thus, taking the facts in favor of the nonmoving party, Plaintiff has completed its side of the bargain. Thus, any claim that the assignment contains a condition precedent which gives the insured the unilateral right to cancel the contract is without merit.

Defendant asserts the claims in Plaintiff's complaint are not covered in the policy of insurance. Defendant cites *Vazquez v. Citizens Property Insurance Corporation,* WL 5406523 (Fla 3rd DCA 2019). However, the Court in *Vazquez v. Citizens Property Insurance Corporation,* 45 Fla. L. Weekly Supp. 642a (Fla. 3d DCA 2020) in its opinion filed March 18, 2020 withdrew its previous opinion filed October 23, 2019 and substituted its opinion to be more consistent with its opinion in *Servando Vazquez v. Southern Fidelity Property and Casualty Inc.,* 230 So. 3d 1242 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2174b]. The case involved an argument over whether actual cash value included matching costs. The case at bar does not involve payment to match tiles which were not damaged by the storm. The discussion in the *Vazquez* opinion about direct physical loss was whether the tile flooring not damaged should be paid for in order to match the new tile. "The Court noted that Ms. Vazquez had chosen to bring suit based on the actual cash value owed and ruled that, as a matter of law, actual cash value did not include matching." See *Vazquez.,* above. That case did not involve payment of the engineer for services in finding the direct physical loss. Furthermore, the Appellate Court in *Vazquez* found the lower court committed a procedural error by entering summary judgment based on the effect of the ruling on the motion in limine, without due process.

When considering a motion to dismiss, the Court must confine itself strictly to the allegations "within the four corners of the complaint*" Pizza v. Central Bank And Trust Company,* 250 So.2d 895 (Fla. 1971). See also *Hanano v. Steven P. Petrou, M.D., Mayo Clinic, and St. Luke's Hospital Assoc.,* 683 So. 2d 637 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2566a]. This Court when considering a motion to dismiss may not determine questions of fact and interpret the insurance policy or determine the veracity of the plaintiff's allegations. *Hamide v. State Dept. of Corrections.,* 548 So. 2d 877 (Fla. 1st DCA 1989). The Court must construe an insurance contract as a whole. *Bioscience West, Inc. v. Gulfstream Property And Casualty*

Insurance Co., 185 So. 3d 638, (Fla. 2nd DCA 2016) [41 Fla. L. Weekly D349a], citing *Fla. Peninsula Ins. Co. v. Cespedes,* 161 So. 3d 581 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D14b] and *Washington Nat'l. Ins. Corp. v. Ruderman,* 117 So. 3d 943 (Fla. 2013) [38 Fla. L. Weekly S511a]. Defendant asks this Court to interpret certain language in the complaint a certain way. Defense Counsel has focused on the phrase "direct physical loss to property." Plaintiff maintains the loss occurred on October 10, 2018, the date when Hurricane Michael swept through and damaged the property owned by the homeowner (assignor). Defendant does not deny Hurricane Michael damaged the property listed in the insurance policy. Plaintiff's assertion is that the definition of "loss" in the policy was met and established when the event causing the damage occurred, to wit, Hurricane Michael. This court has reviewed the policy but cannot place itself in the position of trier of the facts. This case is to be set for trial by jury. The policy contains various definitions including "Hurricane loss," and "Insured location.", "property damage," and "occurrence." Counsel for each party has put forth a different interpretation of the phrase in the policy "We insure against risk of direct loss to property." An observation one might consider is that the complete phrase might be subject to different interpretations. So "risk of" might change the meaning of the sentence and the coverage.

The primary purpose of a motion to dismiss for the court is to determine whether, assuming all the allegations in the complaint to be true, the complaint properly states a cause of action upon which relief can be granted. *Provence v. Palm Beach Taverns, Inc.,* 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] and *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d].

Considering the standard required for a Motion to Dismiss, the Court cannot conclude as a matter of law that Plaintiff has not put forth in the Amended Complaint a viable cause of action upon which relief can be granted. The Court hereby finds the complaint does contain the elements of a valid claim for breach of contract.

Therefore, it is

ORDERED AND ADJUDGED that:

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

* * *

Insurance—Property—Standing—Assignment—In ruling on motion to dismiss on grounds that condition precedent to formation of assignment contract was not met and that assignment was invalid due to insufficient specification of scope of work and price, court must not go beyond four corners of complaint to interpret insurance policy or assignment contract—Motion to dismiss is denied

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Richard Ammerman, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY, d/b/a FRONTLINE INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 20-155 SC. November 18, 2020. Timothy C. Campbell, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Giselle Maranges, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE having come before the Court October 1, 2020 on Defendant's Motion to Dismiss. Defendant filed its Motion to Dismiss Plaintiff's complaint based on several grounds. Plaintiff filed its Amended Statement of Claim which attached a copy of the assignment contract between Plaintiff and the insured. The amended complaint alleged in paragraph 15 that "Defendant acknowledged the loss and assigned an adjuster and the claim number . . . . for same." At the hearing on the motion to dismiss defense counsel agreed that the requirements of Fla. Rule of Civ. P. 1.130 were met in the amended claim with the attachment and incorporation by reference to the policy of insurance.

Counsel for the defense also agreed and did not argue the complaint should be dismissed because the services rendered by Plaintiff were not for covered losses under the policy because the Amended Statement of Claim did allege "Plaintiff provided engineering, mold services to the insured directly relating to the loss." See paragraph 13 the Amended Statement of Claim. The loss referred to is damage caused by hurricane-force winds on October 10, 2018. The complaint alleges a cause of action for breach of contract.

The assertions presented to this Court at the hearing were that the amended complaint should be dismissed for two reasons: 1) the condition precedent to the formation of the assignment contract was never met, and 2) the assignment contract was invalid and unenforceable because the scope of work and price were not sufficiently specified in the contract. The assignment contract attached to the Amended Statement of Claim was entered into between Plaintiff and Richard Ammerman (Assignor). The contract states the purpose of the services "to assess and identify the origin and cause of the damages incurred" to assignor's property. The contract refers to testing and preparation of reports to "properly repair and preserve and protect" the property. The paragraph titled "Scope Of Work And Price" states that such will be pursuant to "reasonable pricing for services in the geographic region. . . ." Under the paragraph titled "Assignment of Benefits & Direct Pay Authorization" the exchange is addressed as follows: "In consideration of the labor, services, and/or materials provided to me by AQAF and its subcontractors (hereinafter "services"), I agree to the following: I hereby assign all insurance rights, benefits, proceeds, and causes of action under the above-referenced policy of insurance (hereafter "the policy") to AQAF, for services rendered in connection with this loss." Later in the paragraph it is further stated "This is direct and irrevocable assignment of my rights and benefits under the Policy." Defendant asserts the language in the final paragraph titled "Acknowledgement" is controlling to the extent that it renders the entire agreement illusory and thus void.

This Court must not go beyond the four corners of the complaint in ruling on a motion to dismiss. This Court likewise must not place itself in the place of the trier of the facts. This case is to be set and tried before a jury. To interpret the insurance policy or the assignment contract terms which might be capable of different meanings in certain situations would not be appropriate in ruling on a motion to dismiss. In this case, the homeowner (Assignor) assigned his rights, benefits and "causes of action" to Plaintiff. It is not alleged and there is no evidence that assignor wishes to attempt to cancel the contract. Plaintiff alleges the services were already performed according to the assignment contract. The obligation to pay "reasonable pricing for services in the . . .region" might be common and acceptable business practices for work after a hurricane has damaged an insured's property. There may be methods for contractors to keep up with any increase in prices for like services after a hurricane. This Court can not go beyond the four corners of the complaint and speculate about facts necessary to validate or invalidate the contract between Plaintiff and the homeowner (Assignor). Assignor has not claimed lack of consideration. In *McCampbell v. Aloma Nat'l Bank of Winter Park,* 185 So. 2d 756 (Fla. 1st DCA 1966), the Court held Defendant had no standing to challenge assignment on ground of lack of consideration. Florida law does not prohibit assignment of claims on an insurance policy. See *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.,* 165 So.3d 749,752-753 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]. Courts in Florida have held "whenever possible a contract should receive such construction as will uphold it rather than render it invalid." *Hunt v. First National Bank of Tampa,* 381 So2nd 1194 (Fla. 2nd DCA 1980). Plaintiff argues the assignment contract provided a quid pro quo in that the homeowner "contracted for services in exchange for the assignment." Consideration for a contract may be provided in many different forms. Refraining from enforcing a legal right may constitute valid consideration for a contract. See *Loper v.*

Weather Shield Manuf., Inc., 203 So. 3d 898 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1492a]. As Plaintiff points out, the price for Plaintiff's services were not left to the determination of the insurance company. "A contract may be supported by any act of the plaintiff from which the defendant derives a benefit, or it may be supported by any labor, detriment, or inconvenience, however small, sustained by the plaintiff, if such act as performed or inconvenience suffered is by the consent express or implied of defendant." *Tampa N. R.R. Co. v. City of Tampa,* 140 So. 311, 313 (Fla. 1932). The defense assertion in the motion to dismiss in this case is the lack of formation of a contract not with the defendant, but between the insured and the plaintiff.

When considering a motion to dismiss, the Court must confine itself strictly to the allegations "within the four corners of the complaint*" Pizza v. Central Bank And Trust Company,* 250 So.2d 895 (Fla. 1971). See also *Hanano v. Steven P. Petrou, M.D., Mayo Clinic, and St. Luke's Hospital Assoc.,* 683 So. 2d 637 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2566a]. This Court when considering a motion to dismiss may not determine questions of fact and interpret the insurance policy or determine the veracity of the plaintiff's allegations. *Hamide v. State Dept. of Corrections,* 548 So. 2d 877 (Fla. 1st DCA 1989). The Court must construe an insurance contract as a whole. *Bioscience West, Inc. v. Gulfstream Property And Casualty Insurance Co.,* 185 So. 3d 638, (Fla. 2nd DCA 2016) [41 Fla. L. Weekly D349a], citing *Fla. Peninsula Ins. Co. v. Cespedes,* 161 So. 3d 581 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D14b] and *Washington Nat'l. Ins. Corp. v. Ruderman,* 117 So. 3d 943 (Fla. 2013) [38 Fla. L. Weekly S511a]. The primary purpose of a motion to dismiss for the court is to determine whether, assuming all the allegations in the complaint to be true, the complaint properly states a cause of action upon which relief can be granted. *Provence v. Palm Beach Taverns, Inc.,* 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] and *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d].

Considering the standard required for a Motion to Dismiss, the Court cannot conclude as a matter of law that Plaintiff has not put forth in the Amended Complaint a viable cause of action upon which relief can be granted. The Court hereby finds the complaint does contain the elements of a valid claim for breach of contract.

Therefore, it is

ORDERED AND ADJUDGED that:

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

2. Defendant's objection to discovery and motion for protective order were not addressed at the hearing, so the Court takes no action on those issues by agreement of counsel for both parties.

* * *

Insurance—Property—Standing—Assignment—Issue of validity of assignment is not proper ground for motion to dismiss

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA a/a/o Bobbie Jean Crabtree, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 20-230 SC. November 10, 2020. Timothy C. Campbell, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. David W. Molhem, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE having come before the Court October 14, 2020 on Defendant's Amended Motion to Dismiss. The Court having reviewed said motion and the response as well as the precedent submitted by counsel for both parties and having considered the arguments and being otherwise advised in the premises, it is hereupon, the Court makes the following conclusions:

When considering a motion to dismiss, the Court must confine itself strictly to the allegations "within the four corners of the complaint" *Pizzi v. Central Bank and Trust Company,* 250 So.2d 895 (Fla. 1971). See also *Hanano v. Steven P. Petrou, M.D., Mayo Clinic, and St. Luke's Hospital Assoc.,* 683 So. 2d 637 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2566a]. The primary purpose of a motion to dismiss for the court is to determine whether, assuming all the allegations in the complaint to be true, the complaint properly states a cause of action upon which relief can be granted. *Provence v. Palm Beach Taverns, Inc.,* 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] and *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d].

Defendant moves to dismiss the complaint for failure to comply with section 627.7152. Plaintiff's complaint alleges an assignment from the homeowner. There is no allegation that the homeowner wishes to invalidate the assignment, which would not be proper for a motion to dismiss anyway. The issue of "standing" would not be proper for a motion to dismiss. See *Broward Ins. Recovery Center v. GEICO Casualty Company,* (Fla. Cir. Ct. 17th Cir. Aug. 2015) [23 Fla. L. Weekly Supp. 642a], citing *Wells Fargo Bank, N.A. v. Reeves,* 92 So. 3d 249 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1381a]. In this case the allegation of assignment has been sufficiently pled. This is a Small Claims case which is to be set for jury trial.

Considering the standard required for a Motion to Dismiss, the Court cannot conclude as a matter of law that Plaintiff has not put forth in the Complaint a viable cause of action upon which relief can be granted. The Court hereby finds the complaint does contain the elements of a valid claim for breach of contract.

Therefore, it is

ORDERED AND ADJUDGED that:

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

* * *

Insurance—Property—Standing—Assignment—Motion to dismiss on ground that assignment of benefits is limited in scope to mold assessment services and does not assign plaintiff the right to seek benefits for engineering inspection and report is denied

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Dana and Dennis Dunnigan, Plaintiff, v. OMEGA INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 19-1726 CC. February 22, 2021. Timothy C. Campbell, Judge. Counsel: Robert Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Todd M. Ladouceur, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE SUMMARY JUDGMENT

This cause having come before the Court January 21, 2021 with the Court having heard the argument of counsel and reviewed the file and being fully advised in the premises does find as follows:

Defendant's motion described above was addressed at the hearing. Plaintiff's Cross-Motion for Summary Judgment was not argued as Plaintiff's counsel announced that motion would be withdrawn. This cause should have been filed in Small Claims Court. The action was filed by Plaintiff (Kidwell) after entering into a contract for assignment of insurance benefits (AOB) with the insured homeowners. The homeowners' property was damaged by Hurricane Michael on October 10, 2018. Plaintiff filed a motion to amend the complaint to correct a "scrivener's error" and allege the correct jurisdictional dollar amount. As a result, this Court has drafted a separate order to transfer the cause to Small Claims Court, to be filed along with this order. Small Claims Rule 7.020 sets forth the applicability of the rules of civil procedure. The rules enumerated within that rule do not include Florida Rule of Civil Procedure 1.510 for summary judgment. Small Claims Rule 7.020(c) provides the Court may order that an action proceed under 1 or more additional rules of the Florida Rules of Civil Procedure. This Court has not invoked the rule of civil procedure for summary judgment. Therefore, it is not necessary for each party to file evidence or responding affidavits under that rule and serve the same

on the opposing party before the hearing on a motion for Summary Disposition. Many small claims cases are litigated by parties pro se. Under the Small Claims Rules, a defendant is not required to file an answer or any defensive pleadings or motions. Under the rule for summary disposition, the court is permitted to enter judgment if it appears at the pretrial conference or any subsequent hearing that there is no triable issue. *Linden v. Auto Trend, Inc.,* 923 So. 2d 1281 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D933d]. The parties in the case at bar have requested a jury trial. Summary disposition under Small Claims Rule 7.135 should not be granted when factual disputes exist which need to be resolved. *Jackson v. Wells Fargo Home Mortgage, Inc.,* 12 Fla. L. Weekly Supp. 188a (6th Cir. Ct. 2004) (appellate capacity). See *RAB Performance Recoveries, LLC v. Rodriquez,* 14 Fla. L. Weekly Supp. 492b Palm Beach Cty. Ct. 2007), holding when defendant orally disputes a debt at pretrial conference, summary disposition is not appropriate. When a dispute existed as to the amount of money owed, the court in *South Miami Health Systems, Inc. v. Perry,* 7 Fla. L. Weekly Supp. 26a (11th Cir. Ct. 1999) (appellate capacity) held summary disposition should not have been granted.

Defendant requests this Court to dismiss the complaint alleging Plaintiff has no standing because the "engineering report is outside the scope of the claims assigned to Plaintiff pursuant to the AOB." Defendant asserts the complaint must be dismissed as a matter of law. When considering a motion to dismiss, the Court must confine itself strictly to the allegations "within the four corners of the complaint. *Pizza v. Central Bank And Trust Company,* 250 So.2d 895 (Fla. 1971). See also *Hanano v. Petrou,* 683 So. 2d 637 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2566a]. Since this case is to be tried by a jury, this Court, when considering a motion to dismiss, may not determine questions of fact and interpret the insurance policy or the assignment of benefits (AOB), or determine the veracity of the plaintiff's allegations. *Hamide v. State Dept. of Corrections,* 548 So. 2d 877 (Fla. 1st DCA 1989).

Defendant relies on *Sidiq v. Tower Hill Select Insurance Company,* 276 So. 3d 822 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1969a] for the proposition that the AOB in this case is limited in scope and does not assign Plaintiff the right to seek insurance benefits for the engineer inspection and report. Defendant does not refute the fact that insurance benefits were assigned to Plaintiff but argues the AOB was limited to the mold assessment. Plaintiff obviously asserts the AOB does include the engineer, but also asserts Defendant does not have privity with Plaintiff concerning the AOB agreement between Plaintiff and the homeowners. It is significant that *Sidiq,* cited above, involves a suit in which the homeowner is suing the insurance company directly, asserting the claim arising from water damage to the house was not assigned to a mitigation company. In that case, unlike the case at bar, the Court was provided the knowledge of the intention of the homeowner. In this case, no deposition of the homeowners nor an affidavit from either homeowner has been provided to the Court. If the homeowners did intend to assign their rights under the insurance policy, the homeowners could not sue the insurance company for those benefits. "Once the interest has been assigned, the insured has no standing to bring an action against the insurer." *Sidiq,* above citing *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic,* 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b]. Defendant asserts the converse, id est. that since Plaintiff was never assigned the benefit as to the engineering services provided, Plaintiff "lacks standing to bring suit." See Defendant's motion. In *Sidiq,* "the Insureds argued that the language was limiting language, . . .limited the assignment to only services rendered by United." See *Sidiq,* at pg. 825. In the case at bar, Plaintiff is only seeking services rendered by itself, which included the mold assessment and the engineering services. Plaintiff has not claimed it was assigned all the benefits under the insurance contract. The Court in *Sidiq* determined "whatever facial ambiguity that may have existed by looking at the contested sentence in isolation is resolved when all of the language of the document is considered as a whole." *Sidiq,* at 827. Defendant concludes that the chronological facts concerning the date of the inspections and the corresponding invoices together with the reference to the language in the AOB to wit, "reason to believe fungi, mold, wet or dry rot, or bacteria . . ., make it "clear" ". . . that the intention of both homeowners and Plaintiff was to assign only the benefits for mold inspection. Plaintiff's engineer performed the inspection on December 6, 2018. The AOB was dated December 10, 2018. The invoice for the engineering services is dated December 13, 2018. The mold inspection took place on December 10, 2018 and the invoice for the same is dated January 31, 2019. Plaintiff alleged in the Amended Complaint "in exchange for an assignment of benefits, Plaintiff provided reasonable and necessary engineering assessment services to the Insured relating to the loss and in exchange, Assignor agreed to allow direct billing of the insurance carrier . . ., and agreed to assign rights under their insurance policy." See Amended Complaint para. 13. "The primary purpose of a motion to dismiss for the court is to determine whether, assuming all the allegations in the complaint to be true, the complaint properly states a cause of action upon which relief can be granted." *Provence v. Palm Beach Taverns, Inc.,* 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] and *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]. Defendant requests the Court to analyze and interpret the AOB and make the determination that Plaintiff did not receive what Plaintiff intended when it entered into the AOB contract with the homeowner. The Court, as stated above, does not have the testimony of the homeowner to make that determination. The homeowner does not contest or deny the allegations stated by Plaintiff in the Amended Complaint. There is no evidence and indeed no allegation the homeowner has attempted to cancel the AOB contract. To analyze whether Plaintiff has standing to bring the action here, the Court must consider all the evidence and all provisions in the contract. "Courts should avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings v. Zurich Ins. Co.,* 845 So.2d 161, @ 165 (Fla. 2003) [28 Fla. L. Weekly S307d].

The Court has noticed a few other phrases in the AOB contract related to the issues presented here. In the first paragraph of the AOB the insured homeowners "authorize. . . AQAF to enter the above-referenced property, provide consultation services assess water and or mold related damages, supply a written pre-assessment protocol report and post-remediation verification (PRV) assessment report. . ." Defendant seems to argue the homeowner cannot sign the contract and assign the benefits after the work for the engineering services were completed. There is no rule which would prohibit the homeowner from signing an AOB contract allowing Plaintiff to seek payment for the engineering services just because the inspection was completed days before. Florida courts do not prohibit homeowners from assigning benefits under insurance policies. For example, the second district court has stated, "Florida law prohibits an insurer from restricting an insured's unilateral post-loss assignment of a benefit derived from that policy." *Bioscience West, Inc. v. Gulfstream Property And Casualty Insurance Co.,* 185 So. 3d 638, (Fla. 2nd DCA 2016) [41 Fla. L. Weekly D349a]. The past tense is used in the AOB to wit; "I hereby assign all insurance rights, benefits, proceeds, and causes of action . . . *for services rendered.* . ." and again ". . .my rights and benefits to the extent of *services provided* by Assignee and subcontractors under AQAF." According to the chronology of events as put forth in the Amended Complaint and Defendant's motion, the first invoice submitted by Plaintiff was for the engineering services (December 13, 2018). The AOB under the paragraph for **Scope Of Work And Price** states "I understand that all *services performed &*

will be performed by AQAF will be listed on *the initial invoice . . . .*" That language also utilized the past tense. The provisions referenced above seem to indicate Plaintiff and the insureds intended benefits for the engineering services would be assigned to Plaintiff and paid by Defendant insurance company. The Court herein does not interpret the AOB language to rule on the ultimate conclusions or to question the allegations of Plaintiff (which would usually be inappropriate in considering a motion to dismiss). As the Court stated in *Sidiq,* this Court must attempt to resolve the issue "when all of the language of the document is considered as a whole." The Court addressed the contract language to rule on the question of standing brought forth by Defendant. "When there is room for a difference of opinion between reasonable persons about the proof of facts from which the ultimate fact is sought to be established, or when there is room for such differences as might be drawn from the conceded facts, the court should submit the case to the jury for their finding." *Fla. Jur. 2d, Trial Juries* § 10 West Group (2003). The Court does find Plaintiff has standing to bring the cause of action alleged in the Amended Complaint. Considering the standard required for a Motion to Dismiss, the Court cannot conclude as a matter of law that Plaintiff has not put forth in the Complaint a viable cause of action upon which relief can be granted. The Court hereby finds the complaint does contain the elements of a valid claim for breach of contract. This Court cannot find that there is no genuine issue of material fact. Likewise, this Court cannot find that there is no triable issue.

Therefore, it is hereby

ORDERED AND ADJUDGED

1. Defendant's motion for summary disposition/judgment is hereby **DENIED.**

2. Defendant's motion to dismiss is hereby **DENIED.**

* * *

Insurance—Property—Release—Motion to dismiss plaintiff/assignee's action based on general release executed by insured one year after assignment was executed is denied where there is no evidence that plaintiff gave insured authority to settle its claims—Coverage—Motion to dismiss on ground that engineering assessment services are not "direct physical loss" to property covered by policy is denied

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Kyle Hunt, Plaintiff, v. FAMILY SECURITY INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 20-1404 SC. May 21, 2021. Timothy C. Campbell, Judge. Counsel: Leo Manon, III, Florida Insurance Law Group, LLC, for Plaintiff. Michael J. Bonfanti, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE having come before the Court March 23, 2021 on Defendant's Motion to Dismiss. Having reviewed the Defendant's motions and Plaintiff's response to the motion to dismiss, hearing argument of counsel, reviewed the Court file, and being otherwise fully advised in the premises, the Court hereby finds as follows:

Counsel for both parties agreed and only put forth argument at the hearing on the Motion to Dismiss. The motion for Summary Disposition was not properly noticed for the hearing. The Florida Rules of Civil Procedure have been invoked only for discovery and Defendant has filed motions for protective order and objections to discovery. For issues which require extrinsic evidence, before scheduling a hearing on a motion for Summary Disposition, each party should be allowed to participate in full discovery and be given adequate notice of the hearing on said motion. In addition, the Court is not clear on the specific issue Plaintiff has requested partial summary disposition. Defendant has moved to dismiss the complaint on two grounds for the Court to consider: (1) Full satisfaction of the debt as evidenced by a general release signed by the insured, and (2) Lack of coverage because Defendant asserts the services provided by Plaintiff did not "provide any tangible benefit to the physically damaged covered property." See Defendant's Motion to Dismiss, paragraph 15.[1]

The Amended Statement of Claim consists of one count for breach of contract together with the invoice for services provided, the Assignment of Benefits (AOB), and the insurance policy. The assignment agreement (AOB) was dated February 5, 2019. Plaintiff alleges notice of the assignment was given to Defendant on March 12, 2019 and again on April 4, 2019. The general release referred to by Defendant was dated March 6, 2020.

The right to assign a contractual benefit is found in the common law. Because an unqualified assignment transfers to the assignee all the interest of the assignor under the assigned contract, the assignor has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the assignee. 4 Fla.Jur.2d, Assignments § 23 (1978); see also *Howard v. Pensacola & A.R. Company*, 24 Fla. 560, 5 So. 356 (1886). As stated by the 1st DCA, "the assignee stands in the shoes of the assignor and is able to maintain suit in its own name as the real party in interest." *United Water Restoration Grp., Inc. v. State Farm Fla. Ins. Co*., 173 So 3d 1025 (1st DCA 2015 [40 Fla. L. Weekly D1569a], quoting *Weiss v. Johansen,* 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D680a]. It is not refuted that the homeowner Kyle Hunt assigned the benefits under the policy to Plaintiff. There is no evidence Plaintiff, as assignee gave the insured the authority to negotiate and settle Plaintiffs claim with the insurance company after entering into the assignment agreement (AOB). The release was not executed until more than a year after the AOB was executed.

Defendant states the services provided by the engineer were not a "direct physical loss" to property covered in the policy. The pertinent provision in the insurance policy states "we insure against direct physical loss to property described in Coverages A and B." See the policy **Section I—Perils Insured Against.** Plaintiff argues the "loss" is the event which resulted in Hurricane-force winds on October 10, 2018. Neither party disputes the existence of the hurricane on that date and that it caused physical damage to property of the insured. Defendant argues that the services provided by the engineer were not physical because he did not repair anything. In ruling on an issue involving an anti-assignment provision in an insurance policy, the Second District stated, "it is imprudent to place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs." *Bioscience West, Inc. v. Gulfstream,* 185 So. 3d 638 (Fla. 2nd DCA 2016) [41 Fla. L. Weekly D349a]. "A Court construes an insurance contract as a whole, endeavoring to give every provision its full meaning and operative effect". *Fla. Peninsula Ins. Co. v. Cespedes,* 161 So. 3d 581 (Fla. 2d DCA 2014) [40 Fla. L. Weekly D14b]. "Where the language in an insurance contract is plain and unambiguous, the court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So.3d 566, (Fla. 2011) [36 Fla. L. Weekly S469a]. However, "Courts should avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings v. Zurich Ins. Co.,* 845 So.2d 161, @ 165 (Fla. 2003) [28 Fla. L. Weekly S307d]. Plaintiff asserts that certain rules of construction to ascertain the meaning or formation of a contract should be applied to establish coverage for the services prayed for in its complaint. Some determinations inherently must be determined by the trier of the facts. "Unconscionability of a contract, for example, should not be determined by summary disposition." *B.R.H. Maintenance, Inc. v. Santopietro,* 3 Fla. L. Weekly Supp. 576a (19th Cir. Ct. 1995) (appellate capacity). "When a contract's terms are not susceptible to more than one meaning, a court may not indulge in interpretation or resort to extrinsic evidence." *Vocelle & Berg, LLP v. IMG Citrus, Inc.,* 125 So.3d 843, 844 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D738a]. Ultimately, the report of the engineer is not the purpose of the invoice, but rather it is the services that an engineer can

provide after a catastrophic event to repair the damage. In *Trinidad v. Florida Peninsula Insurance Company,* 121 So. 3d 433 (Fla. 2013) [38 Fla. L. Weekly S507a], the Court held that overhead and profit were included in the replacement cost of a covered loss when the insured was *reasonably likely to need* a general contractor for the repairs. Even though a contractor may not work with a hammer to repair the property, the Court in *Trinidad* found the expense was covered.

Another provision Defendant points to in support of its motion is quoted in the motion is **13. Fungi, Wet Or Dry Rot, Or Bacteria**. Defendant asserts that because this is the only provision which refers to testing, that this is the only type of testing that is covered under the policy. But the beginning of the provision might be interpreted to mean, for other types of testing, the insurance company will pay "in excess of the $10,000. "The canon of ***expressio unius est exclusion alterius*** does not apply to every statutory listing or grouping, but rather, it has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence," quoting *RGF Envtl.Grp., Inc. Activ Tek Envtl. Corp.,* 2009 U.S. Dist. LEXIS 139366 (S.D. Fla. July 2009) (citing *Barnhart v. Peabody Coal Co.,* 537 U.S. 149 (2003) [16 Fla. L. Weekly Fed. S35a]. Engineering was not a category which was the subject of the provision such that excluding the services of all other engineers would be justified. Otherwise, one would exclude all contractors and subcontractors not mentioned in the policy.

Defendant asserts the complaint must be dismissed as a matter of law. This case is to be set for a jury trial. The Court makes no factual determination whether Plaintiff's contracted services were or were not intended to protect or repair the property of the insured. When considering a motion to dismiss, the Court must confine itself strictly to the allegations "within the four corners of the complaint. *Pizzi v. Central Bank And Trust Company,* 250 So.2d 895 (Fla. 1971). See also *Hanano v. Petrou,* 683 So. 2d 637 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2566a]. This Court, when considering a motion to dismiss, may not determine questions of fact and interpret the assignment of benefits (AOB), or determine the veracity of the plaintiff's allegations. *Hamide v. State Dept. of Corrections,* 548 So. 2d 877 (Fla. 1st DCA 1989). "The primary purpose of a motion to dismiss for the court is to determine whether, assuming all the allegations in the complaint to be true, the complaint properly states a cause of action upon which relief can be granted." *Provence v. Palm Beach Taverns, Inc.,* 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] and *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]. "A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." *Roberts v. Children's Med. Servs.,* 751 So. 2d 672, 673 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D169c]. "As a general rule, all allegations in a well-pleaded complaint must be accepted as true when ruling on a motion to dismiss." *Gomez v. Fradin,* 41 So. 3d 1068, 1070 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1822a] (citing *Smith v. 2001 S. Dixie Highway, Inc.,* 872 So. 2d 992, 993 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1154a]).

Considering the standard required for a Motion to Dismiss, the Court cannot conclude as a matter of law that Plaintiff has not put forth in the Amended Complaint a viable cause of action upon which relief can be granted. The Court hereby finds the Amended Complaint does contain the elements of a valid claim for breach of contract. Therefore, it is

ORDERED AND ADJUDGED that:

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

[1]Another basis for Defendant's request for dismissal was that Plaintiff named the wrong Defendant in the complaint. However, at the hearing, counsel agreed this issue was moot since Plaintiff has now named the correct Defendant in the Amended Statement of Claim.

* * *

Insurance—Property—Standing—Assignment—Motion to dismiss on ground that assignment does not comply with section 627.7152 is denied where complaint states that service provided was not meant to protect, repair, restore or replace damaged property or mitigate against further damage—In ruling on motion to dismiss, court may not go beyond four corners of complaint to interpret assignment

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Brian Holley, Plaintiff, v. FIRST PROTECTIVE INSURANCE COMPANY d/b/a FRONTLINE INSURANCE COMPANY, Defendant. County Court, 14th Judicial Circuit in and for Bay County. Case No. 20-2342 SC. May 19, 2021. Timothy C. Campbell, Judge. Counsel: Leo Manon, III, Florida Insurance Law Group, LLC, for Plaintiff. Kelley Kronenberg, for Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE having come before the Court March 23, 2021 on Defendant's Motion to Dismiss. Defendant asserts the assignment of benefits contract (AOB) does not give legal standing to Plaintiff. The assertion is based on the logic that the AOB is "invalid and unenforceable" because it "fails to comply with all seven of the legal requirements set forth in Section 627.7152(2)(a), Florida Statutes (2019).' Having reviewed the Defendant's motion, argument of counsel, reviewed the Court file, and being otherwise fully advised in the premises, the Court hereby finds as follows:

1. The complaint consists of one count for breach of contract, which includes the assignment of benefits and the invoices attached. Plaintiff alleges reasonable and necessary assessment services were provided to the assignor related to the loss resulting from Hurricane Michael on October 10, 2018. Paragraph 14 of the complaint alleges "Plaintiff's services were not to protect, repair, restore, or replace property or mitigate against further damage to the property but rather to assess, observe, test, and measure." The initial invoice attached to the complaint describes the services as "full package assessment to include the initial assessment, infra-red scan, moisture detection, category determination, and report." The AOB describes the services of Plaintiff as "to enter the above-referenced property to perform a non-emergency indoor environmental assessment and/or forensic engineering study by a indoor environmental professional and/or a forensic engineer." Also included in the AOB is the following: "I understand that this non-emergency indoor environmental assessment in no way is meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to the property."

2. The stated purpose for the Florida Legislature and Governor Ron DeSantis passing section 627.7152 was to protect Florida consumers from abuses in the assignment and predatory insurance practices.[1] There is no evidence and indeed no allegation the homeowner has attempted to cancel the AOB contract. To analyze whether Plaintiff has standing to bring the action here, the Court must consider all provisions in the contract. "Courts should avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings v. Zurich Ins. Co.,* 845 So.2d 161, @ 165 (Fla. 2003) [28 Fla. L. Weekly S307d]. Florida courts do not prohibit homeowners from assigning benefits under insurance policies. For example, the second district court has stated, "Florida law prohibits an insurer from restricting an insured's unilateral post-loss assignment of a benefit derived from that policy." *Bioscience West, Inc. v. Gulfstream Property And Casualty Insurance Co.,* 185 So. 3d 638, (Fla. 2nd DCA 2016) [41 Fla. L. Weekly D349a]. See *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.,* 165 So.3d 749,752-753 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1196a]. Courts in Florida have held "whenever possible a contract should receive such construction as will uphold it rather than render it invalid." *Hunt v. First National Bank of*

Tampa, 381 So2nd 1194 (Fla. 2nd DCA 1980). Plaintiff argues the assignment contract provided a quid pro quo in that the homeowner contracted for services in exchange for the assignment. Consideration for a contract may be provided in many different forms. Refraining from enforcing a legal right may constitute valid consideration for a contract. See *Loper v. Weather Shield Manuf., Inc.,* 203 So. 3d 898 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1492a]. "A contract may be supported by any act of the plaintiff from which the defendant derives a benefit, or it may be supported by any labor, detriment, or inconvenience, however small, sustained by the plaintiff, if such act as performed or inconvenience suffered is by the consent express or implied of defendant." *Tampa N. R.R. Co. v. City of Tampa,* 140 So. 311, 313 (Fla. 1932). Plaintiff asserts Defendant does not have privity of contract to attack the AOB. In *McCampbell v. Aloma Nat'l Bank of Winter Park*, 185 So. 2d 756 (Fla. 1st DCA 1966), the Court held Defendant had no standing to challenge an assignment on ground of lack of consideration. This Court must analyze the terms of the AOB herein to address the issue of standing of Plaintiff to bring the lawsuit. Defendant asserts the legislature passed a law that eliminated all assignments unless the contract of assignment complied with every requirement of Florida Statute section 627.7152 (2019). Even assuming the statute applied to every assignment agreement, the homeowner may be the only party to the AOB who may rescind it. Section 627.7152(2)(a) contains a provision that allows the assignor to rescind the assignment agreement. This does not give the insurer the right to rescind the AOB. Subsection 627.7152(2)(d) states that an AOB that does not comply with the new provisions is "invalid and unenforceable." The AOB executed after the effective date of the new law may not be binding, but the statute does not state the AOB is void "ab initio". The Legislature intended that the homeowner must rescind the agreement. In subsection 627.7152(7) the assignee waives certain rights upon accepting an AOB. The statute states "such waiver remains in effect after the assignment agreement is rescinded by the assignor . . ." Fla. Statute §627.7152(7)(a) (2019). Under subsection (7)(b) "a named insured is responsible for the payment of all of the following: . . . "3. Any contracted work performed before the assignment agreement is rescinded." See Fla. Stat. § 627.7152(7)(b)3. The point is that the legislature designed the statute to protect the consumer by giving him or her the right and responsibility to rescind the AOB. Thus, even if the new statute is retroactive, unless and until the AOB is rescinded by the homeowner, certain rights and benefits of the insurance policy remain with the assignee. *In the case at bar, there is no evidence the homeowner has rescinded the AOB.* For the Court to deny standing to Plaintiff, the Court must assume the legislature intended to deny homeowners the right to assign any and all benefits whether or not included within the definition in Florida Statute §627.7152 of "assignment agreement."

3. As stated by the 1st DCA, "the assignee stands in the shoes of the assignor and is able to maintain suit in its own name as the real party in interest." ***United Water Restoration Grp., Inc. v. State Farm Fla. Ins. Co.,* 173 So 3d 1025 (1st DCA 2015)** [40 Fla. L. Weekly D1569a]**, quoting *Weiss v. Johansen,* 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005)** [30 Fla. L. Weekly D680a]**.**

4. The statute states in pertinent part: 627.7152 **Assignment agreements**. (1) *As used in this section,* the term: (a) "Assignee" means a person who is assigned post-loss benefits through an assignment agreement. (b) "Assignment agreement" means any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property. By stating "as used in this section", the legislature did not include all assignment agreements. The statute did not mandate that all assignments must comply with every requirement listed therein. The legislature defined the term for purposes of the statute cited by Defendant. Defendant's only basis for a defective assignment is the argument that it does not comply with Section 627.7152.

5. As stated above, included in the AOB is the following: "I understand that this non-emergency indoor environmental assessment in no way is meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to the property." Defendant asserts, when considering an assignment, there are no services outside the statute. The right to assign a contractual benefit is established in the common law. An assignee of that right has a common law right to sue on a breach of contract claim. Should the Legislature pass a statute that is in derogation of the common law, it must be strictly construed. See *Accident Cleaners, Inc., v. Universal Ins. Co.,* 186 So. 3d 1, 3 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D862a]; and *Humana Health Plans v. Lawton*, 675 So. 2d 1382 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1299g]. The definition of "assignment agreement" includes water remediation and other emergency services, but the statute does not include the types of service provided by Plaintiff in the AOB. The Court must interpret the AOB in accordance with the plain meaning of its terms. Defendant is asking the court to disregard the plain meaning of the AOB and "read between the lines" to find an ulterior motive in Plaintiff without further evidence. "A court, on the basis of the apparent intent of the parties, may not run roughshod over the actual terms of the agreement." *Tampa Pipeline Transport v. Chase Manhattan Serv.,* 928 F. Supp. 1568 (M.D. Fla. 1995).

6. Defendant asserts the complaint must be dismissed as a matter of law. This case is to be set for a jury trial. The Court makes no factual determination whether Plaintiff's contracted services were or were not intended to protect or repair the property of the insured. When considering a motion to dismiss, the Court must confine itself strictly to the allegations "within the four corners of the complaint. *Pizzi v. Central Bank And Trust Company,* 250 So.2d 895 (Fla. 1971). See also *Hanano v. Petrou*, 683 So. 2d 637 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D2566a]. This Court, when considering a motion to dismiss, may not determine questions of fact and interpret the assignment of benefits (AOB), or determine the veracity of the plaintiff's allegations. *Hamide v. State Dept. of Corrections,* 548 So. 2d 877 (Fla. 1st DCA 1989). "The primary purpose of a motion to dismiss for the court is to determine whether, assuming all the allegations in the complaint to be true, the complaint properly states a cause of action upon which relief can be granted." *Provence v. Palm Beach Taverns, Inc.,* 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] and *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]. "A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." *Roberts v. Children's Med. Servs.,* 751 So. 2d 672, 673 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D169c]. "As a general rule, all allegations in a well-pleaded complaint must be accepted as true when ruling on a motion to dismiss." *Gomez v. Fradin,* 41 So. 3d 1068, 1070 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1822a] (citing *Smith v. 2001 S. Dixie Highway, Inc.,* 872 So .2d 992, 993 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1154a]). Considering the plain meaning of the AOB and the statute itself, section 627.07152 Florida Statute does not apply.

Considering the standard required for a Motion to Dismiss, the Court cannot conclude as a matter of law that Plaintiff has not put forth in the Complaint a viable cause of action upon which relief can be granted, and the Court must conclude Plaintiff has standing to bring the cause of action alleged in the Complaint. The Court hereby finds the complaint does contain the elements of a valid claim for breach of

contract.

Therefore, it is

ORDERED AND ADJUDGED that:

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

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[1]See www.insurancejournal.com/news/southeast/2019/05/24/527402.htm

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Insurance—Property—Standing—Assignment—Motion to dismiss on ground that assignment does not comply with section 627.7152 is denied where complaint states that service provided was not meant to protect, repair, restore or replace damaged property or mitigate against further damage—Further, general averment that plaintiff has complied with all conditions precedent to suit is sufficient to survive motion to dismiss

THE KIDWELL GROUP, LLC., d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Ricky Jones, Plaintiff, v. UNITED PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RJ. Case No. 50-2020-SC-018968-XXXX-MB. May 10, 2021. John J. Parnofiello, Judge. Counsel: Robert Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Ailene S. Rogers, Fort Lauderdale, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S STATEMENT OF CLAIM WITH PREJUDICE FOR LACK OF STANDING AND ALTERNATIVE MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

THIS CAUSE came before the Court for review on May 10, 2021. Based upon review of the Defendant's Motion to Dismiss Plaintiff's Statement of Claim with Prejudice for Lack of Standing and Alternative Motion to Dismiss for Failure to State a Cause of Action, a complete review of the court file, and the Court being otherwise fully advised in the premise, it is

ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss Plaintiff's Statement of Claim with Prejudice for Lack of Standing and Alternative Motion to Dismiss for Failure to State a Cause of Action is **DENIED**. A the motion to Dismiss stage, the Court's only duty is to presume all allegations and attachments provided in the Plaintiff's Complaint as true.; *see Mitleider v. Brier Grieves Agency, Inc.,* 53 So. 3d 410 (Fla. 4DCA 2011) [36 Fla. L. Weekly D346a]; *U.S. Project Mgmt., Inc., v. Parc Royale E. Dev., Inc.* 861 So.2d 74, 76 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2481b]Without commenting on the truth or falsity of the allegations therein, the plain language of the contract by which the Plaintiff premises its standing to sue on behalf of Ricky Jones, attached to the Plaintiff's complaint, indicates that Air Quality Assessors of Florida does not purport to provide "services to protect, repair, restore, or replace property or to mitigate against further damage to the property" and as such does not fall under the statutory definition of "assignment agreement" as defined by 627.7152(1)(b) *Fla. Stat.* As such, the mandatory strictures required of "assignment agreements" pursuant to 627.7521(2) *Fla. Stat.* and the mandatory invalidation of "assignment agreements" failing to comply with those strictures pursuant to 627.7521(2)(d) does not apply at this Motion to Dismiss stage.

The Motion to Dismiss for Failure to State a Cause of Action is similarly **DENIED**; Plaintiff has generally averred that they have complied with all conditions precedent to the filing of the lawsuit in Paragraph 19 of the instant Complaint which, at the motion to dismiss stage, is sufficient. *See Ingersoll v. Hoffman*, 589 So. 223 (Fla. 1991).

The Defendant has ***twenty (20) days*** from the date of the hearing, May 6, 2021, within which to file its response. Thus the Defendant's Response is due on or before Thursday, May 27, 2021 or else the Defendant will be subject to default.

* * *

Insurance—Property—Standing—Assignment—Motion to dismiss on ground that assignment does not comply with section 627.7152 is denied where complaint states that service provided was indoor environmental assessment not meant to protect, repair, restore or replace damaged property or mitigate against further damage

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Matthew Kahn, Plaintiff, v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, County Civil Division RE. Case No. 50-2020-CC-006626-XXXX-MB. November 16, 2020. Sarah L. Shullman, Judge. Counsel: Hans Kennon, Orlando, for Plaintiff. Christopher R. Cooper, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court for hearing on November 3, 2020 on Defendant's Motion to Dismiss. Based upon review of the Defendant's Motion to Dismiss, argument of counsel, a complete review of the court file, and the Court being otherwise fully advised in the premise, the Court hereby finds as follows:

1. "The purpose of a motion to dismiss is to test the legal sufficiency of the complaint." *Norwich v. Glob. Fin. Assocs., LLC*, 882 So. 2d 535, 536 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2136b] (citing *Ramos v. Mast,* 789 So. 2d 1226 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1839a]). "The trial court may not look beyond the four corners of a complaint when ruling on a motion to dismiss." *Id.* "As a general rule, all allegations in a well-pleaded complaint must be accepted as true when ruling on a motion to dismiss." *Gomez v. Fradin*, 41 So. 3d 1068, 1070 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1822a] (citing *Smith v. 2001 S. Dixie Highway, Inc.,* 872 So.2d 992, 993 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D1154a]).

2. The Complaint alleges that:

- The Insured incurred covered claim expenses for Plaintiff's professional engineering, observation, measurement, and/or testing services.
- Plaintiff performed those services for the Insured in Palm Beach County, Florida, on or about September 17, 2019. Plaintiff does not provide any services to protect, repair, restore, replace or mitigate further damage to property.

Compl. at ¶¶ 5-6.

3. The Complaint attaches an Assignment of Benefits ("AOB") dated September 17, 2019 under Policy Number UHV103697505. Plaintiff acknowledges that the AOB was executed after July 1, 2019, which was the effective date of section 627.7152, Florida Statutes (2019).

4. The AOB expressly states the following: "I understand that this non-emergency indoor environmental assessment in no way is meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to property." The AOB provides only for the "visual inspection of the subject property which may include destructive testing and non-destructive testing to determine repairability, scope, and/or categorization of water damage . . . in order to prepare a forensic engineering report."

5. Section 627.7152, Florida Statutes, describes with specificity the types of services to which the statute applies, and this Court must apply this definition strictly.

6. The statute states in pertinent part:

627.7152 Assignment agreements.—

(1) As used in this section, the term:

(a) "Assignee" means a person who is assigned post-loss benefits through an assignment agreement.

(b) "Assignment agreement" means any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services to protect,

repair, restore, or replace property or to mitigate against further damage to the property.

7. Section 627.7152 further states:

(2)(a) An assignment agreement must:

5. Relate only to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.

8. Thus, the statute by its terms only applies to "work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property." The statute clearly encompasses water remediation and other emergency services, but does not cite to or reference in any way the use of measurement, testing, or observation services such as those allegedly provided by Plaintiff.

9. Defendant argues that the subject assessment services were rendered in furtherance of, or for the ultimate purpose to, "protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage." In other words, the assessment was not done for the sake of it, but for the obvious purpose of ultimately remediating or repairing any damage, and therefore the AOB statute applies.

10. However, while this argument may make logical sense, it contradicts the four corners of the Complaint and the AOB, which expressly state that the services were *not* provided "to protect, repair, restore, or replace damaged property or to mitigate against further damage to property."

11. The Court makes no factual determination as to whether the services were or were not intended to protect or repair the property. Rather, the Court must accept as true for purposes of this motion to dismiss, as it is required to do, Plaintiff's allegations that it did not provide any services to protect, repair, restore, replace or mitigate further damage. In light of these allegations, the AOB statute does not apply.

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

* * *

Insurance—Personal injury protection—Provider's action against insurer—Venue—Transfer—Plaintiff's contention that it can file all cases brought by plaintiff in Broward County, no matter where specific clinic that provided treatment may be located, because provider has its billing offices in Broward County is incorrect—Plaintiff's argument that only "legal issues" are involved in instant case is belied by review of the pleadings in which several factual issues are disputed by defendant—Policy provision requiring venue "where the covered person lived at the time of the accident" controls—Moreover, undisputed record established that Broward County is forum non conveniens—Considering interests of justice Broward County jury should not be burdened with determining case that has no connection with the county—Case transferred to county in which accident occurred and in which all substantial contacts fall—Under circumstances, plaintiff to bear the costs of transfer

PATH MEDICAL LLC (a/a/o Gaia Lopez), Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE 20-033877 (53). September 9, 2021. Robert W. Lee, Judge. Counsel: John C. Daly, Plantation, for Plaintiff. Beth Gordon, Deerfield Beach, for Defendant.

ORDER TRANSFERRING CASE TO HILLSBOROUGH COUNTY FOR IMPROPER VENUE AND FORUM NON CONVENIENS

THIS CAUSE came before the Court on September 9, 2021 for hearing of the Defendant's Motion to Transfer Case for Improper Venue, which also raises alternatively that the case should be transferred for forum *non conveniens*, and the Court's having reviewed the Motion and entire court file, heard argument, and reviewed the relevant legal authorities, finds as follows:

This case is one of ***literally thousands*** of insurance cases that have been flooding Broward County courts during the past two years that having nothing whatsoever to do with Broward County, other than the fact that Plaintiff's counsel may have an office here, or Plaintiff's counsel simply does not want to file their cases—for whatever reason—in their home county. Indeed, Broward County Court is on track to having almost 200,000 civil cases being filed in the County Court in 2021, shattering the record of civil cases filed each month, and more than triple the amount of the last pre-Covid year, 2019. This case is yet but one exemplar of the forum shopping occurring for these type of cases.

Background:

1. By Plaintiff's own admission at the hearing, everything in this case happened 250 miles away in Hillsborough County, other than the Plaintiff's billing office being in Broward County. The insurance policy at issue in this case insures a driver residing in Hillsborough County; the three-vehicle auto accident occurred in Hillsborough County; the owners and occupants of the other vehicles involved in the accident reside in Hillsborough County; and the medical treatment took place in Hillsborough County.

2. The Plaintiff has multiple clinics statewide.

3. No evidence was presented or argument made that the owners of the subject property, any witness to the automobile accident, or any person involved in the medical treatment reside or work in Broward County.

4. The Plaintiff filed this complaint in Broward County, Florida. The Plaintiff did not allege any connections between the facts of this case and the chosen venue.

5. The Defendant is a foreign corporation conducting and licensed to do business in the State of Florida. Although it issues policies in Broward County, it issued the policy at issue in this case in Hillsborough County. The policy at issue in this case contains a provision stating, "Unless we agree otherwise, any legal action against us ***must be brought*** in a court of competent jurisdiction in the county and state ***where the covered person lived at the time of the accident***" (emphasis added). In this case, this is Hillsborough County.

6. The Plaintiff has demanded a jury trial, which is in keeping with the great majority of cases coming before the Court in which an insurance company is a defendant.

CONCLUSIONS OF LAW

The Plaintiff argues that it can file ALL of its Path Medical cases in Broward County—wherever the clinic may be—simply because Path Medical has its billing offices here. Based on the facts of this case, the Court finds that the Plaintiff is wrong. Additionally, Plaintiff argues that only "legal issues" are involved in this case. Counsel's argument is belied by a mere review of the pleadings in this case in which several factual issues are disputed by the Defendant.

First, the Court finds that the provision in the policy requiring venue "where the covered person lived at the time of the accident" controls. This is Hillsborough County, and this case should have been filed there.

As alternative grounds for transfer, the Court finds that the undisputed record in this case establishes that Broward is forum *non conveniens*. The Fourth District Court of Appeal has recently aligned itself with the decision of the Third District Court of Appeal in *Caceres v. Merco Grp. of Palm Beaches*, 282 So.3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2802a]. *See Expert Inspections, LLC v. State Farm Florida Ins. Co.*, Case No. 4D21-520 (Fla. 4th DCA May 19, 2021) [46 Fla. L. Weekly D1152d]. In *Caceres*, the appellate court relied on decisions which upheld a trial court's decision to

transfer a case to another Florida county when the other location was the "location of the majority of witnesses and the site of the alleged contact, noting that 'in the interest of justice' Polk County should not hear a case where the only connection was the location of the lawyer's office," citing *E.I. DuPont de Nemours & Co. v. Fuzzell*, 681 So.2d 1195, 1197 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a].

When venue is otherwise proper, the Florida Legislature has for more than 50 years set forth a simply-stated procedure for transferring the case from county to another: "For the convenience of the parties or witnesses or in the interests of justice, any court of record may transfer any civil action to another court of record in which it might have been brought." Fla. Stat. §47.122. This Court recognizes that these are in the disjunctive—it is possible that parties will not be inconvenienced, but witnesses will be. It is further possible that both parties and witnesses will not be inconvenienced, but in the interests of justice, the trial court determines that the case should nevertheless be transferred to another county. In the instant case, however, all three components militate against the case remaining in Broward. All the fact witnesses in this case are about 250 miles northwest of this county. And, the interests of justice strongly compel a decision that the workload of the Broward County Court should not be exponentially increased because attorneys simply want to practice here, and further that Broward jurors be called upon to make decisions in cases that have nothing to do with the county in which they live.[1] Moreover, the Court notes that the laws in play in the instant case are such that the jurors of the county in which the treatment took place are uniquely in a better position to determine whether the provider's medical charges are reasonable.

The Court agrees that the Plaintiff has chosen an inconvenient and improper forum because all the parties, accident, treatment and witnesses reside or took place in Hillsborough County. The substantial contacts in this case all fall in Hillsborough County.

Moreover, considering the interests of justice, a Broward County jury should not be burdened with determining a case that has no connection with Broward County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 673 So.2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a] (finding the trial court was correct in transferring a case from Dade County to Hillsborough County as a "Dade County jury, which is both a scarce and precious resource, should not be burdened with determining a case that has no connection with Dade County"). *See also Hall v. R.J. Reynolds Tobacco Company,* 118 So.3d 847 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] (affirming transfer of case from Dade County to Seminole County based upon the fact that Dade County had no relevant connection to the case); *Pep Boys v. Montilla*, 62 So.3d 1162, 1166 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1171a] (stating that the interest of justice weighs in favor of Sarasota County . . . "Broward County's connections to the case are that the plaintiff's attorney is from there and the tire had been sold and installed there. Broward County is a larger, more populous county, has crowded dockets, and the community has virtually no connection to the case"). *See Hall v. R.J. Reynolds Tobacco Company*, 118 So.3d 847, 848 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] and cases cited therein; *Stamen v. Arrillaga*, 169 So.3d 1209, 1210 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1638a] ("a trial court may *sua sponte* raise the question" of inconvenient forum "in the interest of justice"), quoting *McDaniel Reserve Realty Holdings, LLC v. B.S.E. Consultants, Inc.*, 39 So.3d 504, 511 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1491c]. See also *Clear Vision Windshield Repair LLC v. GEICO*, 24 Fla. L. Weekly Supp. 194a (Lee Cty. Ct. 2016).

Simply put, this case is a Hillsborough County case that belongs in Hillsborough County. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Transfer Case is GRANTED. The Clerk shall transfer this case to Hillsborough County. Because the Plaintiff has continued to create this problem despite frequent court admonitions, the Court exercises its discretion to require the Plaintiff to bear the costs of transfer. Fla. Stat. §47.191.

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[1]This Court recognizes that in a recent decision of the Fourth DCA, this third factor is of almost no significance when neither party agrees to the transfer. However, in the instant case, the Defendant is requesting to the transfer.

* * *

Criminal law—Driving under influence— Evidence— Breath test—Substantial compliance with administrative rules—Twenty-minute observation period —Videotape—Failure to record—Where defense failed to prove existence of policy requiring officer to use body-worn camera to record twenty-minute observation period or administration of breath test, failure to make recording does not rise to level of constitutional violation that would require suppression of breath test results

STATE OF FLORIDA, Plaintiff, v. KEVIN NIEME, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 17-010258MU10A. August 16, 2018. Kenneth A. Gottlieb, Judge. Counsel: Garrett M. Berman, Assistant State Attorney, for Plaintiff. Carlos Canet, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO SUPPRESS BREATH TEST RESULTS

THIS CAUSE having come before this Court upon the Defendant's Motion to Dismiss or in the Alternative to Suppress Breath Test Results, and the Court having considered the Defendant's Motion, having heard arguments on the same and being otherwise fully advised in the premises,

ORDERS AND ADJUDGES that the Defendant's Motions are hereby **DENIED** for the reasons set forth below.

The defendant was arrested on April 21, 2017 for a violation of Florida Statue 316.193 and subsequently submitted to a breath test. During the DUI investigation, Deputy Sapp of the Broward Sheriff's Office utilized a body-worn camera (hereinafter "BWC"). However, the BWC was not utilized to record the 20-minute observation period or the administration of the defendant's breath test.

The defense contends that the failure of the Deputy to utilize the body-worn camera to record the 20-minute observation and administration of the breath test amounted to a deprivation of the defendant's due process rights.

The defense presented the testimony of Matthew Malhiot. Mr. Malhiot is the President and proprietor of Forensic Alcohol Consulting and Training, a limited liability corporation since 2010, based out of Canton, Georgia. It was apparent from Mr. Malhiot's testimony that he has vast experience regarding the Intoxilyzer 8000. Mr. Malhiot testified that during his time with FDLE, the Intoxilyzer 8000 was still in the evaluation and testing process for approval for use in the State of Florida. Mr. Malhiot was an integral part of the evaluation, research and approval studies team. According to Mr. Malhiot, he has first-hand knowledge of what was done during this process.

Mr. Malhiot testified that the possibility of RFI affecting breath testing started as a theory years and years ago, that a cause of electronic radio frequency in the environment can affect electronic circuits and change the value flowing through the circuits, and therefore it could affect the breath test results (higher or lower), or some other change. This is because external radio frequencies have penetrated the instrument and are being absorbed by the circuits, thereby changing the electronic value in the circuits. Mr. Malhiot testified that he is familiar with the Intoxilyzer 8000's capability deal with radio frequency interference (hereinafter "RFI"). He explained that within the Intoxilyzer 8000 face plate or display is an antenna that contains a cell phone circuit, and if radio frequency penetrates the case and trips the circuit, the instrument will terminate the breath test, inspection test, etc. if the radio frequency is above the threshold of the limits set by the factory and will alert the operator of the RFI condition.

Mr. Malhiot testified that while it is possible for RFI to interfere with the breath test analysis process, it is not realistic to expect that it would. He stated that the hardware and software safeguards will terminate the analysis should radio frequency occur. Mr. Malhiot stated that he has seen the Intoxilyzer 8000 affected by and identify RFI, but that the breath test results were not altered by radio frequency and produce a valid result. He further stated that in order for RFI to affect a subject's breath test result, the RFI would have to occur and affect only the two breath test samples provided, and not affect any of the other testing processes. Essentially, the RFI would have to affect only two out of the ten testing processes, and still produce two breath test samples that are within .02 agreement of each other.

Mr. Malhiot testified that he reviewed the Broward Sheriff's Office general policy, dated September 5, 2017, section 17.1.3 which was stipulated into evidence. He stated that the policy does not have any reference to breath testing at all, and that while there are exceptions for not deactivating the BWC, breath testing is not one of them. Having reviewed the BWC footage, Mr. Malhiot stated that the breath test in this case was not videotaped. He stated that the Deputy turned off the camera as he walked the defendant into the breath testing facility and made announcement that he was turning off the BWC for breath testing and implied consent.

In preparation for the hearing, Mr. Malhiot testified that he reviewed the owner's manual and technical specification sheets for the Axon version 1 and version 2 BWC. He testified that the Axon BWC emits radio frequency, but that it will not emit radio frequency when it is recording, so long as it is not in Bluetooth mode and paired with a cell phone or not uploading to a central database or computer system. He explained that all electronic devices emit low level radio frequencies which may not escape the case, but this is different from a live streaming signal, because it is not always transmitting because the BWC is an internal camera and storage device. Mr. Malhiot believes that Deputy Sapp would not have had to fear RFI if he was recording the defendant taking the breath test because of the instrument's safeguards are sufficient to prevent RFI from affecting the breath test results.

On cross-examination, Mr. Malhiot admitted that he has very little training and experience in radio frequency itself. He agreed that when he was conducting evaluations of the Intoxilyzer 8000, body-worn cameras did not exist and that he has conducted no testing on the Intoxilyzer 8000's propensity to be affected by Axon BWCs. He stated that he is familiar that the Broward Sheriff's Office has a specific policy that applies to their DUI/Breath Alcohol Testing Unit. This policy, BSO DUI/BAT Standard Operating Procedures was stipulated into evidence. Specifically, he noted that section 3.10.2(L)(1) states with regards to videotaping that "at no time will video recording be interrupted except during the administration of the breath, urine and/or blood test(s)."

Mr. Malhiot agreed that RFI could come from radios, cell phones, Wi-Fi signals, and any other electronic instrument. He noted that if the RFI message is displayed by the Intoxilyzer 8000, the operator must troubleshoot and determine the cause. However, he agreed that the cause of RFI is not easily determined. Mr. Malhiot admitted that he could not provide a scientific reason, if RFI affecting a breath test was so remote, why would there be a need for an RFI detector in the Intoxilyzer; just that it helps eliminate the argument about RFI. When asked why law enforcement should take the risk of leaving the BWC on, Mr. Malhiot's main response was, why should they not? Lastly, Mr. Malhiot admitted that he does not know whether the Axon BWCs maintain a constant Bluetooth connection, but that if it maintained a constant Bluetooth connection, that could be a possible reason for RFI.

The defense asserts that the Broward Sheriff's Office creation of a policy requiring and detailing the use of body-worn cameras created certain rights for those investigated by the agency for DUI. The defense equates this to the policies required for DUI checkpoints, and is intended to restrict law enforcement's discretion in the gathering of evidence once they have taken it upon themselves to gather it. Through this comparison the defense claims that turning off the BWC for the administration of the 20-minute observation and breath test, the defendant's constitutional due process rights were violated. The defense argues that the specific DUI/BAT policy (State Exhibit 1), predates the general BSO BWC policy (Defense Exhibit 1), therefore the general policy controls. Put another way, the general policy enlarged the rights of DUI suspects by imposing restrictions on BSO once they took it upon themselves to abide by the policy.

The defense further argues that the technology is outstripping the law, which is the reason for the checkpoints comparison, and that cases like *Trombetta* and *Powers* no longer apply to this situation. The defense claims that they are not imposing that law enforcement officers gather evidence in a certain respect or manner. However, because law enforcement has taken it upon themselves to avail themselves of this technology, it comes with responsibilities to preserve constitutional safeguards and curtail the discretion of the law enforcement officer.

The State argues that the defense's checkpoints comparison fails for several reasons. Checkpoints involve the detaining of motorists without reasonable suspicion or probable cause, and that such a stop would necessarily run afoul of the Fourth Amendment proscriptions against unreasonable searches and seizures. It is because of this reason that checkpoints guidelines must be explicitly followed. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990). The State also notes that the Fourth Amendment protects against "unreasonable" searches and seizures. According to the recent U.S. Supreme Court ruling of *Birchfield v. North Dakota,* 136 S.Ct. 2160, 195 L.Ed. 2d 560, 84 USLW 4493 (2016) [26 Fla. L. Weekly Fed. S300a], breath testing is not an unreasonable search, because Fourth Amendment permits warrantless breath test incident to arrests for DUI. Thus, the State argues, because breath testing is not an unreasonable search or seizure, it cannot run afoul of the Fourth Amendment, and no constitutional issue exists.

The State further argues that the evidence shows that two policies regarding videotaping of breath testing exists at BSO. The policies are a specific policy and a general policy. The State argues that it is possible for both to coexists with each other, since the specific DUI/BAT policy applies in addition to the general BSO policy. Nevertheless, the State contends that even if there was a violation of the policy, the failure to videotape the 20-minute observation and/or breath test is not exculpatory and the defense would have to prove that the agency acted in bad faith by not videotaping. State argues this would be difficult to do given the history of the DUI/BAT policy to not videotape breath testing, The State provided the Court and the defense with the following cases in support of their position: *California* v. *Trombetta,* 467 U.S. 479, 104 S.Ct. 2528 (1984); *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333 (1988); *State v. Powers,* 555 So.2d 888 (Fla. 2d DCA 1990); and *Bennett v. State,* 23 So.3d 782 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2428a].

The defense contends that they do not have to show that what should have been videotaped is exculpatory because this type of evidence is not controlled by *Trombetta* and its progeny. According to the defense, officers are casting out a net, to see if they can catch anything, and in order for the net to be legal it must abide by strict constitutional requirements, the most important of which is strict supervision and a plan that can be challenged. Like a checkpoint where an officer does not need reasonable suspicion or probable cause if they restrict themselves to the written policy, the same theory applies to the use of BWCs.

The State counters that unlike checkpoints, in this situation the

officer already has reasonable suspicion to have stopped the defendant's vehicle, has conducted the DUI investigation, determined that he or she has probable cause to arrest and has effectuated that arrest, and is now requesting the defendant submit to a breath test. The State argues that there is no more evidence to be gathered at this point beyond the breath test itself, the best evidence of which would be the breath test affidavit from the Intoxilyzer. If something occurred during the 20-minute observation or the breath test, the defense is free to question the officer, breath test operator, and even the defendant himself.

The State further points out that the defense is, in fact, requiring law enforcement to gather evidence in a certain manner. As the State correctly points out, caselaw does not require the person conducting the 20-minutes observation to have direct face-to-face contact with the defendant, nor does any rule require the breath test operator to face the defendant or the Intoxilyzer while administering the breath test. The State described a situation where, even if the BWC was not turned off, there is no guarantee that the 20-minute observation or the breath test would be recorded. According to the State, the defense is therefore mandating that law enforcement does videotape or record these events or evidence in a certain manner, not just that the BWC is left on.

The State challenges that the defense has not met their burden of substantial competent evidence. The defense contends that they have met their burden of substantial competent evidence through the testimony of their expert Matthew Malhiot.

The Court does not find that Mr. Malhiot is not an expert in radio frequency. His knowledge only comes from what he has read and told by others. The Court acknowledges Mr. Malhiot's vast experience with the Intoxilyzer 8000, but that his experience with RFI and how it affects it was from 2006 and only dealt with radios and cell phones, not the Axon BWCs at issue here. He has not conducted any studies or investigations into how the Axon BWCs used operate, or whether they would or could affect the Intoxilyzer 8000 in the instant case.

The Court notes that the testimony showed that many other devices like radio and cell phones, which begs the question that the State asked wouldn't it make better sense to turn off the BWC. There is no study to the effect of the BWC and its effect on the Intoxilyzer 8000. Nevertheless, even if the situation is exactly as Mr. Malhiot testifies it is, the Court doesn't believe that a constitutional right arises such that it requires elimination of all of the evidence of the breath test.

The Court agrees with the State that the defense has not met their burden of establishing by competent substantial evidence that a policy existed requiring the officer in this case to use his BWC to record the 20-minute observation and administration of the breath test, such that failure to do so rises to the level of a constitutional violation that would require the suppression of the breath evidence. The evidence shows that two policies exist, one more specific than the other, with may or may not be in conflict with each other, regarding the use of recording equipment during breath testing. Essentially, there is the likelihood that the policy entered into evidence by the defense as Defense Exhibit 1 was violated. But that the same time, there is the same likelihood that the policy entered into evidence by the State as State's Exhibit 1 was not violated and adhered to by the officer. The two policies are similar yet different in respect to the issue at bar.

The Court agrees with the State's arguments that the caselaw regarding checkpoints is not analogous to the issue at hand. The Courts have created procedures required for checkpoints and that is different from what we have in this case. This issue does not rise to the level of a constitutional right or violation of the Constitution with respect to the fact that a BWC was worn and turned off at a point during the investigation. This is a factual issue and a credibility issue for the jury to decide, but it does not rise to the level of a constitutional violation.

Based on the foregoing, **IT IS ORDERED** that the Defendant's Motion is hereby **DENIED**.

* * *

Insurance—Automobile—Windshield repair— Appraisal— Disinterested appraiser—Where insurer that was unsuccessful in seeking certiorari relief from order compelling discovery regarding whether its designated appraiser is truly disinterested has now designated another appraiser, insurer confessed judgment in declaratory action—Plaintiff is entitled to judgment in its favor, but is not entitled to now-irrelevant documents regarding original appraiser

AUTO GLASS AMERICA, LLC, a/a/o Terry Tennant, Plaintiff, v. ALLSTATE INSURANCE COMPANY, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19017635, Division 53. July 1, 2021. Robert W. Lee, Judge. Counsel: Emilio R. Stillo, Kevin W. Richardson, and Andrew B. Davis-Henrichs, Stillo & Richardson, P.A., Davie; Mac S. Phillips, Phillip Tadros, P.A.; Joseph R. Dawson, Law Office of Joseph Dawson, P.A.; and Anthony T. Prieto, Morgan & Morgan, P.A., for Plaintiff. Crystal Urquiza, and Janine Menendez-Aponte, Law Offices of Robert J. Smith; Sally R. Culley, Rumberger, Kirk & Caldwell, P.A.; and Kansas R. Gooden and Geneva R. Fountain, Boyd & Jenerette, P.A., for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL JUDGMENT UPON CONFESSION, AND ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER RE: CORPORATE REPRESENTATIVE'S DEPOSITION

This cause came before the Court on June 21, 2021 and June 30, 2021 for hearing of the Defendant's Motion for Protective Order for Corporate Representative Deposition, and the Plaintiff's Motion for Final Judgment for Declaratory Relief upon Confession of Judgment.

This case was filed almost two years ago. During this time, although the complaint originally sounded in four counts, only one issue has been hotly contested—whether Allstate's go-to appraiser, AGIS, is a "disinterested" appraiser. The Plaintiff quickly conceded that the case should go to appraisal. The law is fairly well settled that if an insurance company invokes an appraisal clause in a policy, which it has done in this case, the insurer must select an appraiser who is disinterested. The Plaintiff presented colorable evidence that AGIS is not disinterested. As a result, this Court permitted limited discovery on the issue of whether AGIS is disinterested. Allstate, unwilling to produce the limited information required to be produced, sought certiorari relief in the circuit appellate court. Its petition was unavailing. Nevertheless, it filed for rehearing, and before a decision could be issued on rehearing, the circuit court lost jurisdiction which thereupon vested in the district court of appeal. Here, the DCA denied the motion for rehearing, and granted the Plaintiff's entitlement to appellate attorney's fees assuming it prevailed below.

Having lost at the appellate level, Allstate was forced to face the music—it would have to turn over the limited discovery that might show whether AGIS is truly disinterested. Rather than comply, Allstate switched its position after losing its appeal and instead decided to simply designate another appraiser. It argued to this Court that it did so to "streamline" the resolution of this case—an odd position, given that Allstate could have done this at the inception of this case to avoid this issue at all. Allstate's argument is a hollow effort at best and disingenuous at worst—it can attempt to mask its action however it might like, but the unmistakable conclusion is that Allstate simply did not want to comply with the Court's order, for which it was denied appellate relief. Just look at the number of attorneys that Allstate has had file an appearance in this case—they are from all corners of the State of Florida, four of whom appeared at the final hearing in this case.

To be sure, Allstate thwarted the Plaintiff's desire to obtain these documents by agreeing to use another appraiser, who at this point no one is claiming to be anything but disinterested. The Court rejects Allstate's argument that by switching to another appraiser, it simply

wanted to move on in this case and not generate any more attorney work (i.e., fees). Rather, it seems fairly clear to the Court that Allstate simply does not want the Plaintiff to get its hands on the documents Allstate has been ordered to produce. But in finally giving up on AGIS and designating a disinterested appraiser, Allstate conceded to the relief Plaintiff was seeking—and in doing so, confessed judgment in this case. After all, it was Allstate's actions that required the Plaintiff to seek a judicial determination of the issue. *See Contreras v. 21st Century Ins. Co*., 53 So.3d 1194, 1199 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D314c] (confession of judgment doctrine applies in actions for declaratory relief); *O'Malley v. Nationwide Mut. Fire Ins. Co.*, 890 So.2d 1163, 1164 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D5b] (when insurer provides insured precisely what the insurer was claiming it did not have to provide, "it was thus the 'functional equivalent of a confession of judgment' ").

Nevertheless, the Plaintiff argues that this Court should still require the production of the documents notwithstanding the mootness. To do otherwise, in its view, would leave unresolved an issue "capable of repetition yet evading review." *See Katz v. Frank, Weinberg & Black, P.L.*, 268 So.3d 773, 774 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D332b]. In the Court's view, however, there are two problems with Plaintiff's argument. First, this issue has not evaded review. The trial court issued a decision in favor of the Plaintiff after a hearing. Allstate took a petition for writ of certiorari to the circuit appellate court, and its request for relief was denied. Due to the change from circuit appellate to district appellate jurisdiction, Allstate's motion for rehearing before the Fourth DCA was also denied. The Plaintiff prevailed and was entitled to the narrow list of documents that the trial court ordered Allstate to produce concerning AGIS—the appraiser that everyone involved in this case focused on since the inception of this case, and that Allstate clearly knew was the focus of the lawsuit. Plaintiff may not have the strongest appellate decision it would want—after all, it was a ruling on a petition for writ of certiorari with an unelaborated opinion—but the issue was clearly reviewed.

Moreover, in the Court's view, the Fourth DCA could have granted rehearing if it disagreed with the circuit appellate decision, as it did in another unrelated Allstate case with the same posture—the change of jurisdiction coming before a motion for rehearing could be ruled on by the circuit appellate court. *See Marshall Bronstein, D.C. v. Allstate Ins. Co.*, 315 So.3d 44 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D725b]. The Fourth DCA's decision not to grant rehearing in the instant case sends a fairly clear message that the circuit appellate court was correct in denying the petition for writ of certiorari.

Additionally, according to Plaintiff's own argument, Allstate has avoided this issue in other cases by simply settling those cases. The Plaintiff had no obligation to settle those cases, so it has also had a role to play in the lack of appellate review of the status of AGIS as an appraiser.

Which takes us to our second problem with Plaintiff's argument. These documents simply no longer have any relevance in this case. Even if the Court ordered that they be produced, to what end? Certainly, the Plaintiff would like to have these documents to try to demonstrate, for once and for all, that AGIS is clearly not a disinterested appraiser *in any case* involving Allstate. But this action for declaratory relief is for the property damage to a single automobile in this case. So, while the Plaintiff is entitled to a judgment in its favor, the Court finds it is no longer entitled to the documents ordered by this Court. Accordingly, is hereby

ORDERED AND ADJUDGED that the Plaintiff's Motion for Final Judgment for Declaratory Relief Upon Confession of Judgment, and Defendant's Motion for Protective Order for Corporate Representative's Deposition, are both GRANTED. The Plaintiff may submit its proposed final judgment.

* * *

Insurance—Property—Standing—Assignment—Section 627.7152 is not applicable to policy in effect prior to effective date of statute—Motion to dismiss is denied

THE KIDWELL GROUP LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Clark Stephens, Plaintiff, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-SC-000853. September 17, 2020. James J. DeKleva, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. Matthew P. Strauss, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be heard upon a Motion to Dismiss by Defendant, AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, and the Court having considered the motion and being otherwise advised in the premises, it is hereupon:

ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendant's Motion to Dismiss based on Plaintiff's failure to comply with Fla. Stat. §627.7152 (2019) is hereby DENIED.

2. The Court finds that since the policy of insurance was issued prior to to the enactment of §627.7152 (2019), the law that governs over the policy of insurance and Plaintiff's Assignment of Benefits is the law that was in effect at the time the policy was issued following the Florida Supreme Court's decision in *Menendez v. Progressive Exp. Ins. Co., Inc.,* 35 So.3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b].

3. Defendant has 20 days to file an Answer and Affirmative Defenses.

* * *

Criminal law—Battery—Immunity—Stand Your Ground Law—Defendant who was charged with battery on his child's mother established prima facie case of self-defense with evidence that victim struck him first—Further, defense impeached victim's contrary testimony, and state presented no evidence other than victim's injuries—Motion to dismiss is granted

STATE OF FLORIDA, Plaintiff, v. AARON FREDERICK HARPER, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2019-MM-057718-AXXX-XX. June 8, 2021. Aaron J. Peacock, Judge. Counsel: Sara Flenniken, Office of the State Attorney, Viera, for Plaintiff. Jake Parton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS—STATUTORY IMMUNITY

This cause came before the Court on May 10, 2021, upon Mr. Harper's Motion to Dismiss—Statutory Immunity, filed on March 29, 2021 pursuant to Fla. R. Crim. P. 3.190(b), and sections 776.032 and 776.012, Florida Statutes. Having considered the Motion, testimony, evidence presented, arguments of counsel and being otherwise fully advised in the premises, the Court finds the following:

On January 16, 2020, Mr. Harper was charged by Information with Battery—Domestic Violence. Mr. Harper argues that he used non-deadly force to prevent Kristen Laurella, the mother of Mr. Harper's child, from committing an unlawful battery on him, and that he is entitled to immunity based upon section 776.032, Florida Statutes, colloquially known as the "Stand Your Ground Law."

STATUTES

Section 776.032(1), Florida Statutes, Immunity from criminal prosecution and civil action for justifiable use or threatened use of force, provides:

> A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened . . .

Section 776.012(1), Florida Statutes, Use or threatened use of force

in defense of person, provides:

(1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

BURDEN OF PROOF

Section 776.032(4), Florida Statutes provides:

(4) In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).

THE MOTION

Filed pursuant to Fla. R. Crim. P. 3.190(b), the Motion was not sworn and did not include an affidavit. The State did not file a challenge to the facial sufficiency of the Motion. However, at the outset of the hearing, the State specifically noted that it did not concede that Mr. Harper had raised a *prima facie* claim of self-defense but that the State desired to proceed with the hearing as scheduled. Absent an objection from the State, the hearing was held. Ultimately, Mr. Harper testified that he grabbed Mrs. Laurella and must have struck her while defending himself from Mrs. Laurella's attacks. During final argument the State conceded that Defendant's testimony asserted a *prima facie* claim of defense shifting the burden to the State.

FACTS

Both Mr. Harper and Mrs. Laurella testified during the hearing. Mr. Harper also introduced a video showing Mrs. Laurella's actions during a previous incident between the parties. The State introduced photographs showing Mrs. Laurella's facial area and the alleged injuries she sustained during this incident.

Mr. Harper testified to the following facts surrounding an incident that took place on December 08, 2019. Mr. Harper and Mrs. Laurella were arguing about their daughter's school and the adult responsibilities that come along with the schooling. This argument took place at a restaurant in Brevard County. Both parties were drinking alcoholic beverages while at dinner. Eventually the argument had "cooled down" and the couple consumed more alcoholic beverages at the home that they share with their daughter. The Defendant testified that Mrs. Laurella appeared to be drunk, and the argument heated up again at the shared home. Mr. Harper indicated that he took their daughter to the bedroom to remove himself from engaging in further argument. While laying in the bed with his daughter, Mrs. Laurella entered the bedroom, and after more words were exchanged between the couple, Mrs. Laurella began to strike Mr. Harper in the right-side of his body. Mr. Harper testified that he threw his hand up and struck Mrs. Laurella. Mr. Harper also stated that he grabbed Mrs. Laurella by the wrist.

Mrs. Laurella also testified during the hearing. Mrs. Laurella testified that the couple had not gone to dinner on December 08, 2019. Mrs. Laurella testified that the couple had an argument two days prior and she was avoiding the Defendant on that day while at home. Mrs. Laurella cooked dinner and the couple ate dinner together. During dinner Mrs. Laurella had a glass of wine. After dinner the couple drank wine on the back porch together and started arguing. Mrs. Laurella testified that she went to bed with their daughter and that Mr. Harper came into the room and laid down in the bed. Mrs. Laurella closed her eyes while the Defendant continued to talk to her. While Mrs. Laurella's eyes were closed she felt a forceful impact to her left eye. Mrs. Laurella rolled out of the bed and called the police.

FINDINGS

The Court finds that Mr. Harper has established a prima facie claim of self-defense. Further, the Court finds that the State has not met its burden that Mr. Harper is not entitled to immunity by clear and convincing evidence. The only evidence presented by the State are photos of Mrs. Laurella's alleged injuries and Mrs. Laurella's testimony. Mrs. Laurella's testimony was impeached by Defense Counsel with several prior inconsistent statements that she made to law enforcement on the night of the incident. The evidence presented by the State of Florida does not rise to the level of clear and convincing.

Based upon the foregoing, it is

ORDERED AND ADJUDGED:

Defendant is entitled to immunity from prosecution under 776.032 Florida Statutes and the Defendant's Motion to Dismiss is hereby **GRANTED.**

* * *

Criminal law—Driving under influence—Evidence—Statements of defendant—Officer had probable cause to stop defendant for making unlawful right turn on red light, but did not have reasonable suspicion to require defendant to exit vehicle or to initiate DUI investigation where only indicia of impairment was glassy bloodshot eyes—All statements made by defendant and field sobriety exercises performed by defendant are suppressed—Breath test results are suppressed as fruit of poisonous tree

STATE OF FLORIDA, Plaintiff, v. MICHAEL STEVEN YOUNG, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CT-001715-A. May 20, 2021. Frederic M. Schott, Judge. Counsel: Isela Guzman, Assistant State Attorney, Sanford, for Plaintiff. Matthews Bark, Matthews R. Bark, P.A., Altamonte Springs, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS EVIDENCE PURSUANT TO FLORIDA STATUTES SECTIONS 901.15 AND 901.151(6) AND MOTION TO SUPPRESS CONFESSIONS, STATEMENTS AND ADMISSIONS / ORDER GRANTING DEFENDANT'S REQUEST THAT COURT TAKE JUDICIAL NOTICE OF FACT NO WARRANT WAS ISSUED IN THIS CASE

THIS CAUSE came on to be heard for Hearing before the undersigned County Court Judge on the 19th day of May, 2021, upon the Defendant's Motion to Suppress Evidence pursuant to Florida Statutes Sections 901.15 and 901.151(6) and Motion to Suppress Confessions, Statements and Admissions; Defendant's Motion in Limine with Regard to Field Sobriety Tests; Defendant's Motion in Limine with Regard to Horizontal Gaze Nystagmus; and Defendant's Request that Court Take Judicial Notice. The Defendant had also filed Motions regarding the breath test administered in this case but withdrew these Motions following the presentation of evidence at the Hearing.

After carefully reviewing the Motions, after carefully reviewing and considering all of the evidence admitted at the Hearing, after carefully reviewing all of the applicable U.S. Constitutional Law, Florida Constitutional Law, Florida Statutes and case law, as well as carefully considering the arguments raised by counsel for the State and by counsel for the Defendant, the Court makes the following findings of fact and conclusions of law:

1. That the Defendant's Motion to Suppress Evidence pursuant to Florida Statutes Sections 901.15 and 901.151(6) and Motion to Suppress Confessions, Statements and Admissions is hereby GRANTED IN PART AND DENIED IN PART.

It is my finding, based upon clear and convincing evidence, the State has proved Officer Sherrod had probable cause to stop the Defendant on July 24, 2020, based upon the Defendant having made

a right turn on red light from the eastbound exit ramp off I-4 onto Lake Mary Boulevard in Lake Mary, Florida, when there were clearly marked "No Turn on Red" signs at that intersection for motor vehicle drivers turning onto Lake Mary Boulevard from the eastbound exit ramp off I-4 in the lane from which the Defendant had exited I-4. Consequently, I do find that the stop was legal.

However, the Court finds that there was no probable cause or reasonable suspicion for Officer Sherrod to have commenced a DUI investigation at the time that he did commence a DUI investigation of the Defendant on July 24, 2020. For reasonable suspicion to exist the law enforcement officer must have a "particularized objective basis" for suspecting the defendant of violating the law. *United States v. Cortez,* 449 U.S. 411, 412 (1981). The Court finds that there was no particularized objective basis for Officer Sherrod to have suspected, prior to commencing his DUI investigation, that the Defendant herein was under the influence of alcohol or that the Defendant herein was impaired or that the Defendant herein had violated any laws other than taking a precluded right hand turn on a red light.

The only indicia of impairment in evidence prior to Officer Sherrod initiating his DUI investigation was an allegation that the Defendant had bloodshot, glassy eyes. There was no driving pattern which could have provided any reasonable suspicion or even a hunch for Officer Sherrod to have considered that the Defendant might be under the influence of alcohol or that his normal faculties may have been impaired. There was no odor of alcohol detected which could have provided any reasonable suspicion or even a hunch for Officer Sherrod to have considered that the Defendant might be under the influence of alcohol or that his normal faculties may have been impaired. There were no movements made by the Defendant either in response to Officer Sherrod's requests for information/identification or otherwise which could have provided any reasonable suspicion or even a hunch for Officer Sherrod to have considered that the Defendant might be under the influence of alcohol or that his normal faculties may have been impaired. There was no slurred or sluggish or unusual speech pattern which could have provided any reasonable suspicion or even a hunch for Officer Sherrod to have considered that the Defendant might be under the influence of alcohol or that his normal faculties may have been impaired.

In summary, there were simply no signs and no evidence presented whatsoever of impairment other than bloodshot, glassy eyes which, under the specific circumstances of this case including the basis for the stop, could form a basis for probable cause or reasonable suspicion or even a hunch that the Defendant was impaired by alcohol, or otherwise impaired, prior to Officer Sherrod ordering the Defendant to exit his car for purposes of a DUI investigation. Although additional indicia of potential impairment were obtained during the DUI investigation, this Court must determine whether Officer Sherrod had suspicion of illegal activity, in this case DUI, based upon some factual foundation in the circumstances as observed by Officer Sherrod at the time that he commenced his DUI investigation. Under the specific facts and circumstances of this case, Officer Sherrod lacked any factual foundation for any suspicion of DUI at that point of his interaction with the Defendant on July 24, 2020.

The Defendant has also raised argument the State failed to bring forth clear and convincing evidence how Officer Sherrod's training, knowledge and experience led him to have probable cause or reasonable suspicion of the Defendant's impairment prior to commencing the DUI investigation in this case. However, in light of the foregoing findings, the Court need not address this argument.

As a consequence of the foregoing findings, the Court is constrained by the facts of this case to suppress all statements, admissions and confessions made by the Defendant following his exit from his vehicle in the 7-11 parking lot on July 24, 2020, as well as results of the Field Sobriety Exercises performed by the Defendant on July 24, 2020. Furthermore, all breath test results for the Defendant on July 24, 2020, must be suppressed as well as fruits of the poisonous tree.

2. That the Defendant's Motion in Limine with Regard to Field Sobriety Tests and Defendant's Motion in Limine with Regard to Horizontal Gaze Nystagmus Test are moot based upon the findings of the Court hereinabove.

3. That the Defendant's Request that Court Take Judicial Notice is GRANTED. The State stipulated that no warrant was issued in regard to the Defendant in this case.

* * *

Insurance—Property—Standing—Assignment—Section 627.7152 is not applicable to policy in effect prior to effective date of statute—Motion to dismiss is denied

THE KIDWELL GROUP, LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Harry Carpenter, Plaintiff, v. HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 20th Judicial Circuit in and for Lee County. Case No. 20-SC-008584. June 11, 2021. Josephine Gagliardri, Judge. Counsel: Leo Manon, III and Robert Gonzalez, Florida Insurance Law Group, LLC, for Plaintiff. James Bruce McGee, III, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND MOTION TO STAY DISCOVERY

THIS CAUSE came on to be heard upon a Motion to Dismiss AND Motion to Stay Discovery by Defendant, HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, and the Court having considered the motion and being otherwise advised in the premises, it is hereupon:

ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendant's Motion to Dismiss is hereby DENIED.

2. This Court relies upon the ruling by the Honorable Judge Michael McHugh in the Circuit Court in and for Lee County, FL in *SFR Services, LLC a/a/o Douglas Pals and Diana Pals v. American Integrity Ins. Co. of Fl.,* 2020-CA-005940 holding that the law that was in effect when the policy was entered applies to assignment of benefits. The Policy in this matter went into effect in 2017, as such Florida Statute 627.7152 is not applicable to the assignment of benefits contract attached to Plaintiff's Complaint.

3. Defendant shall file a responsive pleading to Plaintiff's Complaint within thirty (30) days of this Order.

4. Defendant's Motion to Stay Discovery is hereby DENIED.

5. Defendant shall file responses to all outstanding discovery within forty-five (45) days of this Order.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Eight-minute detention while awaiting arrival of DUI investigator was not unreasonable—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. JAHAN HAJIANI, Defendant. County Court, 20th Judicial Circuit in and for Collier County, Criminal Division. Case No. 2020-CT-1143. June 30, 2021. Michael J. Brown, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE came before the Court on Defendant's Motion to Suppress. Having considered the evidence presented, the arguments of counsel, and the applicable law, and having heard argument by the parties at the hearing conducted on June 22nd, 2021 the Court finds as follows:

The Defense moved to suppress evidence obtained in this case based upon two arguments. First, that the initial stop of the vehicle was unlawful, and second, that the delay in the investigation to wait for a backup officer created an unlawful detention. The Court finds that the stop was based upon a well-founded concern by Sgt. Tuff that the driver could be ill, tired, or impaired, and for the reasons stated on the record, denies the motion on that basis. The Court reserved ruling on the second argument to review the authority provided by counsel and to consider any other applicable case law on the subject.

At issue is whether it amounts to an unlawful detention for Sgt. Tuff to have waited approximately eight minutes for a backup officer to arrive and take over the DUI investigation. The Court finds that it is not. There are no controlling opinions on this issue from any of the District Courts of Appeal or the Supreme Court. However, there are persuasive opinions on this subject written by trial courts and Circuit Courts in their appellate capacity. The Court considered the countervailing opinions provided by Counsel. However, it finds the Order written by Judge Hamer in *State v. Downing,* 28 Fla. L. Weekly Supp. 865a to be most persuasive. In it, he wrote,

> Defendant does not cite, and the Court is not aware of, any statute or case law requiring the first officer on the scene of a possible crime to begin immediately an investigation when the potential offender is being detained. It would intrude on the prerogatives of law enforcement in conducting efficient, thorough, and effective investigations for a court to impose such a rule. If a law enforcement agency chooses to investigate DUIs using officers whose responsibilities are so focused, and as long as employing those specialized officers does not result in unreasonably detaining a suspect, then the pre-DUI investigation detention does not provide a legal basis to suppress evidence thus obtained. The Court finds the nineteen-minute detention to be reasonable under the totality of the circumstances.

This Court agrees with this reasoning, and would also decline to create any such rule which would intrude upon the discretion of law enforcement to determine which personnel would best be suited to conduct a criminal investigation. The simple fact that Sgt. Tuff was capable of conducting a DUI investigation does not create an unconstitutional delay if he deems it appropriate to have a backup officer present before doing so. This is not to say that a delay of any extended period of time would be lawful, but the Court finds that the eight-minute delay in this case was not unreasonable.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress is denied.

* * *

Insurance—Property—Standing—Assignment—Where statutory change that makes it more difficult for policyholder to assign its rights to provider affects substantive rights, statute cannot be applied retroactively to policy that predates statutory change—Motion to dismiss is denied

INDUSTRY STANDARD EXPERTS, LLC, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20039112, Division 53. May 15, 2021. Robert W. Lee, Judge. Counsel: Leo Manon, Florida Insurance Law Group, LLC, for Plaintiff. Marybeth Cullinan and Selma Rowe, for Defendant.

ORDER DENYING DENYING DEFENDANT'S MOTION TO DISMISS, WITH NOTICE OF IMPENDING DEFAULT

This cause came before the Court on May 5, 2021 for hearing of the Defendant's Motion to Dismiss the Complaint with Prejudice. The Court finds as follows:

The Defendant argues that the Plaintiff's Complaint should be dismissed with prejudice because the assignment of benefits involved in this case fails to comply with Florida Statute sec. 627.7152 (2019). The Plaintiff responds that because the policy was in existence prior to the effective date of the statute, the new statute does not apply to the policy in this case. The Court agrees with the Plaintiff.

In the context of an insurance policy, courts have held that "the statute in effect at the time the insurance contract is executed governs any issues arising under the contract." *See Glenn Corkins, D.C. v. GEICO Indemnity Co.*, 16 Fla. L. Weekly Supp. 1185a (Broward Cty. Ct. 2009), quoting *Lumbermens Mutual Cas. Co. v. Ceballos*, 440 So.2d 612 (Fla. 3d DCA 1983), citing to *Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788 (5th Cir. 1963); *Allison v. Imperial Cas. & Indemnity Co.*, 222 So.2d 254 (Fla. 4th DCA 1969); and *Poole v. Travelers Ins. Co.*, 130 Fla. 806, 179 So. 138 (1937). *See also Hassen v. State Farm Mutual Auto. Ins. Co.*, 674 So.2d 106, 108 (Fla. 1996) [21 Fla. L. Weekly S102c]; *MR Services LLC v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 678a (Broward Cty. Ct. 2009).

In order to apply the statutory amendment dealing with assignments to the insurance policy at issue, which was issued prior to the effective date of the statute, the Court must first determine whether the statutory amendment is one that affects substantive rights. If so, the amendment can be applied to the insurance policy only if the insured holder expressly consented to the application of the amendment. However, in this case, the Defendant insurer has not suggested that the policyholder consented; therefore, the issue is solely one of whether the insured's substantive rights would be affected by application of the amendment.

In Florida, "*[a]ny* legislative action which diminishes the value of a contract is repugnant to and inhibited by the [Florida] Constitution." *In re Advisory Opinion*, 509 So.2d 292, 314 (Fla. 1987) (emphasis added). The test to determine whether a substantive right is affected is whether the amended or new "statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mutual Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995) [20 Fla. L. Weekly S173a]. *See also Menendez v. Progressive Express Ins. Co.*, 35 So.3d 873, 878-79 (Fla. 2010) [35 Fla. L. Weekly S222b]. Stated another way, "[a]n impairment occurs[. . .] when a contract is made worse or is diminished in quantity, value, excellence or strength." *Lawnwood Medical Center, Inc. v. Seeger*, 959 So.2d 1222, 1224 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1543a]. A substantive right is vested if it is an "immediate right to present enjoyment, or a present fixed right of future enjoyment." *See School Board of Miami-Dade County v. Carralero*, 992 So.2d 353, 355 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2329a].

In this case, the policyholder received a policy and paid a premium for an insurance policy that specifically provided certain benefits with no limitation on how a policyholder might assign its rights to a provider for work to be done on the insured premises. This assists the policyholder because work can be done, under then-existing Florida case law, without having to pay the provider upfront for these services, a provider who would then be permitted to seek payment directly from the insurer. After the policy was issued, but before the policy expired, the Florida Legislature enacted a statutory amendment which is more advantageous to the insurer and makes it more difficult for the policyholder to assign its rights to a provider. Fla. Stat. §627.7152 (2019). Now, a policyholder must sign a written assignment that contains several provisions that simply were not part of Florida's common law development of the rights to assign benefits due under an insurance policy. Policyholders are limited to those providers who agree to provide a right of rescission of their service contract, as well as those providers who are able and/or willing to provide a "written, itemized, per-unit cost estimate" at the time the assignment is signed. Indeed, this estimate must now be part of the assignment agreement. *Id.* §627.7152(2)(a) 2 & 4. The new law also includes an indemnification provision on behalf of the provider. *See id.* §627.7152(2)(a)7. It further limits the amount of "emergency" work that may be done to protect the premises *See id.* §627.7152(2)(c). The list of new requirements is lengthy, and as a whole, leads the Court to conclude that the change is substantive, that the policyholder's vested rights are affected by the change, and that the change cannot be applied retroactively. Accordingly, it is hereby

ORDERED THAT the Defendant's Motion to Dismiss is DENIED. Additionally, the Defendant is advised that the Court, on its own motion pursuant to Rule 1.500(b), shall enter a default against the Defendant without further notice or hearing unless within 10 days of the date of this Order, the Defendant shall FILE an ANSWER to the Complaint.

* * *

Volume 29, Number 5
September 30, 2021
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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Candidate's non-election activities—Code of Judicial conduct does not require a general magistrate to resign or stop acting as a magistrate in order to be a candidate to judicial office

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-7 (Election). Date of Issue: June 25, 2021.

ISSUE

1. Does the Code of Judicial Conduct require a general magistrate to resign or not remain in that position, if the magistrate becomes a candidate for a judicial seat?

ANSWER: No. As previously held in JEAC Ops. 08-08 [15 Fla. L. Weekly Supp. 527a] and 11-09 [18 Fla. L. Weekly Supp. 1065a], Canon 7A(2) does not require a general magistrate who intends to become a candidate for judicial office to resign.

2. Does the fact that the general magistrate will continue to act in the capacity of a magistrate create an appearance of impropriety prohibited by the Code of Judicial Conduct?

ANSWER: No. The mere fact that the candidate will continue to act as a magistrate does not, by itself, create an appearance of impropriety under the Code of Judicial Conduct.

FACTS

The inquirer presently holds a position of general magistrate. The magistrate has become a candidate for a judicial office which will become an open seat during the next election, as the sitting judge does not intend to qualify to run again. The inquirer asks two related questions: 1) Whether Canon 7 of the Code of Judicial Conduct requires the inquirer to resign as a general magistrate to run for judicial office and 2) Does the mere fact of the candidacy for judge where the general magistrate continues to act as such, create an appearance of impropriety prohibited by the Code of Judicial Conduct.

DISCUSSION

The Application of the Code of Judicial Conduct section provides, in relevant part, that a "…general or special magistrate…shall, while performing judicial functions, conform with Canons 1, 2A and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed." Therefore, the inquirer is specifically required to conform with the above Canons, as well as Canon 7, as the inquirer has now become a candidate for judicial office.

This Committee has previously dealt with very similar inquires posed by traffic hearing officers. In JEAC Op. 08-08 [15 Fla. L. Weekly Supp. 527a], the Committee opined that a traffic hearing officer did not have to resign in order to run for a position as a county court judge. There, we considered the provision in Canon 7A(2) which required sitting judges to resign to run for a *non-judicial office*. (Emphasis added) The JEAC found that this Canon did not, therefore, require the traffic hearing officer to resign in order to run for a judicial office. On the other hand, the Committee has found this Canon to require a traffic hearing officer to resign in the case where a hearing officer wanted to run for sheriff. Fla. JEAC Op. 96-5. A slightly different question was considered by the JEAC in Fla. JEAC Op. 11-09 [18 Fla. L. Weekly Supp. 1065a]. There, the traffic hearing officer inquirer posed the same question as that herein, that is, whether the civil infraction officer remain in that position while campaigning for election as a county judge. The JEAC opined that Canon 7(2) applied to the hearing officer but that it did not require the officer to resign thereby allowing the officer to remain in that position while campaigning. Here, the Committee also finds that the Code does not require the inquirer to resign or cease working as a general magistrate while campaigning for election as a judge.

The second question posed is whether to continue to work as a general magistrate while campaigning will generally create such an appearance of impropriety that would be prohibited by the Code.

Canon 2A provides "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." The Commentary to Canon 2A informs and guides our disposition of this issue. This Commentary is instructive to judges and to those others who perform judicial functions, as the inquirer herein. The Commentary states:

> The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all the prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

The Committee considers the candidacy of the inquirer just as it would consider the candidacy for re-election or retention of a sitting judge. The Code allows sitting judges to actively campaign for re-election and election while performing their judicial duties. Therefore, just as the simple or mere fact that a sitting judge's campaigning does not, by itself, create an appearance of impropriety under Canon 2A, neither would the inquirer's campaigning as a sitting general magistrate necessarily create such an appearance. The inquirer, just as other sitting judge candidates, will have to continuously evaluate their specific conduct while performing their judicial duties or in their personal lives under the test set out in the Commentary to Canon 2A quoted herein above.

The inquirer is cautioned that the JEAC cannot and does not render an opinion whether the proposed conduct violates any statutory provisions, local Court Administrator's Rules or any directives or rules established by the Office of the State Court Administrator (OSCA). Our jurisdiction is limited only to issue opinions concerning the Code of Judicial Conduct.

REFERENCES

Fla. Code Jud. Conduct, Application of the Code of Judicial Conduct, Canon 2A, Canon 7A(2), Commentary to 2A.
Fla. JEAC Op. 1996-05, 2008-08, 2011-09.

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Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, disqualifications—Professional relationships—A judge may be named as a trustee in a trust instrument if the appointment will not take effect until a later, undetermined date when the judge may no longer be in office

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-08. Date of Issue: July 19, 2021.

ISSUE

May a judge be named as a trustee of a friend's trust, if the judge would not be required to serve until a later date?

ANSWER

Yes, but the judge should make the friend aware that the judge

would be ineligible to serve as trustee if he or she remains a member of the judiciary at the time the appointment takes effect.

FACTS

A judge was contacted by a close friend who wishes to name the judge as trustee of a trust the friend intends to create for himself and his wife. The judge wishes to know whether the judge may allow himself or herself to be named as trustee of the trust. The actual appointment of the judge to serve in such capacity would not occur until the death of both the friend and the friend's spouse.

DISCUSSION

A sitting judge is prohibited from serving as a trustee or in any other fiduciary capacity, except for the judge's own family members. Canon 5E(1) of the Florida Code of Judicial Conduct states:

> A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

Accordingly, had the judge been asked to serve immediately as a trustee, the judge would clearly have to decline. The inquiring judge, however, seeks an opinion as to whether merely being named as trustee under a trust for which the judge would not serve as trustee until a later time, if ever, is prohibited by the Code of Judicial Conduct.

The Code of Judicial Conduct specifically limits its application to judges of the various courts of Florida, and to those acting in a judicial capacity. *See* "Application" section of the Code of Judicial Conduct. Canon 3C(2) of the Code further directs a judge to require those under the judge's direction and control to abide by the standards of fidelity and diligence that apply to judges. The person who intends to name the judge as trustee, however, is not a member of the judiciary, nor is the person one who is under the direction and control of a judge. Thus, the settlor of the proposed trust is not subject in any way to the provisions of the Code.

Canon 5E(1) prohibits a judge only from *serving* as a trustee or other fiduciary for non-family members. Nothing in the Canon prohibits a judge from being *named* to serve in such capacity at some time in the future, with the understanding that the judge could serve as trustee only if the judge is no longer serving in a judicial capacity when the appointment takes effect. In this instance, the inquiring judge would not be called upon to act as trustee until after the death of both the friend and the friend's spouse. By that time, the judge may no longer be in office or be otherwise bound by the Code of Judicial Conduct and would be free to serve as trustee. Under the circumstances presented in this inquiry, nothing in the Code prohibits the judge from being named as trustee of the trust.

Despite there being no prohibition against the judge being named as trustee, the Committee recommends that the judge advise the friend of the prohibition contained in Section 5E(1) of the Code and should encourage the friend to either name a different trustee or provide for an alternate trustee should the judge be unable to serve.

REFERENCES

Fla. Code of Judicial Conduct, Canons 3C(2), 5E(1)

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