Volume 29, Number 6, October 29, 2021

Pages 373-494

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—IMMUNITY—STAND YOUR GROUND LAW. Where a defendant fails to raise a prima facie claim of immunity under section 776.032, the burden does not shift to the state to overcome the defendant's claim.** *STATE v. PENALVER. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed August 31, 2021. Full Text at Circuit Courts-Original Section, page 423b.*
- **ESTATES—ASSETS—FLORIDA FIDUCIARY ACCESS TO DIGITAL ASSETS ACT. A personal representative of an estate was entitled to custody of the contents of the decedent's email accounts under the provisions of the Fiduciary Access to Digital Assets Act, Chapter 740, Florida Statutes.** *IN RE: ESTATE OF QUADRI. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed August 9, 2021. Full Text at Circuit Courts-Original Section, page 431a.*
- **CORPORATIONS—SHAREHOLDER DERIVATIVE ACTIONS—SETTLEMENT—JUDICIAL APPROVAL. Following the binding precedent of *Batur v. Signature Properties of Northwest Florida, Inc.*, the circuit court examined a proposed settlement of a shareholder derivative suit under both section 617.07401(3) and section 617.07401(4). The court approved the settlement after finding that the special litigation committee appointed by the corporation acted in good faith and conducted a reasonable investigation of the claims asserted before recommending the settlement at issue and that the settlement met the fairness criterion of section 617.07401(4). The court's judgment included an extensive analysis of the issues before it.** *LAURIA v. FISHER ISLAND COMMUNITY ASSOCIATION, INC. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed August 4, 2021. Full Text at Circuit Courts-Original Section, page 435a.*

FLW SUPPLEMENT (ISSN10684050) is published monthly by Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Tallahassee, FL 32303. All rights reserved. Subscription price is $250 per year plus tax. Internet subscription available at www.FloridaLawWeekly.com. Periodical postage paid at Tallahassee, FL. POSTMASTER: Send address changes to FLW Supplement, P.O. Box 4284, Tallahassee, FL 32315. Telephone (800)

FLW SUPPLEMENT

CASES REPORTED.

FLW Supplement includes reports of decisions of Florida circuit and county courts, and miscellaneous reports of the proceedings of other public agencies. Sections are divided as follows:

CIRCUIT COURT - APPELLATE	Opinions in those cases in which circuit courts were reviewing decisions of county courts or administrative agencies.
CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
MISCELLANEOUS	Other proceedings.

Subject Matter Index and Tables

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

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

Bold denotes decision by circuit court in its appellate capacity.

Statement required by Title 39 United States Code, Section 3685, showing the ownership, management and circulation of *FLW SUPPLEMENT*, published monthly. The office of publication and the headquarters of the publishers is located at 1327 North Adams Street, Tallahassee, Florida 32303. The Publisher is Judicial and Administrative Research Associates, Inc., 1327 North Adams Street, Tallahassee, Florida 32303. The Editor and Managing Editor is E. Neil Young, 1327 N. Adams St., Tallahassee, Florida 32303. The owner is Judicial and Administrative Research Associates, Inc., 1327 North Adams Street, Tallahassee, Florida 32303; the names and addresses of stockholders owning or holding 1 percent or more of the total amount of stock are E. Neil Young, 1327 N. Adams St., Tallahassee, Florida 32303, and Everett Young, 1327 N. Adams St., Tallahassee, Florida 32303. There are no known bondholders, mortgagees, or other security holders owning or holding 1 percent or more of total amount of bonds, mortgages or other securities. The average number of copies of each issue during the preceding twelve months: Net press run, 425 paid circulation: (1) sales through dealers and carriers, street vendors and counter sales, 0; mail subscriptions, 279; total paid circulation, 279, free distribution by mail, carrier or other means, sample, complimentary and other free copies, 116, total distribution, 395, copies not distributed: (1) office use, left over, unaccounted, spoiled after printing, 30; (2) returns from news agents, 0; total, 425; paid electronic copies, 1020; total paid print copies + paid electronic copies, 1,299; total print distribution + paid electronic copies, 1,415. The actual number of copies of single issue published nearest filing date: Net press run, 275; paid circulation; (1) sales through dealers and carriers, street vendors and counter sales, 0; (2) mail subscriptions, 267; total paid circulation, 267; free distribution by mail, carrier or other means, samples, complimentary and other free copies, 3, total distribution, 270; copies not distributed: (1) office use, left over, unaccounted, spoiled after printing, 5; (2) returns from news agents, 0; total 275; paid electronic copies, 1035; total paid print copies + paid electronic copies, 1,302; total print distribution + paid electronic copies, 1,305. I certify that the statements made by me above are correct and complete. E. Neil Young, Editor.

TORTS (continued)

TRAFFIC INFRACTIONS

TRUSTS

* * *

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

FLORIDA CONSTITUTION

FLORIDA STATUTES

TABLE OF STATUTES CONSTRUED (continued)

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

* * *

REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

* * *

Volume 29, Number 6
October 29, 2021
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of arrest—Where deputy conducting welfare check on licensee who appeared to be changing tire on side of road observed that licensee had odor of alcohol and front-end damage to his vehicle, and licensee began crying and claiming to have hit a deer and a sign, any *de facto* arrest that occurred when deputy temporarily placed licensee in patrol vehicle was supported by probable cause to believe licensee was driving under influence—Hearings—Telephonic—Hearing officer did not violate due process by administering witness oath telephonically

ANDREW G. JACKSON, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Clay County. Case No. 2020-CA-000761, Division B. July 30, 2021. Petition for Writ of Certiorari arising from the decision of the Department of Highway Safety and Motor Vehicles sustaining the administrative suspension of the Petitioner's driver's license. Counsel: Susan Z. Cohen and David M. Robbins, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

OPINION

(DON H. LESTER, J.) This cause came before the Court on the Amended Petition for Writ of Certiorari (Petition) filed by the Petitioner, Andrew G. Jackson pursuant to sections 322.2615(13) and 322.31, Florida Statutes. The Petitioner seeks review of a decision by the Respondent, the Department of Highway Safety and Motor Vehicles that determined the Petitioner's driving privilege was properly suspended. The Respondent filed a response to the Petition and the Petitioner filed a reply to the Respondent's response. On January 25, 2021, the Court held oral argument on the Petition. The Court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution and Florida Rule of Appellate Procedure 9.030(c)(3).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the early morning of April 26, 2020, Deputy Stone of the Clay County Sheriff's Office observed the Petitioner's vehicle pulled over on the side of the road. Deputy Stone saw the Petitioner outside the vehicle and believed the Petitioner was changing a tire. Deputy Stone turned his patrol car around to head towards the Petitioner in an attempt to assist and initiated the emergency lights of the patrol car. Before Deputy Stone made it to the Petitioner's vehicle, the Petitioner returned to the inside of his vehicle and began to drive onto the roadway. However, after about 100 yards, the Petitioner pulled his vehicle back off the roadway. As the Petitioner was driving, Deputy Stone heard scraping coming from the vehicle.

Thereafter, Deputy Stone made contact with the Petitioner. The Petitioner immediately started crying and first told Deputy Stone that he hit a deer, then later stated he hit a sign. Deputy Stone observed damage to the front end of the Petitioner's vehicle. Further, Deputy Stone detected the odor of an alcoholic beverage coming from the Petitioner. Deputy Stone asked the Petitioner to exit his vehicle and told the Petitioner he was being detained for a driving under the influence (DUI) investigation. Deputy Stone performed a pat down search of the Petitioner and placed the Petitioner in the patrol car to wait for Deputy Riley.

Deputy Riley of the Clay County Sheriff's Office arrived on the scene to conduct the DUI investigation. When Deputy Riley made contact with the Petitioner he detected an odor of an alcoholic beverage, and noticed the Petitioner had slurred speech and bloodshot, watery eyes. Deputy Riley conducted the DUI investigation, placed the Petitioner under arrest, and transported the Petitioner to the Clay County jail. At the jail, the Petitioner submitted to a breath test which showed the Petitioner's breath alcohol level was 0.255g/210L and 0.250g/210L. Deputy Riley arrested the Petitioner for driving under the influence (DUI) of alcohol.

As a result of the Petitioner's arrest, the Respondent suspended the Petitioner's driver's license. The Petitioner timely requested a formal review of the suspension with the Bureau of Administrative Reviews. A formal review hearing was held on May 27, 2020, with a continued hearing on June 24, 2020, and August 5, 2020. The hearings were conducted telephonically. Over the objection of the Petitioner, the witnesses were placed under oath over the telephone by the hearing officer. On August 18, 2020, the hearing officer entered an order upholding the suspension of the Petitioner's driver's license.

II. STANDARD OF REVIEW

On certiorari review of an administrative decision, this Court's duty is to determine whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent, substantial evidence. *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. *Educ. Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989).

III. DISCUSSION

The Petitioner raises two claims upon which he seeks relief. The Court finds that under its limited review both claims are without merit.

A. Legality of Arrest

For claim one, the Petitioner argues that the Respondent's decision that he was lawfully arrested departed from the essential requirements of the law and was not supported by competent substantial evidence. The Petitioner asserts that when Deputy Stone initiated the emergency lights the stop became an investigatory stop and Deputy Stone had no basis to conduct the stop. Further, the Petitioner contends that once the stop was made Deputy Stone had no reasonable suspicion to detain him for a DUI investigation. Lastly, the Petitioner argues he was under an unlawful *de facto* arrest when Deputy Stone placed him in the patrol car to wait for Deputy Riley's arrival.

The Respondent contends Deputy Stone had an objectively reasonable basis to conduct a welfare check as part of his community caretaking function of law enforcement and his use of the emergency lights did not transform the welfare check into an unlawful investigatory stop. Further, the Respondent states that the subsequent detention of the Petitioner was lawful based on the totality of the circumstances. In particular, the time of the encounter, Deputy Stone's detection of an odor of an alcoholic beverage, Deputy Stone's observation of damage to the Petitioner's vehicle, and Petitioner's demeanor. Moreover, the Respondent contends that assuming a *de facto* arrest occurred when the Petitioner was temporarily placed in the patrol car, Deputy Stone had probable cause to arrest the Petitioner for DUI based on his own observation and encounter with the Petitioner. If no probable cause was established by Deputy Stone, the Respondent contends that placing the Petitioner in the patrol car did not in and of itself constitute a *de facto* arrest, and based on the totality of the circumstances, the Petitioner's temporary detention did not constitute a *de facto* arrest.

Here, the facts are largely undisputed. Based on these facts and the Respondent's persuasive arguments, the Court finds that the Respondent's decision observed the essential requirements of law and the administrative findings and judgment are supported by competent substantial evidence.

B. Telephonic Oath

For claim two, the Petitioner argues the hearing officer departed from the essential requirements of law and denied him his right to due process when she administered the oaths over the telephone. Formal review hearings are governed by section 322.2615, Florida Statute and Chapter 15A-6 of the Florida Administrative Code. Pertinent to this issue is section 322.2615(6) (b) that provides

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

§ 322.2615(6) (b), Fla. Stat. Additionally, Chapter 15A-6.013 provides "[o]ral evidence shall be taken only on oath or affirmation" and "[t]he testimony of any witness shall be under oath." Fla. Admin. Code R. 15A-6.013.

The Petitioner argues the Respondent's rule that oral evidence be taken under oath requires that the witnesses providing testimony at a formal review hearing must be "in the presence of" the hearing officer when the hearing officer administers the oath. As such, the Petitioner argues that the oaths given over the telephone at his hearing violated his due process right because the Respondent's failed to follow their own procedures and rules. In support of his argument, the Petitioner cites to certain cases, an 1992 Attorney General Opinion, and an opinion from the Respondent's General Counsel. Further, the Petitioner supplemented the Petition with opinions from other Florida circuit courts that have granted certiorari after finding a petitioner's due process right was violated when the hearing officer conducted telephonic oaths in the absence of a positive identification of the witnesses.

The Respondent contends section 322.2615(6) (b) allows the formal review hearing in this case to be conducted telephonically, including the administration of the oath. The Respondent acknowledge that witness testimony must be taken under oath but states there is no rule or statute that specifies the manner in which the oath is administered. Therefore, the Respondent asserts no due process violation occurred.

Section 322.2615(6) (b) authorizes a hearing officer to conduct a hearing by telephone. Section 322.2615(6) (b) also authorizes a hearing officer to administer oaths. Section 322.2615(6) (b) does not expressly authorize that a hearing officer can administer oaths telephonically. Nonetheless, section 322.2615(6) (b) does not prohibit a hearing officer from administering an oath telephonically. That said, the Respondent's rules provide that for a hearing officer to consider witness testimony and oval evidence, the witness testimony and oral evidence must be under oath. Neither the statute nor the rules specify how or the manner in which the oath must be administered.

The Court is mindful that the key of a valid oath is that perjury will lie for its falsity. As a result, in certain matters and proceedings, specific measures on how and the manner in which to administer an oath have been implemented, arguably to ensure the oath's validity. However, the Petitioner has presented no case law, statute, or binding authority that these measures were applicable to this formal review hearing. The Court notes that due to technology advancement and other circumstances what is an acceptable manner in which to administer an oath changes. *See In re:* COVID-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts, Fla. Admin Order No. AOSC21-17 (Fla. June 4, 2021) (allowing "[n]otaries and other persons qualified to administer an oath in the State of Florida [to] swear a witness remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness" in response to the Coronavirus Disease 2019 pandemic); Fla. R. Jud. Admin. 2.530(d) (allowing testimony to be taken by telephone but "only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is present with the witness and administers the oath consistent with the laws of the jurisdiction"); *Markey v. State*, 37 So. 53, 59 (Fla. 1904) (finding a valid oath must be made "in the presence of an officer authorized to administer it").

Here, the hearing officer, who was authorized to administer oaths, did administer oaths to the witnesses at the Petitioner's hearing. The hearing officer was not held to any specified manner in which to administer the oaths. Thus, the hearing officer followed the statute and the rules, based on the plain language of the statutes and the rules.

In this case, the Petitioner had notice and an opportunity to be heard. The Petitioner was able to cross-examine the witnesses and present his version of events and arguments before the hearing officer. Therefore, the Court finds that the Respondent's decision observed the essential requirements of the law and the Petitioner was accorded procedural due process. For these reasons, it is

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

* * *

Criminal law—Driving under influence—Dismissal—Where state filed traverse the day before hearing on defendant's rule 3.190(c) motion to dismiss DUI charge and provided defendant with copy of traverse before hearing started, trial court abused its discretion by denying state's motion for continuance and granting defendant's motion to strike the traverse and motion to dismiss—Dismissal of charge was too severe a sanction under circumstances

STATE OF FLORIDA, Appellant, v. NICKEY LEE LAMB, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-60. L.T. Case No. 18-MM-2269. UCN Case No. 512019AP000060APAXWS. December 28, 2020.

ORDER GRANTING APPELLANT'S MOTION FOR REHEARING

THIS MATTER comes before the Court on Appellant's Motion for Rehearing timely-filed on September 11, 2020. This Court previously entered a written Order and Opinion which was issued on August 31, 2020, and rendered on September 4, 2020.

In the motion, Appellant argues that this Court overlooked or misapprehended points of fact and law. Appellant first argues that this Court made a mistake of fact, contending that Appellee was provided a copy of Appellant's Traverse/Demurrer (traverse) just prior to the start of the hearing on Appellee's motion to dismiss and not after the start of the hearing. Therefore, Appellee continues, *State v. Burnison,* 438 So. 2d 538 (Fla. 2d DCA 1983) is applicable and *State v. Rodriguez,* 505 So. 2d 628 (Fla. 3d DCA 1987) is not. Appellant argues that because *Burnison* is applicable, the trial court erred by striking the traverse and denying Appellant's motion to continue the hearing on Appellee's motion to dismiss.

Appellant further argues that *Rodriguez* is inapplicable because that opinion turned on when the traverse was filed, not when it was provided to the defendant. Appellant notes that the traverse in this case was filed the day before the hearing and that "the ministerial failure of the clerk to docket the motion does not change that it was timely filed. Further, the defense counsel did not have a copy of the motion in hand prior to the start of the hearing." *Motion for Rehearing p. 3.*

Appellant is correct that *Burnison* is applicable and not *Rodriguez.* The record reflects that immediately after the start of the hearing, Appellant's counsel informed the trial court that he received the traverse that morning. (*Hearing Tr. p. 4.*) Therefore, while it was not provided until the day of the hearing, it was provided prior to the start

of the hearing.

Additionally, Appellant is correct that the record now reflects that the traverse was filed the day before the hearing. While the traverse was not docketed until after the hearing and therefore the record before the trial court did not yet show that it had been filed the day before, the operative fact in determining whether *Rodriguez* or *Burnison* is applicable is the date the traverse was filed and not the date or time the trial court became aware of the traverse or the date it was docketed by the Clerk's office.

The above being said, this Court notes that the blame for the traverse not being docketed and served on Appellee prior to the motion to dismiss hearing falls squarely on Appellant, not on the Clerk or Appellee. This is not a case where the Clerk held onto the traverse for days without docketing and serving it. Despite knowing that Appellant's motion to dismiss was set to be heard the morning of July 3, 2019, Appellant did not file the traverse until 2:41 P.M. on July 2, 2019. Thus, Appellant is solely responsible for the fact that the traverse had to be provided to Appellee and filed in open court on the morning of the hearing.

Because Appellant is correct and *Burnison* is the applicable case, we withdraw the Court's Opinion issued on August 31, 2020, and issue the following opinion in its stead.

AMENDED ORDER AND OPINION

Because Appellant filed a Traverse/Demurrer (traverse) the day before the hearing on Appellee's motion to dismiss, the trial court abused its discretion when it denied Appellant's motion to continue the hearing and granted Appellee's motion to strike the traverse. Accordingly, the trial court's order granting Appellee's motion to dismiss is reversed.

STATEMENT OF THE CASE AND FACTS

Appellee was charged by Information with Obstructing or Resisting an Officer without Violence, Driving While License Suspended or Revoked, and Driving Under the Influence (DUI). He moved to dismiss the DUI charge only and the motion was set for hearing. While Appellant had drafted a traverse well before the hearing date, it was not filed until the afternoon before the hearing date. The traverse did not appear on the Clerk's docket in Clericus and was not electronically served on Appellee by the start of the hearing the next morning. Appellant had to serve a copy on Appellee just prior to the start of the hearing and file the traverse in open court.

During the hearing, Appellee moved to strike the traverse as untimely under Florida Rule of Criminal Procedure 3.190(d). Appellant conceded that the traverse was not timely within the meaning of the rule. However, Appellant argued that the correct remedy was a continuance of the hearing rather than striking the traverse. Appellant then moved for a continuance.

Appellee argued that as a matter of law, an untimely-filed traverse was the same as a traverse not being filed at all and therefore the trial court should only consider the merits of Appellee's motion and not the traverse. However, Appellee did not cite to any case law where a traverse had been filed late. Instead, Appellee cited to case law where a traverse had never been filed at all. Thus, those cases did not support Appellee's legal argument. Appellee further argued that rule 3.190(c)(4) does not permit continuances and therefore Appellant's motion to continue should be denied.

The trial court found that the traverse was not timely-filed and granted Appellee's motion to strike. Appellant again moved to continue which was denied by the trial court. The trial court then considered the merits of Appellee's motion to dismiss. After hearing the arguments of counsel the trial court granted Appellee's motion. Appellant timely-appealed.

STANDARD OF REVIEW

A trial court's order ruling on a Rule 3.190(c)(4) motion to dismiss involves a pure question of law and is therefore reviewed pursuant to a de novo standard. *See Armstrong v. Harris,* 773 So. 2d 7 (Fla. 2000) [25 Fla. L. Weekly S656a].

"Granting a continuance is within the trial court's discretion, and the court's ruling on a motion for continuance will be reversed only when an abuse of discretion is shown." *Randolph v. State,* 853 So. 2d 1051, 1063 (Fla. 2003) [28 Fla. L. Weekly S659a] (citing *Gorby v. State,* 630 So. 2d 544, 546 (Fla. 1993)); *Lundy v. State,* 531 So. 2d 1020 (Fla. 2d DCA 1988).

Where, as here, a judge's decision to grant or deny a motion to strike a filing is discretionary, an appellate court reviews the decision for abuse of discretion. *Cf. Bryant v. State,* 901 So. 2d 810, 817 (Fla. 2005) [30 Fla. L. Weekly S310a].

LAW AND ANALYSIS

"The state may traverse or demur a motion to dismiss that alleges factual matters. Factual matters alleged in a motion to dismiss under subdivision (c)(4) of this rule shall be considered admitted unless specifically denied by the state in the traverse. . . The demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss." Fla. R. Crim. P. 3.190(d).

In support of reversal, Appellant cites to *State v. Burnison,* 438 So. 2d 538, 540 (Fla. 2d DCA 1983). In *Burnison,* a traverse was provided to the defendant just before the hearing. *Id.* at 538. The Second District Court of Appeal held that the trial court abused its discretion by granting the motion to dismiss because a continuance would have cured any prejudice to the defendant. *Id.* at 539-40.

In support of affirmance, Appellee argues that the trial court did not abuse its discretion by striking the traverse and denying Appellant's motion to continue. Despite Appellee's lack of citations before either the trial court or this Court, there is appellate case law holding that a trial court has the discretion[1] to strike a late-filed traverse and consider only the merits of a defendant's motion to dismiss. *See State v. Rodriguez,* 505 So. 2d 628 (Fla. 3d DCA 1987), *reversed on other grounds,* 523 So. 2d 1141 (Fla. 1988); *State v. Purvis,* 560 So. 2d 1296 (Fla. 5th DCA 1993); *State v. Covington,* 973 So. 2d 481 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2477a].

In *Rodriguez,* the State did not file a traverse until *after* the start of the hearing. *Rodriguez,* 505 So. 2d at 628. The Third District Court of Appeal held that the trial court did not err by striking the traverse and considering only the merits of the motion itself. *Id.* The Supreme Court of Florida later reversed the Third District's opinion, but based upon the defendant's defective oath contained within the motion. *Rodriguez,* 523 So. 2d at 1142. The Supreme Court did not disturb the traverse portion of the Third District's holding.

This Court holds that *Burnison* is the applicable case in this appeal. As in *Burnison,* while a copy of the traverse was not provided to Appellee until the morning of the hearing, it was provided before the hearing started. Additionally, unlike in *Rodriguez,* the traverse in this case was filed prior to the start of the hearing on Appellee's motion to dismiss. Specifically, in this case, the record reflects that the traverse was filed the afternoon before the hearing date. Accordingly, as in *Burnison,* denying Appellee's motion to continue and dismissing the charge was too severe a sanction in this case. A continuance would have cured any prejudice to Appellee.

CONCLUSION

Because Appellant's traverse was filed the day before the hearing on Appellee's motion to dismiss and a copy was provided to Appellee just prior to the start of the hearing, the trial court abused its discretion by denying Appellant's motion to continue, striking the traverse, and dismissing the DUI charge. Accordingly, the trial court's order granting the motion to dismiss is reversed and the case remanded for a new hearing on Appellee's motion to dismiss.

It is therefore ORDERED and ADJUDGED that the trial court's order granting Appellee's motion to dismiss is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion. (KIMBERLY SHARPE BYRD, LAURALEE WESTINE, and KIMBERLY CAMPBELL, JJ.)

[1]Contrary to Appellee's assertion before the trial court, there is not a per se requirement that a trial court must strike an untimely traverse. Instead, the trial court has the discretion to do so.

* * *

Criminal law—Obstructing or resisting officer without violence—Post conviction relief—Ineffective assistance of counsel—Claims of ineffective assistance of postconviction counsel and actual innocence are not cognizable in rule 3.850 motion—Trial court did not err in summarily denying claim that trial counsel was ineffective for failing to interview witnesses to defendant's alleged battery of his wife—Defendant was charged with obstructing officers, not battery, and outcome of trial for obstructing officers would not have been different if witnesses testified that defendant did not batter wife since, at time defendant refused order to open bedroom door, officers had no reason to believe that wife was not in danger or that witness who claimed defendant dragged wife into bedroom was not telling truth—Claims of ineffective assistance of counsel for failing to object to wife's testimony and for misadvice not to testify were abandoned where claims had previously been stricken as facially insufficient and were not adopted or corrected in amended motion—Claim that trial counsel was ineffective for failing during voir dire to inquire into jurors' possible bias regarding interracial marriage could not have been summarily denied based on its speculative nature, but claim was correctly denied because defendant expressly approved selected jury

ANDRE LAVON GRANT, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-92. L.T. Case No. 15-MM-4197. UCN Case No. 512019AP000092APAXES. December 17, 2021. On appeal from Pasco County Court, Honorable William G. Sestak, Judge. Counsel: Andre Lavon Grant, Pro se, Appellant. No response required, for Appellee.

ORDER AND OPINION

Appellant seeks appellate review of the trial court's order summarily denying without an evidentiary hearing his motion for postconviction relief filed under Florida Rule of Appellate Procedure 3.850. For the foregoing reasons, the trial court's order is affirmed.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by Information with Obstructing or Resisting an Officer without Violence during an investigation into whether Appellant had committed battery against his wife.[1] Appellant was found guilty of the charged offense after a jury trial. He was adjudicated guilty and sentenced to one year of probation. The judgment and order of probation were affirmed by this Court on direct appeal. *See Grant v. State*, Case No. 16-CF-3762 (Fla. 6th Cir. Ct. Mar. 10, 2017).

Appellant later timely-filed a pro se motion for postconviction relief with the trial court. The motion raised multiple claims of ineffective assistance of trial counsel and a claim of actual innocence. The motion also asked the trial court to appoint postconviction counsel to represent him. The trial court denied the actual innocence claim, struck the ineffective assistance of trial counsel claims as facially insufficient, and appointed postconviction counsel for Appellant.

Postconviction counsel then filed an amended motion.[2] At some point thereafter, postconviction counsel obtained the trial court's permission to file a second amended motion. The trial court's order ruling on the second amended motion addressed claims raised in both Appellant's pro se motions and postconviction counsel's motions. The trial court struck three claims as facially insufficient and reserved

ruling on the remaining claims. The trial court's order granted Appellant's postconviction counsel permission to file a third amended motion.

Appellant's third amended motion filed by postconviction counsel raised the following claims of ineffective assistance of trial counsel: failure to investigate and speak with Shecoya Pope and Cierra Hall prior to trial (part of Ground Two), failure to inquire into possible racial biases of potential jurors during voir dire (Ground Five), and failure to convey plea offers (Ground Six).

The third amended motion expressly declined to adopt the following ineffective assistance of trial counsel claims: any claims related to a failure to investigate body-worn camera videos (Ground One), failure to investigate or speak with Kayla Hall and Deputy Matthew Brewer prior to trial (part of Ground Two), failure to object to Appellant's wife's testimony that Appellant was arrested for battery (Ground Three), and misadvising Appellant not to testify during trial (Ground Four). The trial court issued a final order denying the third amended motion. Appellant timely-appeals.

STANDARD OF REVIEW

In an appeal from an order denying a Rule 3.850 motion for postconviction relief alleging ineffective assistance of trial counsel without holding an evidentiary hearing, a defendant's factual assertions must be accepted as true to the extent they are not rebutted by the record. The trial court's legal conclusions are reviewed de novo. *Thompson v. State*, 759 So. 2d 650, 663 (Fla. 2000) [25 Fla. L. Weekly S599a].

LAW AND ANALYSIS

Appellant's initial brief raises six claims, one claim in the Summary of the Argument section and five claims under Grounds II through VI.[3] None warrant relief.

1. Ineffective Assistance of Postconviction Counsel

In the Summary of the Argument section of his initial brief, Appellant claims that his appointed postconviction counsel was ineffective while representing Appellant in the Rule 3.850 proceedings before the trial court. However, a claim of ineffective assistance of postconviction counsel is not cognizable before either a trial court or an appellate court. *See Peterka v. State*, 890 So. 2d 219, 241 (Fla. 2004) [29 Fla. L. Weekly S557a].

2. Ineffective Assistance of Trial Counsel—Failure to Investigate Witnesses

In Ground II of his initial brief, Appellant argues that the trial court erred by summarily denying his claim that trial counsel was ineffective by failing to investigate and speak with Shecoya Pope and Cierra Hall prior to trial. Ms. Pope was a witness for Appellee during trial. Ms. Hall was not called as a witness by either party.

Appellant's motion before the trial court argued that had trial counsel spoken with Ms. Pope, she would have informed trial counsel that she may have exaggerated her testimony but that she would not change her testimony for fear of being charged with perjury.

The motion argued that had trial counsel spoken with Ms. Hall prior to trial, she would have informed trial counsel and would later have testified at trial that Appellant's wife knocked on Appellant's door and wanted to be let in. She also would have testified that she did not see or hear anything that would have caused her to think that his wife was in any danger. Appellant argued that this would have refuted Ms. Pope's testimony that Appellant dragged his wife into his room against her will. Appellant attached to the second and third amended motions an affidavit sworn and signed by Ms. Hall.

Even if trial counsel was deficient, we hold that Appellant was not prejudiced by the deficiency because the portion of the record attached to the trial court's order shows that there is no reasonable probability that the outcome of the trial would have been different.

Ms Hall's affidavit conflicts with Ms. Pope's trial testimony regarding Appellant's actions towards his wife. However, Appellant was not charged with battering his wife. He was charged with obstructing or resisting law enforcement without violence. The focus of that charge is whether the defendant was obstructing a law enforcement officer who was engaged in the lawful execution of a legal duty. In determining whether law enforcement was engaged in the lawful execution of a legal duty, the question is what information did law enforcement have at the time the defendant was alleged to have obstructed them? Information learned after the fact is irrelevant if that information was not known by law enforcement at the time of execution of their legal duty and the defendant's obstruction.

The portions of the record attached to the trial court's order show that at the time the deputies were investigating, the only information they had was that Ms. Pope told them that she observed Appellant pick up his wife and drag her into his bedroom and then heard her say "get off me" and "you're hurting my back. I can't breathe." Ms. Pope told the deputies that Appellant would not let her in the room to check on his wife. Ms. Hall, despite being present, did not tell law enforcement that the wife knocked on the bedroom door and asked Appellant to be let in. At the time of the investigation and Appellant's obstruction, Ms. Hall did not contradict what Ms. Pope told law enforcement in any way. And after the deputies arrived at Appellant's residence, they could see that the wife was laying unmoving on the bed. This was the information available to the deputies when they ordered Appellant to open the bedroom door and let them in, which Appellant refused to do, thus obstructing law enforcement without violence.

Had Ms. Pope and Ms. Hall testified at trial as alleged in Appellant's postconviction motion, their testimony would have had no effect on the outcome of the trial. Their testimony would not have changed the fact that they did not make these statements to the deputies and therefore at the time the deputies ordered Appellant to open the bedroom door, there was no information available to the deputies that contradicted Ms. Pope's statements to them that that Appellant had dragged the wife into his bedroom against her will and then hurt her. Therefore, at the time Appellant refused to let the deputies into the room, law enforcement had no reason to know or believe that the wife was not in danger or that Ms. Pope was not telling the truth. Because the outcome of the trial would not have been different, the trial court did not err by summarily denying this claim without an evidentiary hearing.

3. Ineffective Assistance of Trial Counsel—The Wife's Testimony

In Ground III of his initial brief, Appellant argues that the trial court erred by summarily denying his claim that trial counsel was ineffective by failing to object to his wife's testimony that Appellant had been arrested for battery. Additionally, Appellant argues that trial counsel should have moved for a *Richardson*[4] hearing when she was called as a witness because she was not on Appellee's witness list.

This claim was initially stricken by the trial court as facially insufficient. Because postconviction counsel expressly refused to adopt and correct the claim, the facial insufficiency was not cured and the trial court did not err by summarily denying the claim without an evidentiary hearing. *See* Fla. R. Crim. P. 3.850(f)(3); *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) [32 Fla. L. Weekly S680a].

Even if the claim were facially sufficient, the fact that postconviction counsel expressly refused to adopt it in the third amended motion would have resulted in the claim's denial. *See Chacon v. State*, 938 So. 2d 532, 533 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2028a] (affirming the denial of a pro se newly discovered evidence claim where the trial court denied the claim because appointed counsel abandoned the claim after being appointed).

4. Ineffective Assistance of Trial Counsel—Misadvice not to Testify

In Ground IV of his initial brief, Appellant argues that the trial court erred by denying his claim that trial counsel was ineffective by misadvising Appellant not to testify in his own defense. As with Ground III, the trial court initially struck this claim as facially insufficient. Because postconviction counsel expressly refused to adopt and correct the claim, the facial insufficiency was not cured and the trial court did not err by summarily denying the claim without an evidentiary hearing. *See* Fla. R. Crim. P. 3.850(f)(3); *Spera*, 971 So. 2d at 761.

As with Ground III, even if the claim were facially sufficient, the fact that postconviction counsel expressly refused to adopt it in the third amended motion would have resulted in the claim's denial. *See Chacon*, 938 So. 2d at 533.

5. Ineffective Assistance of Trial Counsel—Possible Jury Bias

In Ground V of his initial brief, Appellant argues that the trial court erred by denying his claim that trial counsel was ineffective by failing to ask questions during voir dire that would have exposed jury bias. Appellant asserts that because he is an African-American man in an interracial marriage with a white woman, trial counsel should have asked questions during voir dire that addressed possible juror racial prejudices. Appellant claims that had trial counsel done so, any jurors that might have had a bias would have been removed from the jury.

The trial court found this claim facially sufficient but summarily denied it for two reasons. First, the trial court found that the claim was speculative. Second, the trial court found that Appellant had expressly approved of the jury that trial counsel selected. With regard to the first basis for denial, the trial court was correct that this claim was speculative because the claim alleged that there might have been biased jurors. Generally, speculation cannot form the basis of postconviction relief. *See McLean v. State*, 147 So. 3d 504, 512 (Fla. 2014) [39 Fla. L. Weekly S431a]. However, potential juror racial bias is an exception to that general rule. Accordingly, Appellant's claim could not have been summarily denied based on its speculative nature. *See Fennie v. State*, 855 So. 2d 597, 602-603 (Fla. 2003) [28 Fla. L. Weekly S619a].

That said, the trial court's second basis for denial was correct. *See Kelley v. State*, 109 So. 3d 811, 812-13 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D324a] (*citing Stano v. State*, 520 So. 2d 278, 279 (Fla. 1988)). In *Kelley*, a defendant claimed that trial counsel was ineffective for failing to strike two jurors for cause. *Id*. at 812. The First District affirmed the trial court's denial of that claim because the defendant had expressly and affirmatively told the trial court that he agreed with the jury trial counsel had selected. *Id*. at 813. Citing *Stano*, the First District wrote that a "rule 3.850 motion cannot be used to go behind representations the defendant made to the trial court, and the court may summarily deny post-conviction claims that are refuted by such representations." *Id*. at 812-13.

In the instant case, Appellant obviously knew that he was in an interracial marriage at the time of voir dire. The portion of the trial court record attached to the trial court's order shows that Appellant expressly stated that he was satisfied with the jury that trial counsel had selected despite that knowledge. Similar to the defendant in *Kelley*, Appellant cannot now go behind his express representation to the trial court. Accordingly, the trial court did not err by summarily denying this claim without holding an evidentiary hearing.

6. Evidence Adduced During Trial

In Ground VI of his initial brief, Appellant alleges that the evidence adduced at trial should have resulted in him being found not guilty and that therefore his conviction should be vacated. To the extent Appellant is appealing the trial court's denial of his "actual innocence" claim in his initial pro se Rule 3.850 motion, the trial court did not err.[5] Claims of actual innocence are not cognizable in a Rule 3.850 motion. *See Dailey v. State*, 283 So. 3d 782, 787 (Fla. 2019) [44 Fla. L. Weekly S241a] ("Moreover, we have repeatedly held that freestanding actual innocence claims are not cognizable under Florida law").

To the extent Appellant argues that either the trial court or the jury erred during the trial, such claims must be raised on direct appeal. They cannot be raised for the first time and are not cognizable in a Rule 3.850 motion for postconviction relief. *See Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005) [31 Fla. L. Weekly S39a] (providing that issues that should have been addressed on direct appeal are procedurally barred even under the guise of ineffective assistance of trial counsel).

CONCLUSION

Because the record conclusively refuted two of Appellant's claims and the remainder of Appellant's claims were either facially insufficient or procedurally barred, the trial court did not err when it summarily denied Appellant's third amended motion for postconviction relief without holding an evidentiary hearing. Accordingly, the trial court's order is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (LINDA BABB, KIMBERLY SHARPE BYRD, and LAURALEE WESTINE, JJ.)

---

[1]Ultimately, the state attorney's office did not charge Appellant with domestic battery. *See* case number 15-MM-4196.

[2]Appellant also filed a pro se amended motion. However, that motion was a nullity and should have been stricken because of the appointment of postconviction counsel. *See Sheppard v. State*, 17 So. 3d 275, 282 (Fla. 2009) [34 Fla. L. Weekly S477a] (holding that a trial court cannot entertain a pro se pleading if the defendant is represented by an attorney unless the pro se pleading makes allegations against that attorney that would give rise to a clear adversarial relationship).

[3]Appellant's initial brief purports to raise a claim under Ground I. However, Ground I does not allege a specific error. Instead, it recites the legal standard that a trial court must follow before summarily denying a claim of ineffective assistance of trial counsel and argues that the trial court failed to follow that standard when it summarily denied the ineffective assistance of trial counsel claims listed in Grounds II through V of the initial brief.

[4]*Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

[5]Because Appellant's actual innocence claim was denied by the trial court prior to the appointment of postconviction counsel, the claim was not a nullity and was not deemed abandoned.

* * *

Criminal law—Search and seizure—Suppression hearing—Evidence—Hearsay—Error to grant defendant's hearsay objection to suppression hearing testimony that, based on related domestic battery case, deputy knew that apartment in which defendant was arrested was residence of victim who was subject of no-contact order—Error was not harmless where deputy's testimony was only evidence supporting state's argument that defendant was in apartment illegally at time of his arrest—New suppression hearing required

STATE OF FLORIDA, Appellant, v. RICKY WINFRED REDDEN, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 20-AP-3. L.T. Case No. 19-MM-4881. UCN Case No. 512020AP000003APAXWS. December 29, 2020. On appeal from Pasco County Court, Honorable Debra Roberts, Judge. Counsel: Jennifer Counts, Assistant State Attorney, for Appellant. Kari Jorma Myllynen, Ft. Lauderdale, for Appellee.

ORDER AND OPINION

Because the trial court erred by granting Appellee's hearsay objection and the error was not harmless, the trial court's order granting Appellee's motion to suppress must be reversed and the case remanded for a new suppression hearing.

STATEMENT OF THE CASE AND FACTS

In case number 19-MM-4817,[1] one of the conditions of Appellee's pretrial release was compliance with a no contact order issued by the

trial court. The no contact order stated that Appellee could not go within 500 feet of the victim or her residence regardless of whether Appellee shared the residence with the victim prior to the order's issuance. However, the no contact order did not specify the victim's residential address.

Appellee was arrested at an apartment that he allegedly shared with the victim and was charged by Information with Violation of Pretrial Release. Appellee moved to suppress law enforcement's identification of him as well as statements he made to law enforcement after his arrest. Appellant's motion asserted that when law enforcement was investigating the offense, Appellee was inside the apartment in question. A deputy threatened to kick in the front door unless Appellee opened it and cooperated. Appellee opened the door and was arrested inside the apartment.

The motion argued that law enforcement's actions violated the Fourth Amendment because "a suspect does not consent to being arrested[2] within his residence when his consent to entry into his residence is prompted by a show of official authority." *United States v. Edmondson*, 791 F. 2d 1512, 1515 (11th Cir. 1986). The motion further argued that "[c]ases in which police have used their position to demand entry have held that consent was not voluntary and thus have required suppression of evidence discovered pursuant to entry." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

During the motion hearing, Appellant attempted to admit evidence that Appellee was in the apartment illegally by calling Pasco Sheriff Deputy Matthew Griffin to testify that the apartment was the victim's. Deputy Griffin further testified that he knew this because of information from the related domestic battery case. Appellee objected on the ground that because the deputy's testimony was based on what he read in the domestic battery case, the testimony was hearsay. The trial court sustained the objection which resulted in no evidence being admitted that the apartment was the victim's residence. Deputy Griffin then testified that Appellee refused the deputy's request that Appellee come out of the apartment. He testified on cross-examination that he told Appellee "you need to come outside or we're going to kick the door open, come get you." Only after that, did Appellee let the deputies into the apartment.

During the defense presentation of evidence, Appellee testified that the apartment was his residence. He further testified that he consented to law enforcement's entry into the apartment because one of the deputies said that the door was going to get kicked in and Appellee would be getting another charge if he did not cooperate. The trial court granted Appellee's motion to suppress. Appellant timely-appeals.

STANDARD OF REVIEW

Appellate review of a motion to suppress involves questions of both law and fact. *Rosenquist v. State*, 769 So. 2d 1051, 1052 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1675b]. An appellate court reviews the trial court's application of the law to the facts of the case pursuant to a de novo standard. *Id.*; *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996) [34 Fla. L. Weekly D827a]; *State v. Petion*, 992 So. 2d 889, 894 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2505a]. A trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *See Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002) [27 Fla. L. Weekly S299a]. The reviewing court is bound by the trial court's factual findings if they are supported by competent, substantial evidence. *Id.*

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Jackson v. State*, 107 So. 3d 328, 339 (Fla. 2012) [37 Fla. L. Weekly S683a]. However, that discretion is limited by the rules of evidence. *Id.* If the reviewing court finds that the trial court abused its discretion, the error is subject to harmless error analysis. *Id.* at 342-43.

LAW AND ANALYSIS

Appellant argues that the trial court erred by sustaining Appellee's objection. Appellee argues that the trial court's order should be affirmed because even if the trial court erred, Appellant did not make a legal argument as required by the contemporaneous objection rule and therefore Appellant failed to preserve the issue for appellate review.

Hearsay testimony is admissible in motion to suppress hearings. *Harris v. State*, 826 So. 2d 340, 341 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D529a]. Preservation for appellate review of an error regarding the admission of evidence differs depending on whether the appellant was the party that objected or should have objected, or was the party that sought to admit evidence over an objection.

The contemporaneous objection rule only applies to a party seeking to prevent the admission of testimony as that is the party that has to make the objection. *See Braddy v. State*, 111 So. 3d 810, 855 (Fla. 2012) [37 Fla. L. Weekly S703a]. Where, as here, the appellant was the party that sought to admit testimony over an opposing party's objection, the appellant need only have proffered the witness's expected testimony for the record to preserve the issue for appellate review. *Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007) [32 Fla. L. Weekly S613a]. Without that proffer, "an appellate court will not otherwise speculate about the admissibility of such evidence." *Id.* (*quoting Jacobs v. Wainwright*, 450 So. 2d 200, 201 (Fla. 1984). *See also Whitley v. State*, 349 So. 2d 840, 841 (Fla. 2d DCA 1977) ("Nevertheless, the state failed to make a proffer of what he would have said. . .").

Just prior to Appellee's objection, Deputy Griffin testified on the record that he knew the apartment was the victim's residence due to the domestic battery case. Therefore, the issue was preserved for appellate review. *See Francis*, 970 So. 2d at 814. Assuming *arguendo* that information from the domestic battery case was hearsay, the deputy's testimony was admissible because this was a motion to suppress hearing. *See Harris*, 826 So. 2d at 341. Therefore, the trial court erred by sustaining Appellee's objection.

The Court further holds that this error was not harmless. Without Deputy Griffin's testimony, there was no evidence adduced during the motion hearing establishing that the apartment was the victim's residence. Without such evidence, Appellant was unable to establish that Appellee was in the apartment in violation of the no contact order.

Appellant also argues for the first time on appeal that Appellee did not have standing under the Fourth Amendment.[3] Because a new suppression hearing is required, the Court declines to address this argument.

CONCLUSION

Because hearsay evidence is admissible in a motion to suppress hearing, the trial court erred by sustaining Appellee's objection to Deputy Griffin's testimony that the apartment at which Appellee was arrested was the victim's residence. Because this was the only evidence supporting Appellant's argument that Appellee was in the apartment in violation of the no contact order, the error was not harmless. Accordingly, the trial court's order granting Appellee's motion to suppress must be reversed and the case remanded for a new suppression hearing.

It is therefore ORDERED and ADJUDGED that the trial court's order granting Appellee's motions to suppress is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion. (DANIEL D. DISKEY, KIMBERLY CAMPBELL, and LAURALEE WESTINE, JJ.)

[1]Appellee is appealing his conviction for domestic battery in 19-MM-4817. See appeal number 20-AP-4.

[2]Appellant's motion mischaracterized *Edmondson*. The question was whether the defendant in *Edmondson* consented to law enforcement's entry into the apartment, not whether he consented to his arrest. *See Edmondson*, 791 F. 2d at 1515 ("The government alternatively contends that the warrantless arrest was valid because Edmondson consented to the officers' entry into the apartment").

[3]Lack of standing to file a motion to suppress can be raised for the first time on appeal. *State v. Pettis*, 266 So. 3d 238, 239 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D646a].

* * *

Insurance—Personal injury protection—Coverage—Emergency medical condition—Order clarifying opinion holding that trial court erred in entering partial summary judgment in favor of insurer on issue of validity of EMC determination rendered by qualified physician who was not treating physician—Although EMC determination rendered by qualified treating physician cannot be challenged by non-treating physician, nothing in PIP statute bars insurer from putting forth evidence challenging whether insured had EMC

C & R HEALTHCARE, LLC, a/a/o Samaria Harasta, Appellant, v. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-001475 (AP). L.T. Case No. CONO14-000261 (70). November 5, 2020.

ORDER ON APPELLANT'S MOTION FOR CLARIFICATION

[Original Opinion at 28 Fla. L. Weekly Supp. 899a]

(JOHN B. BOWMAN, J.) **THIS CAUSE** is before the court, in its appellate capacity, upon "Appellant's Motion for Clarification," filed October 2, 2020. Having carefully considered the motion and the response, the record, and the applicable law, it is hereby **ORDERED** that Appellant's Motion for Clarification is **GRANTED** as follows:

C & R Healthcare, LLC a/a/o Samaria Harasta ("Appellant") appealed a final partial summary judgment order of the county court rendered in favor of Progressive Select Insurance Company ("Appellee"). On September 24, 2020, this Court per curiam reversed the county court's order. On October 2, 2020, Appellant filed the instant motion. In its motion, Appellant claims this Court's per curiam opinion, though rendered in its favor, seemingly contradicts itself as to the following statement:

> Although Appellee argues that the peer review of its expert, Dr. Dainius Drukteinis, M.D., determined that the Insured did not have an EMC, this challenge would likely only serve to create a triable issue of fact upon remand in order to plausibly defeat Appellant's motion for partial summary judgment on the issue.

Appellant argues that the insured's EMC cannot be challenged by the peer review of a non-treating physician such as Dr. Dainius Drukteinis, M.D. ("Dr. Drukteinis"). Appellee, however, responds that this Court's ruling is clear and does not need clarification, namely, opining that Appellee has the right to contest whether the insured received an EMC determination at all. Appellee is correct. While this Court acknowledges that an EMC rendered by a qualified, treating physician cannot be challenged by a non-treating physician, nothing in the statute prevents Appellee from putting forth evidence challenging whether the insured had an EMC at all.

Furthermore, the court *did not* say that the peer review of Dr. Drukteinis *would* defeat Appellant's motion for summary judgment on the issue, but only that its sole purpose *could serve to possibly* raise a question of fact as to whether the insured actually received an EMC. In any event, the statement at issue is inconsequential to this Court's ruling and its overall analysis. It remains that the county court erred in granting partial final summary judgment in favor of Appellee on the EMC issue since a qualified physician, pursuant to section 627.736(1)(a)(3), Florida Statutes, rendered an EMC.

* * *

Criminal law—Violation of probation—Hearing—Trial court erred by refusing to consider defense counsel's attempt to invoke defendant's right against self-incrimination in response to questioning about defendant's drug use during violation of probation hearing and by misadvising defendant that she could only invoke her right against self-incrimination if there was pending criminal charge—Errors were not harmless where, absent defendant's testimony that she used cocaine, only evidence that defendant violated her probation was her hearsay testimony that she had not passed her drug screening, which cannot form sole basis for finding of violation—New hearing required

ALEXIS ELAINE MARTINEZ, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 20-AP-5. L.T. Case No. 19-MM-0158. UCN Case No. 512020AP000005APAXWS. December 29, 2020. On appeal from Pasco County Court, Honorable Debra Roberts, Judge. Counsel: Maria Christine Perinetti, Tampa, for Appellant. Ashley Miller, Assistant State Attorney, for Appellee.

ORDER AND OPINION

Because the trial court incorrectly refused to consider trial counsel's attempt to invoke Appellant's Fifth Amendment right against self-incrimination, and because the trial court misadvised Appellant regarding the circumstances under which she could invoke that right herself, the trial court's judgment and order of probation entered after finding that Appellant violated probation must be reversed and the case remanded for a new hearing.

STATEMENT OF THE CASE AND FACTS

Appellant pled no contest to possession of marijuana and possession of paraphernalia. Adjudication was withheld and the trial court sentenced her to 12 months' probation. An affidavit of violation of probation (VOP) was filed alleging that Appellant had violated probation condition #5 by using cocaine. The affidavit alleged that cocaine use was shown by a positive drug screening test result.

During the VOP final hearing, Appellee called two witnesses, probation officer Sherri Cook and Appellant. Cook testified to Appellant's conditions of probation and that those conditions were explained to Appellant. Cook did not testify regarding Appellant's cocaine use or the drug screening test result. Nor was the test result itself admitted into evidence.

The only evidence of Appellant's cocaine use was Appellant's own testimony. Appellee first asked Appellant if she passed her drug screening on August 20, 2019; to which Appellant testified that she had not. Appellee then asked Appellant if she recalled the drug she used that resulted in the failed drug screening. Appellant's trial counsel objected and attempted to invoke Appellant's Fifth Amendment right against self-incrimination on her behalf. The trial court

refused to permit trial counsel's attempted invocation. Appellant then testified that she used cocaine.

Appellee asked Appellant if she was aware that cocaine was an illegal substance. Before Appellant could answer, the trial court said the following to Appellant:

> Ms. Martinez, if there is a criminal case, you have the right to refuse to speak, you understand that, or incriminate yourself if there's a pending criminal case out there? You understand that? You have a Fifth Amendment right not to answer the question if you got pending cases regarding this, ma'am. You understand?

Hearing Tr. p. 12. Appellant stated that she was not aware of any pending criminal cases.

After testimony and argument, the trial court found that Appellant had violated probation. The trial court changed Appellant's withholds of adjudication to adjudications of guilt, sentenced her to 30-days in the Pasco Sheriff Office's Operation Payback program, and continued probation for four months. Appellant timely-appeals.

STANDARD OF REVIEW

Interpretation of a constitutional provision is reviewed *de novo*. *Lewis v. Leon County*, 73 So. 3d 151, 153 (Fla. 2011) [36 Fla. L. Weekly S525a].

LAW AND ANALYSIS

1. Attorneys can invoke their clients' right against self-incrimination

A federal court's interpretation of the United States Constitution controls in state courts. *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376, 384-85 (Fla. 3d DCA 1982).[1] The United States Court of Appeals for the Sixth Circuit[2] has held that a witness's attorney is not legally precluded from invoking the witness's Fifth Amendment right against self-incrimination on that witness's behalf during a trial. However, whether or not to permit the invocation is at the discretion of the trial court judge. *United States v. Mayes*, 512 F. 2d 637, 649 (6th Cir. 1975), cert. denied, 422 U.S. 1008 (1975).

In this case, Appellant's trial counsel attempted to invoke her Fifth Amendment right against self-incrimination before Appellant could respond to Appellee's question regarding Appellant's drug use. The trial court erred by telling Appellant's trial counsel that "you don't get to [invoke] her Fifth Amendment rights, she does. She can say it, but you can't." *Hearing Tr. p. 11*. It appears that the trial court believed that a defendant's trial counsel can never invoke a defendant's right against self-incrimination on the defendant's behalf. If so, such a belief was erroneous.

2. A defendant in a violation of probation proceeding has a limited right against self-incrimination regardless of whether a criminal charge is pending

A defendant in a violation of probation final hearing does not completely forfeit her Fifth Amendment right against self-incrimination. However, the right is qualified. *Watson v. State*, 388 So. 2d 15, 16 (Fla. 4th DCA 1980). While a defendant does not have a Fifth Amendment right to refuse to disclose a non-criminal probation violation, she does have a Fifth Amendment right "applicable to conduct and circumstances concerning a separate criminal offense." *Perry v. State*, 778 So. 2d 1072, 1073 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D644a]. This right is not limited to whether a criminal prosecution is actually pending but extends to answers which "might incriminate [her] in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). *See also United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990) ("A witness may property invoke the privilege when he 'reasonably apprehends' a risk of self-incrimination . . . though no criminal charges are pending against him").

In the instant case, Appellee did not limit its direct examination of Appellant to questions regarding the result of the drug screening. Rather, Appellee also asked Appellant which drug she had *used*. Therefore, that portion of the direct examination asked Appellant to offer testimony of criminal conduct against herself. *See* §893.13(6)(a), Fla. Stat. ("A person may not be in actual or constructive possession of a controlled substance . . ."). Despite the risk of self-incrimination, the trial court misadvised Appellant that she could only invoke her right against self-incrimination if there were charges pending. As a result of this misadvice, Appellant's testimony that she used cocaine was admitted into evidence.

3. The errors were not harmless

Errors regarding a defendant's invocation of the right against self-incrimination are subject to harmless error analysis. *Cf. Phillips v. State*, 621 So. 2d 734, 736 (Fla. 3d DCA 1993) (citing *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1985), and finding that a prosecutor's statement regarding the defendant's exercise of his privilege against self-incrimination was harmless). After reviewing the record in this case, the Court holds that the trial court errors were not harmless.

There were only two pieces of evidence supporting the trial court's finding that Appellant violated her probation by using cocaine: her testimony that she failed a drug screening and her testimony that she used cocaine. Had trial counsel or Appellant successfully invoked her right against self-incrimination, only her testimony regarding the drug screening test result would have remained.

Appellant's testimony regarding the drug screening test result was hearsay. *See Williams v. State*, 553 So. 2d 365, 365-66 (Fla. 5th DCA 1989).[3] While hearsay evidence is admissible in a VOP final hearing, it cannot be the sole basis for a finding that a defendant violated probation. *Wheeler v. State*, 344 So. 2d 630, 632 (Fla. 2d DCA 1977).

CONCLUSION

The trial court erred by refusing to consider trial counsel's attempt to invoke Appellant's Fifth Amendment right against self-incrimination on her behalf and misadvised Appellant that she could only invoke that right if there was a pending criminal charge. Had Appellant or her trial counsel successfully invoked her right against self-incrimination, it is likely that the only evidence of Appellant's cocaine use would have been hearsay. While admissible, this hearsay evidence would have been legally insufficient by itself to result in a finding that Appellant violated probation. For this reason, the Court holds that the trial court's errors regarding Appellant's Fifth Amendment right against self-incrimination and her trial counsel's attempt to invoke same were not harmless. Accordingly, a new VOP hearing is required.

It is therefore ORDERED and ADJUDGED that the trial court's order granting Appellee's motions to suppress is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion.

---

[1]The parties and the trial court addressed only the Fifth Amendment to the United States Constitution. However, the right against self-incrimination is also codified in Florida's state constitution. *See* Art. I, § 9, Fla. Const. That said, even if this Court were interpreting Article I, section 9 of the Florida Constitution alongside or instead of the Fifth Amendment to the United States Constitution, the result would be the same. While a state can grant a citizen broader rights than those contained in the Fifth Amendment, a state cannot grant fewer rights. The United States Constitution is the floor, not the ceiling. *Rigterink v. State*, 2 So. 3d 221, 240-41 (Fla. 2009) [34 Fla. L. Weekly S132a].

[2]This Court could not find any federal 11th Circuit or United States Supreme Court case law addressing this issue.

[3]In *Williams*, the State attempted to admit the result of a drug test through a witness. *Id*. However, because the witness was not involved with the testing, the Fifth District held that the drug test result was hearsay not subject to any exception. *Id*. at 366. In the instant case, Appellee did not even attempt to admit the drug test result itself. Appellee attempted to admit the result of the drug test through Appellant's testimony.

* * *

Criminal law—Possession of paraphernalia—Carrying concealed weapon—Search and seizure—Vehicle stop—Traffic infraction—Continued detention—Officer's immediate calls for K-9 unit and his discussion of criminal histories of defendant and his passengers and fact that they had been at known drug house supports inference that traffic stop was prolonged by criminal investigation which was not justified by reasonable suspicion—Order granting motion to suppress is affirmed

STATE OF FLORIDA, Appellant, v. THOMAS DICKMAN, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-86. L.T. Case No. 18-MM-6472. UCN Case No. 512019AP000086APAXWS. November 18, 2020. On appeal from Pasco County Court, Honorable Joseph Poblick, Judge. Counsel: Justin L. Homburg, Assistant State Attorney, for Appellant. Charalampos G. Demosthernous, Tampa, for Appellee.

ORDER AND OPINION

Based upon the trial court's factual findings regarding law enforcement's investigation into the vehicle occupants during the traffic stop, this Court affirms the trial court's order granting Appellee's motion to suppress.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by Information with Carrying a Concealed Weapon (count one) and Possession of Paraphernalia (count two) as a result of a search by Pasco Sheriff Deputy Christopher Ramos during a traffic stop. Appellant moved to suppress, arguing that the seized evidence should be suppressed because Deputy Ramos delayed the traffic stop longer than was necessary to issue a citation without having reasonable suspicion or probable cause of other illegal activity. Appellant argued that the deputy took specific actions that prolonged the traffic stop but that the total time of the stop could not be definitively determined because the deputy intentionally turned off his body-worn camera for a portion of the stop.

During the motion hearing, Deputy Ramos testified that he conducted a traffic stop of Appellant's vehicle because Appellant ran a stop sign. The deputy testified that during the traffic stop he identified Appellant and his two passengers, explained the reason for the traffic stop, and then returned to his patrol vehicle to confirm that Appellant's driver license was valid and to run all of the vehicle occupants' names through FCIC/NCIC and a local database to check for wants and warrants. The deputy also ran the license plate to make sure the vehicle was registered. The deputy testified that during the traffic stop, he called for a K9 unit and that it took approximately ten minutes for the K9 unit to arrive. The deputy testified that the K9 unit arrived while he was drafting the citation for running the stop sign. He further testified that he did not delay the traffic stop to wait for the K-9 unit.

On cross-examination, video from Deputy Ramos's body-worn camera was played. In the video, Deputy Ramos asks an unidentified person on the other end of the radio if he could come to the site of the traffic stop because the passengers were all seen leaving a "Vicky Valentine's house." Deputy Ramos also spoke with an unidentified speaker regarding whether to ask for consent to search Appellant's vehicle. Additionally, the deputy conversed with the unidentified person regarding the vehicle occupants' criminal histories.

After the hearing, the trial court issued an order granting Appellant's motion to suppress, writing:

> The authority of the deputy to detain the Defendant during the traffic stop ceased when the mission related to the citation was or should have been completed unless the deputy developed a reasonable suspicion for some other matter. . . The evidence shows that the primary concern of the deputy was not related to the moving violation, but was to secure a K9 and pursue his hunch that the Defendant, and/or his passengers were in possession of drugs. Immediately upon making contact with the Defendant, the deputy requests a K9 unit be dispatched to the scene. Upon returning to his vehicle, the deputy again requests K9 assistance. Deputy Ramos discusses with another deputy that the Defendant was seen leaving the suspected drug house of "Vicky Valentin," and further discusses the criminal history of the occupants of the vehicle. . . It is clear from the testimony and evidence that what may have been a valid traffic stop had quickly transformed into an investigatory stop, without any reasonable suspicion or probable cause of criminal activity.

Order pp. 1-2. Appellant timely-appealed the trial court's order

STANDARD OF REVIEW

Appellate review of a motion to suppress involves questions of both law and fact. *Rosenquist v. State*, 769 So. 2d 1051, 1052 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1675b]. An appellate court reviews the trial court's application of the law to the facts of the case pursuant to *a de novo* standard. *Id.*; *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996); *State v. Petion*, 992 So. 2d 889, 894 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2505a]. A trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *See Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002) [27 Fla. L. Weekly S945a]. The reviewing court is bound by the trial court's factual findings if they are supported by competent, substantial evidence. *Id*.

LAW AND ANALYSIS

A defendant cannot be detained during a traffic stop any longer than is necessary to effectuate the purpose of the stop. An officer may conduct certain unrelated checks during an otherwise lawful traffic stop; but the unrelated checks cannot be done in such a way that they prolong the stop unless reasonable suspicion of an additional offense develops during the stop. *Presley v. State*, 227 So. 3d 95, 104-05 (Fla. 2017) [42 Fla. L. Weekly S817a] (*citing Rodriguez v. United States*, 135 S. Ct. 1609, 1612-15 (2015) [25 Fla. L. Weekly Fed. S191a]).

The authority to detain ends when tasks associated with the traffic stop are, or reasonably should have been, completed. *Id*. These tasks include checking the driver license, checking for outstanding warrants against the driver or passengers, and inspecting the vehicle's registration and proof of insurance. *Id*. at 105; *Vangansbeke v. State*, 223 So. 3d 384, 386 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1429b].

Calling a K9 unit to conduct a dog sniff is "a measure directed at detecting evidence of criminal wrongdoing—something which is not an ordinary incident of a traffic stop, or part of the officer's traffic mission." *Presley*, 227 So. 3d at 105. Therefore, an officer may not prolong a traffic stop for the purpose of conducting a dog sniff absent reasonable suspicion that goes beyond the traffic stop. *Id*. That said, a dog sniff without reasonable suspicion is permitted if it occurs while the tasks associated with the traffic stop are occurring and therefore the wait for the dog sniff does not prolong the stop. *Sanchez v. State*, 847 So. 2d 1043, 1046 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1239b].

While the length of the traffic stop is certainly a factor and a shorter traffic stop is more likely to be reasonable, that is not determinative by itself. The detention becomes illegal once it is unnecessarily prolonged. A trial court should look at the specific facts of a particular case in making a ruling. *Compare Sanchez*, 847 So. 2d at 1046 (holding that the detention of a speeding motorist for five to ten minutes was not unreasonable where the officer was still writing the citation when a K9 unit arrived) *with Maldonado v. State*, 992 So. 2d 839, 842 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (trial court order affirmed because State conceded that traffic stop was unnecessarily prolonged even though it was only ten minutes).

By itself, a law enforcement officer's motivation for a traffic stop

has no bearing on whether the stop is legal. *Holland v. State*, 696 So. 2d 757, 758 (Fla. 1997) [22 Fla. L. Weekly S387a] (*citing Whren v. United States*, 517 U.S. 806 (1996)). As long as the officer had reasonable suspicion or probable cause to conduct the traffic stop and the traffic stop is not prolonged beyond what is necessary to effectuate the purpose of the stop, it does not matter if the traffic stop is pretextual. *Presley*, 227 So. 3d at

After reviewing the record in this case, this Court cannot say that the trial court erred. In the written order granting Appellee's motions to suppress, the trial court correctly wrote that the deputy's authority to "detain [Appellant] during the traffic stop ceased when the mission related to the citation was or should have been completed." The trial court then made the following factual findings: "Immediately upon making contact with [Appellant], the deputy requests a K9 unit be dispatched to the scene. Upon returning to his vehicle, the deputy again requests K9 assistance. Deputy Ramos discusses with another deputy that [Appellant] was seen leaving the suspected drug house of 'Vicky Valentin,' and further discusses the criminal history of the occupants of the vehicle."

On this record, the evidence supports the inference that the traffic stop was unnecessarily delayed by law enforcement investigating Appellant and his passengers based upon them leaving "Vicky Valentine's house" and their criminal histories. While law enforcement can conduct a criminal records check for outstanding warrants, once it is determined that there are no warrants, further discussion of and inquiry into the vehicle occupants' criminal histories can unnecessarily delay a traffic stop. *See, e.g., Whitfield v. State*, 33 So. 3d 787, 791 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D915a] (holding that a traffic stop was unnecessarily delayed in part because the officer asked the defendant and his son about their prior criminal history). Therefore, the evidence supports the inference that the traffic stop was delayed longer than was necessary to effectuate the purpose of the traffic stop. It is possible that had law enforcement not taken the time to investigate the vehicle occupants' criminal histories, the traffic stop would not have been delayed and might have been completed before the K9 officer arrived and the dog sniff conducted.

This Court notes that its affirmance is based upon the specific facts of this case. This opinion should not be read to hold that a ten minute traffic stop is unreasonable. A ten minute traffic stop may well be reasonable in the majority of circumstances. *See, e.g., Sanchez*, 847 So. 2d at 1046. But based upon the facts in this case, there is competent, substantial evidence to support the inference that law enforcement delayed the traffic stop beyond what was necessary so that a criminal investigation and dog sniff could be conducted based upon Appellant and his passengers leaving someone's house and their criminal histories.

CONCLUSION

Because the trial court's determination that the traffic stop was unnecessarily delayed by a criminal investigation conducted without reasonable suspicion was supported by competent, substantial evidence, the trial court did not err by granting Appellee's motion to suppress. Accordingly, the trial court's order granting the motion is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (SHAWN CRANE, SUSAN G. BARTHLE, and KIMBERLY CAMPBELL, JJ.)

* * *

Civil procedure—Summary judgment—Contracts—Loan agreement—Error to enter summary judgment in favor of credit union in action against borrower for breach of loan agreement where credit union failed to address borrower's affirmative defenses in its motion for summary judgment and affidavit, and trial court failed to address those affirmative defenses in final judgment

JOSEPH WASHINGTON, JR., Appellant, v. USF FEDERAL CREDIT UNION, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 18-AP-74. L.T. Case No. 17-CC-2145. UCN Case No. 512018AP000074APAXES. May 18, 2020. On appeal from Pasco County Court, Honorable William G. Sestak, Judge. Counsel: Joseph Washington, Jr., Pro se, Zephyrhills, Appellant. No response, for Appellee.

ORDER AND OPINION

Because Plaintiff-Appellee failed to address Defendant-Appellant's affirmative defenses in its motion for summary judgment and affidavit, and the trial court failed to address the affirmative defenses in its final judgment that granted Appellee's motion for summary judgment, the trial court's final judgment and corresponding attorney fee award must be reversed. Because this issue warrants reversal by itself, the Court does not address Appellant's remaining arguments.

STATEMENT OF THE CASE AND FACTS

Appellee University of South Florida Federal Credit Union brought a Third Amended Complaint against Appellant Joseph Washington, Jr. for breach of contract and damages for failing to pay on a loan agreement. In the Complaint, Appellee asserted that the parties had entered into a contract, that Appellant had not paid Appellee pursuant to the terms of the contract, and that Appellant therefore owed Appellee damages of $14,918.67. Attached to the Complaint was a document that Appellee asserted was a loan agreement. The document is entitled "Advance Receipt and Truth-In-Lending Statement." It is signed by Appellant but not by a representative of Appellee.

Appellant filed an Answer and Affirmative Defenses. Appellant denied that the document attached was a contract and denied damages, writing "[i]n that Plaintiff did not provide a contract per se, the allegations in this paragraph are denied."

Appellant raised five affirmative defenses: (1) that the Complaint failed to state a cause of action; (2) that Appellee did not satisfy any applicable condition precedent to suit; (3) that Appellee failed to mitigate damages; (4) that Appellant is entitled to "set-off from damages . . . for interim earnings, or for any amounts recovered or which reasonably could have been recovered, by plaintiff through plaintiff's efforts to mitigate damages or through recovery from a collateral source;" and (5) "handwritten notes [specifically the word "Work Out" on the top of the first page of Complaint Exhibit A] indicate a modification was made, entitling Defendant to relief from damages based on the revised terms of the work-out and negating the award of damages to plaintiff."

Appellee filed an unsworn response to Appellant's affirmative defenses that consisted of a single sentence denial. There was no affidavit or other documentation or evidence attached to the response. Appellee also filed a motion for summary judgment and attorney fees. An affidavit was attached to the summary judgment motion. However, neither the motion nor the affidavit addressed Appellant's affirmative defenses.

The trial court held a hearing on the motion on August 27, 2018, but it was either not recorded or not transcribed. Appellant later attempted to submit a Statement of Evidence or Proceedings. *See* Fla. R. App. P. 9.200(b)(5). However, the trial court refused to approve the statement because it did not accurately reflect what occurred during the motion hearing. This Court affirmed the trial court's order on the statement. Thus, there is no transcript or statement in the record regarding the hearing on the motion for summary judgment.

The trial court issued a written Final Judgment that granted the motion for summary judgment and entered a final judgment in favor of Appellee. The final judgment also awarded Appellee attorney fees totaling $750.00.

STANDARD OF REVIEW

"The standard of review of a summary judgment order is *de novo* and requires viewing the evidence in the light most favorable to the non-moving party." *Skelton v. Real Estate Sols. Home Sellers, LLC*, 202 So. 3d 960, 961 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2466a] (quoting *Sierra v. Shevin*, 767 So.2d 524, 525 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D1605a]

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Jackson v. State*, 107 So. 3d 328, 339 (Fla. 2012) [37 Fla. L. Weekly S683a]. However, that discretion is limited by the rules of evidence. *Id*. If the reviewing court finds that the trial court abused its discretion, the error is subject to harmless error analysis. *Id*. at 342-43.

Generally, where no transcript of a proceeding is made, an appellate court cannot reverse unless there is an error on the face of the trial court's order. Additionally, the error complained of must be a harmful error resulting in a miscarriage of justice. *Harris v. McKinney*, 20 So. 3d 400, 405-06 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2077a] (citations and quotations omitted).

However, the lack of a transcript does not automatically foreclose appellate review of an order ruling on a motion for summary judgment. *Johnson v. Deutsche Bank Nat'l Trust Co. Ams.*, 248 So. 3d 1205, 1210-11 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1071a]. Where the summary judgment evidence in the form of pleadings, attachments thereto, and affidavits demonstrate that genuine issues of material fact remain, a transcript of the summary judgment hearing is not necessary. *Id*.; *Misha Enters. v. GAR Enters., LLC*, 117 So. 3d 850, 853-54 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1493c].

LAW AND ANALYSIS

I. Motion for Summary Judgment Did Not Address Affirmative Defenses

Where a plaintiff moves for summary judgment after the defendant raises affirmative defenses, the motion for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Misha*, 117 So. 3d at 853. The burden of proving the existence of genuine issues of material fact does not shift to the defendant until the plaintiff has met its burden to disprove or refute the affirmative defenses. *Johnson*, 248 So. 3d at 1207-1208 (quoting *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251, 253 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2233a]). Even where there is no transcript of the summary judgment motion hearing, an appellate court can still conduct *de novo* review of a summary judgment hearing on a case-by-case basis. *Johnson*, 248 So. 3d at 1210 (citing *Houk v. PennyMac Corp.*, 210 So. 3d 726, 731 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D384b]).

In *Johnson*, Deutsche Bank National Trust Company Americas, as Trustee RALI 2007-QS1 (RALI), instituted a residential foreclosure action against the Johnsons. *Id*. at 1206. The Johnsons raised multiple affirmative defenses, including standing. *Id*. at 1207. RALI filed a motion for summary judgment, attaching an affidavit by an employee of PNC Mortgage asserting that PNC Mortgage was the servicer of the loan. *Id*. RALI relied upon that affidavit to argue in the motion that they were the holder of the mortgage note and therefore had standing. *Id*. A hearing on the motion was held but was not transcribed. *Id*. at 1209. The trial court granted the summary judgment motion. *Id*. at 1206.

On appeal, the Second District Court of Appeal wrote that RALI's "standing—challenged, as it was, by the Johnsons' affirmative defense—fell well short of what was required for a summary adjudication." *Id*. at 1208. Specifically, the Second District held that the PNC Mortgage employee was not in any way affiliated with RALI and that the employee's affidavit failed to state how she obtained her knowledge of RALI's connection to the Johnsons' note or how RALI had become an owner or holder of the Johnsons' note. *Id*. As a result, the Second District reversed the summary judgment order. *Id*. at 1211.

In *Misha*, GAR Enterprises and Misha Enterprises entered into a business lease. GAR brought a complaint for declaratory judgment, damages for breach of contract, and commercial eviction. *Misha*, 117 So. 3d at 851. Misha raised several affirmative defenses, the fourth of which asserted a set-off of $100,000 for loss of business due to actions taken by GAR. *Id*. at 852. GAR moved for summary judgment and moved to strike Misha's affirmative defenses. *Id*. The trial court granted the motion for summary judgment but the order did not address whether it considered the affirmative defenses stricken at the time of the summary judgment order. *Id*. at 852, 853. Neither party prepared a transcript of the summary judgment hearing. *Id*. at 853.

The Fourth District Court of Appeal held that GAR's affidavit in support of summary judgment failed to address any of the allegations in Misha's fourth affirmative defense. *Id*. at 853-54. Thus, the Fourth District held, GAR had failed to demonstrate the absence of material fact pertaining to that affirmative defense. *Id*. at 854. The summary judgement order was reversed. *Id*.

See also Houk, 210 So. 3d at 731 (holding that appellate review of an order granting a motion for summary judgment was appropriate despite the lack of a transcript because the record contained the "operative complaint, Mr. Houk's answer and affirmative defenses, the motion and order for substitution of the plaintiff, the amended motion for summary judgment, and the supporting and opposing affidavits" and therefore had "all of the portions. . . necessary for us to determine whether summary judgment was properly entered.").

As in *Johnson*, *Misha*, and *Houk*, the parties' pleadings and motions and the trial court's order are sufficient to conduct appellate review of the summary judgment proceeding despite the lack of a transcript. In the instant case, in his Answer and Affirmative Defenses, Appellant denied that the document attached to Appellee's complaint was a contract and asserted that Appellee had failed to state a claim upon which relief could be granted. He further asserted that Appellee failed to satisfy any condition precedent to suit, that Appellee failed to mitigate damages, that Appellant is entitled to a set-off from damages to Appellee for interim earnings, or any amounts recovered or which reasonably could have been recovered, through mitigation efforts, and that even if the trial court were to hold that the document attached to Appellee's third amended complaint were a contract, and that handwritten notes establish that a modification of the contract was made, entitling Defendant to relief from damages.

Neither Appellee's motion for summary judgment nor the affidavit in support thereof addressed Appellant's affirmative defenses in any way. Additionally, the trial court's order granting summary judgment did not address the affirmative defenses. While Appellee filed a reply to Appellant's affirmative defenses, the reply was an unsworn, single-lined denial that fell far below the burden required to refute an affirmative defense in a summary judgment proceeding. The trial court should have denied Appellee's motion for summary judgment. Accordingly, the trial court's order granting Appellee's motion for summary judgment must be reversed.

II. Appellant's Claim Regarding Amount of Attorney Fees is Moot

Appellant is correct that a trial court order determining the amount of attorney fees is in error where neither the record nor the written order make the factual findings required by *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). *See Bayer v. Global Renaissance Arts, Inc.*, 869 So. 2d 1232 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D736a] (where the trial court does not

verbally make the required *Rowe* findings during the attorney fee hearing, or where the hearing transcript is not made part of the appellate record, the trial court's written attorney fee order must contain the required *Rowe* findings and the failure to do so is reversible error).

However, Appellant's argument is now moot. Because this Order and Opinion results in the reversal of the trial court's order granting the motion for summary judgment, Appellee is no longer the prevailing party in the summary judgment proceeding. Therefore, Appellee is no longer entitled to attorney fees.

CONCLUSION

Because Appellee's motion for summary judgment failed to refute or even address Appellant's affirmative defenses, the trial court's final judgment granting summary judgment must be reversed.

Because the final judgment granting summary judgment must be reversed, Appellee's entitlement to attorney fees must also reversed. Thus, Appellant's argument that the trial court erred in determining the amount of the attorney fee award is now moot.

Because the claim that the motion for summary judgment failed to address Appellant's affirmative defenses results in reversal of the trial court's order by itself, this Court does not reach Appellant's remaining claims.

It is therefore ORDERED and ADJUDGED that the final judgment of the trial court is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion. (DANIEL D. DISKEY, SUSAN G. BARTHLE, and KIMBERLY SHARPE BYRD, JJ.)

* * *

Criminal law—Appeals—Guilty plea—Dispositive issues—Carrying concealed weapon—Brass knuckles—Constitutionality of statute—Defendant who entered guilty plea to carrying concealed brass knuckles failed to properly reserve right to appeal trial court's denial of her as-applied constitutional challenge to concealed carry statute where defendant failed to expressly reserve right to appeal issue and there was no finding by trial court or stipulation by state that issue was dispositive—Furthermore, appellate court is bound by Florida Supreme Court decision ruling that statute is facially constitutional—Sentencing—Forfeiture—Argument that trial court erred in ordering defendant to forfeit brass knuckles as part of sentence is unavailing where defendant objected to forfeiture but did not obtain trial court ruling on her objection and agreed to forfeiture in plea agreement

JENNIFER ROSELL, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-62. L.T. Case No. 19-MM-852. UCN Case No. 512019AP000062APAXWS. August 24, 2020. On appeal from Pasco County Court, Honorable Anne Wansboro, Judge. Counsel: David J. Joffe, Joffe Law, P.A., Fort Lauderdale, for Appellant. Michael B. Cowan, Assistant State Attorney, for Appellee.

ORDER AND OPINION

Appellant's constitutional challenge to section 790.01, Florida Statutes (2018), was an as-applied challenge. Appellant failed to properly reserve the right to appeal the denial of the challenge after pleading no contest. Because Appellant did not obtain from the trial court a ruling on her objection to the forfeiture of the brass knuckles as part of her sentence, there is no trial court order for this Court to review. Accordingly, the judgment and sentence is affirmed.

STATEMENT OF THE CASE AND FACTS

During a search incident to Appellant's arrest, law enforcement found brass knuckles in her purse. Appellant was subsequently charged by Information with carrying a concealed weapon in violation of section 790.01(1), Florida Statutes (2018). She filed a written constitutional challenge to the statute.

The Written Challenge

Appellant's challenge argued that Florida applies the intermediate scrutiny test when evaluating the constitutionality of Second Amendment restrictions. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Norman v. State*, 215 So. 3d 18, 39 (Fla. 2017) [42 Fla. L. Weekly S239b] (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

Appellant's motion recited the governmental interest stated in section 790.25(1), Florida Statutes (2018), and argued that the governmental interest is focused on firearms. Appellant's motion then conducted a comparative analysis between her case and the *Norman* opinion. The motion noted that in *Norman*, the Florida Supreme Court held that "the State has satisfied the first prong of intermediate scrutiny, as the government's interest in ensuring public safety by reducing firearm-related crime is undoubtedly critically important."

Appellant's motion argued that even if the State somehow had an interest in public safety in reducing "knuckles-related" crime, section 790.01(1) is not substantially related to the banning of carrying concealed brass-knuckles. Specifically, Appellant wrote: "How can the statue argue that concealed carry supports public safety, yet argue [in *Norman*] that concealed carry opposes public safety?"

Appellant's challenge argued that because brass knuckles are not nearly as dangerous or deadly as a firearm, the justification under immediate scrutiny for firearms should not be applicable to brass knuckles.

The Hearing

At the hearing on Appellant's challenge, Appellee argued that the State has an interest in reducing brass knuckle-related crime and that the statute is substantially related to that interest because knuckles can be concealed and made ready to strike from the privacy of a pocket, purse, or coat jacket. Appellee argued that making it ready in concealment so that a potential victim does not see it coming increases its potential lethality. Thus, the State has an interest in a law that makes sure only certain qualified individuals are allowed to carry this concealed weapon.

Appellee asserted that there is an easy and non-cost-prohibitive process for obtaining a permit to conceal carry brass knuckles. On that basis, Appellee argued that the law is not an outright ban of concealed-carrying brass knuckles.

Appellant responded by repeating the argument in the written challenge that arguing that laws against open carry supports public safety and laws against concealed carry supports public safety are inconsistent. Appellant further responded that the license argument isn't applicable because Appellant's counsel is unaware of any license needed to carry brass knuckles.

The trial court orally denied the challenge, stating that "[t]he statute at issue in *Norman* is not the same as in the case, but by analogy, I agree with the conclusion, and I deny . . . the constitutional challenge." The trial court later issued a written order denying.

Change of Plea

Appellant pled no contest and counsel stated that Appellant "reserves the right to appeal the Court's prior denial of our dispositive motion to dismiss." *COP Hearing Tr. p. 3*. The plea agreement form also states that the right to appeal the dispositive motion to dismiss is reserved. While there was a plea agreement, the parties appeared, at least initially, to disagree regarding the forfeiture of the weapon. Appellee announced that part of the State's offer was that Appellant must "forfeit the weapon involved in the case." *COP Hearing Tr. p. 3*. In response, Appellant's counsel stated "She will resolve anyway. But we're going to formally object to the weapon forfeiture, as statutorily unauthorized and as a further infringement of the right to

bear arms." *COP Hearing Tr. p. 3*.

The trial court accepted the plea agreement, including the weapon forfeiture. The trial court did not hold, and Appellee did not stipulate, that the constitutional challenge was dispositive.

STANDARD OF REVIEW

A trial court's "decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law." *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012) [37 Fla. L. Weekly S763a].

An appellate court cannot review an illegal sentence on direct appeal if the defendant did not raise a contemporaneous objection before the trial court at the time of sentencing. *Brown v. State*, 225 So. 3d 319, 321 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1620b].

LAW AND ANALYSIS

I. Constitutional Challenge to Section 790.01, Florida Statutes (2018)

A. Reservation of the Right to Appeal

Appellant first argues that the trial court erred when it found section 790.01, Florida Statutes (2018), constitutional. This Court holds that Appellant failed to properly reserve her right to appeal the trial court's denial of her constitutional challenge. "A defendant may not appeal from a guilty or nolo contendere plea except as follows: A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved." Fla. R. App. P. 9.140(b)(2)(A)(i). Failure to expressly reserve the right to appeal a specific dispositive issue deprives an appellate court of jurisdiction to review the trial court's order on that issue.

Additionally, there must be a finding by the trial court or stipulation with the State that the issue was dispositive. *See Pamphile v. State*, 65 So. 3d 107, 108 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1387d] ("Without both an express reservation of the right to appeal and a finding that the issue is dispositive, through either a trial court's ruling or a stipulation by the state, a defendant who pleads guilty or nolo contendere has no right to a direct appeal").

In *T.A.R. v. State*, 2 So. 3d 993, 994 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2661b], the defendant sought to appeal the trial court's denial of a motion to suppress. The Second District Court of Appeal held that trial counsel failed to reserve the right to appeal and thus there was no appealable issue, writing "In response to our order, T.A.R. acknowledges that his trial counsel did not identify with particularity the point of law being reserved and he did not seek a stipulation or an order that a dispositive issue existed."

In the instant case, while Appellant asserted that she was reserving her right to appeal her challenge and asserted that the challenge was dispositive, she did not seek a ruling by the trial court or a stipulation from Appellee that the challenge was dispositive. And nowhere in the record before this Court did the trial court so hold or Appellee so stipulate. Therefore, Appellant failed to properly reserve her right to appeal her constitutional challenge. However, that is not the end of this Court's analysis.

B. Facial and As-Applied Constitutional Challenges

When conducting appellate review of a constitutional challenge, the failure to reserve does not always prevent an appellate court from exercising jurisdiction. A trial court's lack of subject-matter jurisdiction can be raised on appeal from a judgment and sentence resulting from a plea agreement with the State regardless of whether the issue was properly reserved. *See* Fla. R. App. P. 9.140(b)(2)(A)(ii)(a) ("A defendant who pleads guilty or nolo contendere may otherwise directly appeal only . . . the lower tribunal's lack of subject matter jurisdiction").

A facially unconstitutional statute is a statute under which there is no set of factual circumstances where the challenged statute could be constitutional. *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) [39 Fla. L. Weekly S421a]. Thus, a facially unconstitutional statute "creates no subject-matter jurisdiction pursuant to which a court may convict the accused." *Alexander v. State*, 450 So. 2d 1212, 1216 (Fla. 4th DCA 1984), reversed on other grounds, 477 So. 2d 557, 560 (Fla. 1985). Because a facially unconstitutional statute results in a lack of subject-matter jurisdiction, a facial constitutional challenge can be raised on appeal from a no contest plea regardless of whether the challenge was properly reserved. *See* Fla. R. App. P. 9.140(b)(2)(A)(ii)(a).

In an as-applied challenge, on the other hand, a statute is alleged to be unconstitutional based upon the specific facts of the case and therefore "has no such [jurisdictional] infirmity." *Id*. An as-applied challenge focuses not on the entire statutory scheme, but on how the statute was applied to the specific facts of the defendant's case. *See, e.g., City of Fort Lauderdale v. Dhar*, 185 So. 3d 1232, 1236 (Fla. 2016) [41 Fla. L. Weekly S61a] (holding that a red-light camera statute that treats short term renters of cars differently than registered owners or lessees of cars "is unconstitutional as applied to short-term vehicle renters such as Dhar"); *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 491 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D140b] (holding that an assertion that section 39.01(14)(a) was unconstitutional because it permitted an adjudication of dependency when there is a non-offending parents willing and able to take immediate custody was an as-applied challenge but reversing on other grounds without answering the constitutional question).

Because an as-applied challenge does not attack subject-matter jurisdiction and is not one of the enumerated "Appeals Otherwise Allowed" under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii), a defendant who pleads guilty or no contest must reserve the right to appeal an as-applied constitutional challenge. *See* Fla. R. App. P. 9.140(b)(2)(A)(i).

In the case below, Appellant challenged the constitutionality of Florida's conceal-carry statute, section 790.01, Florida Statutes (2018). Her argument was that section 790.01 was unconstitutional under the facts of her case. Specifically, she argued that because she was carrying brass knuckles, a less deadly weapon than a firearm, and because she was merely carrying them and not using them, section 790.01 was unconstitutional. She did not argue that there were no set of factual circumstances under which section 790.01 could be constitutional. Therefore, her constitutional challenge was an as-applied challenge and not a facial challenge. Because she did not properly reserve the right to appeal her as-applied challenge, this Court does not have jurisdiction to review the trial court's order and the order is affirmed.

C. The Facial Constitutionality of Section 790.01 Has Already Been Determined

Even if it could be argued that Appellant's constitutional challenge was a facial challenge that could be raised on appeal regardless of reservation, Appellant would still not be entitled to relief. Before the trial court, the parties relied upon another facial challenge case: *Norman v. State*, 215 So. 3d 18 (Fla. 2017) [42 Fla. L. Weekly S239b]. However, *Norman* addressed the constitutionality of the Open Carry Law, section 790.053, Florida Statutes, not the conceal-carry statute, section 790.01.

Had the facial constitutionality of section 790.01 not previously been addressed, *Norman* would have been a reasonable case for the parties to rely on. While addressing a different statute, the *Norman* decision established a detailed analytical framework that can be applied to any statute that infringers upon Second Amendment rights.

Id. at 35-39. However, the Florida Supreme Court has previously addressed the facial constitutionality of section 790.01.

While holding that it was unconstitutional as applied to a particular defendant, the Florida Supreme Court held that section 790.01 is facially constitutional. *See Alexander v. State*, 477 So. 2d 557, 559-560 (Fla. 1985) ("We hold that section 790.01(2), Florida Statutes (1981), as modified by section 790.25(5) and 790.01(15) & (16), Florida Statutes (Supp. 1982), is not unconstitutional"); *State v. Gomez*, 508 So. 2d 784, 785-86 (Fla. 5th DCA 1987) (holding that the Florida Supreme Court upheld the constitutionality of section 790.01(1) and 790.01(2)).

It should be noted that *Alexander* was decided prior to the United States Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) [21 Fla. L. Weekly Fed. S497a] and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) [22 Fla. L. Weekly Fed. S619a]. The United States Supreme Court in *Heller* held that the rational basis test cannot be applied where a federal statute infringes on a Second Amendment right. *Norman*, 215 So. 3d at 36 (citing *Heller*, 554 U.S. at 628 n.27). *McDonald* applied *Heller* to state statutes. *McDonald*, 561 U.S. at 791. As a result of *Heller* and *McDonald*, when conducting its constitutional analysis of section 790.053, the Florida Supreme Court in *Norman* applied the intermediate scrutiny test. Whereas the Florida Supreme Court applied a less stringent test in *Alexander*. *Alexander*, 477 So. 2d at 559 ("We have held that a statue is constitutional if it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive"). Therefore, the continued validity of the Florida Supreme Court's analysis in *Alexander* is questionable.

That said, until the facial constitutionality of section 790.01 is revisited by the Florida Supreme Court, lower courts are bound by the *Alexander* decision. The Florida Supreme Court does not overrule itself by implication. *W. Villages Improvement Dist. v. N. Port Rd. & Drainage Distr.*, 36 So. 3d 837, 840 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1215e] (citing *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) [27 Fla. L. Weekly S122a]). And Florida circuit and county courts are bound to adhere to the Florida Supreme Court's rulings. *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976).

II. Forfeiture of the Brass Knuckles as Part of Plea Agreement

Appellant next argues that the trial court erred by ordering her to forfeit her brass knuckles as part of her sentence. Appellant raises two bases in support of this argument: that the forfeiture is unconstitutional under the Second Amendment and that it is not required by section 932.701, Florida Statutes (2018).

While Appellant initially objected to the forfeiture, she eventually agreed to the forfeiture as part of her plea agreement. As a result, she never obtained a trial court ruling on her objection to the forfeiture. There being no order or ruling on the objection for this Court to review, the judgment and sentence is affirmed as to this issue as well.

CONCLUSION

Because Appellant did not reserve her right to appeal her as-applied constitutional challenge to section 790.01, Florida Statutes (2018), and because she failed to obtain a ruling from the trial court on her objection to forfeiture of her brass knuckles as part of her sentence, the judgment and sentence is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (DANIEL D. DISKEY, LINDA BABB, and LAURALEE WESTINE, JJ.)

* * *

Criminal law—Appeals—Appeal by state—Driving under influence—Search and seizure—Vehicle stop—Where state argued before trial court that officer had reasonable suspicion to stop defendant to investigate child abuse, state failed to preserve for appellate review issue of whether officer had reasonable suspicion to stop defendant to investigate neglect of child—State also did not preserve for appeal issue of whether officer had reasonable suspicion of DUI justifying stop—Further, there was no testimony from stopping officer to support argument that stop was justified as welfare check—Order granting motion to suppress is affirmed

STATE OF FLORIDA, Appellant, v. SCOTT MICHAEL FOSTER, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-48. L.T. Case No. 18-MM-6776. UCN Case No. 512019AP000048APAXWS. August 31, 2020. On appeal from Pasco County Court, Honorable Joseph Poblick, Judge. Counsel: Justin L. Homburg, Assistant State Attorney, for Appellant. Steve Bartlett, The Law Office of Steve Bartlett, P.A., Trinity, for Appellee.

ORDER AND OPINION

Because Appellant did not argue before the trial court that law enforcement had a reasonable suspicion to stop Appellee for either neglect of a child or Driving Under the Influence, those issues are not preserved for appellate review. Because the law enforcement officer that conducted the stop did not testify to facts supporting a finding that he stopped Appellant for a welfare check, the trial court's order granting Appellee's motion to suppress is affirmed.

STATEMENT OF THE CASE AND FACTS

Appellee was charged by Information with Driving Under the Influence (DUI) and Refusal to Submit to Testing. He moved to suppress all statements and evidence obtained from what he alleged was an illegal traffic stop. The motion asserted that after the stop, law enforcement conducted a DUI investigation after which Appellee was arrested. Appellee's motion argued that law enforcement did not have a reasonable suspicion that a crime had occurred and therefore the stop was illegal.

At the motion hearing, Appellee's ex-wife, Rachel Foster, testified that during a phone conversation, their then-nine-year-old son told her that Appellee had picked him up from school but that later he could not wake up Appellee. As a result of this phone call, Ms. Foster drove to Appellee's house. She testified that their son sounded nervous on the phone and looked relieved when she arrived. She testified that their son had told her on previous occasions that he had seen Appellee drinking and later "falling asleep" and had been unresponsive and not able to be awoken. She testified that their son told her that had occurred on the night in question, as well. She testified that she met law enforcement eight houses down from Appellee's house and that that was also where law enforcement stopped Appellee's vehicle. On cross-examination, she testified that their son never said that he smelled alcohol on Appellee. She testified that he told her he was hungry because it was dinner time but that he was not malnourished or neglected or anything like that. At this point, Appellant rested.

Appellee's presentation of evidence consisted solely of playing the officer's body-worn camera video of his interviews of Ms. Foster and the son, and the stop and conversation with Appellee. In the video, Ms. Foster stated that her son had called to tell her that Appellee was passed out and she drove to Appellee's house to pick up their son. She stated that if their son had not called her, she would not have known that Appellee was not going to pick up their daughter from gymnastics at 8:00 p.m. She stated that when she arrived, the son's eyes were swollen and teary and he said things like "I'm so worried" and "I'm so hungry. Daddy hasn't fed me yet. I mean, he's passed out." She told the officer that she had picked up the daughter from school at 4:20 to take her to gymnastics and Appellee had picked the son up from school around 5:30. She stated that she assumed Appellee was still passed out in the house but did not actually see him because the son was waiting for her outside the house when she arrived.

In the video, the son stated that Appellee picked him up around 5:30 or 5:45 but had not yet fed him. He stated that Appellee usually

fed him after picking him up "when he's not drunk or anything." He stated that Appellee had "just been acting very strange" and just fell asleep for a long time. He stated that he knew his sister needed to be picked up at 8:00 p.m. and, starting at 7:15 p.m., kept trying to wake Appellee up for that purpose but he just kept falling asleep. He stated he was worried about his sister being left at gymnastics so he called his mother, Ms. Foster. He stated that at some point, Appellee woke up to answer a phone call from an Aunt Heather but then fell back asleep for another 25 minutes. The son did not say how long Appellee was asleep in total.

The son stated that he did not see Appellee drinking but that his sister told him that she saw him drinking a liquor bottle in the bathroom. In response to the officer's question regarding whether he can make himself a meal, the son stated that he can make cereal and nothing else. He stated that Appellee had been drinking and passing out "for, like a month. Or, like, a couple of weeks it will be good and then he'll just drink and get mad." He stated that when Appellee has not been drinking, Appellee can be woken up after falling asleep. The son stated that he has not personally observed Appellee drinking but he has seen a lot of liquor bottles.

At around 8:15 p.m., Appellee left his house in his vehicle. Appellee was alone in the vehicle. At that time there was no concern for the son because the son was with his mother. The vehicle was stopped by law enforcement. Appellee told the officer that his son was at home and he was leaving to pick up his daughter at 9:00 p.m. Appellee then changed his explanation, telling the officer he was leaving to go look for his son, not picking up his daughter. He stated that he and the son were watching NFL Live at 7:30 p.m. but that he fell asleep for about an hour and 15 minutes. The officer pointed out that an hour and 15 minutes would be 8:45 but that the current time was 8:15. At that point, the video ended.

Appellant first argued that the motion should be denied because Appellee "has cited to no law, no authority, nothing that would give [the trial court] jurisdiction to grant this motion. There are general legal principles discussed in the motion, but there's been no presentation of any legal authority."

As to the merits of the motion itself, Appellant argued that law enforcement had reasonable suspicion that a crime had occurred or was occurring. Appellant argued that law enforcement stopped Appellee based upon reasonable suspicion of child abuse and that the DUI investigation did not begin until after the stop. Appellant argued that the video was sufficient to show that based upon Ms. Foster and the son's statements, in conjunction with their recitation of Appellee's history of drinking and passing out while watching the son, law enforcement had a reasonable suspicion of child abuse to warrant the traffic stop. In support, Appellant cited to *State v. Flowers*, 566 So. 2d 50 (Fla. 2d DCA 1990); *Doe v. State*, 973 So. 2d 682 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D490a].

The trial court asked what evidence there was actually establishing that Appellee was intoxicated. Appellant cited to *State v. Evans*, 692 So. 2d 216 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D912a], a case where a McDonald's employee told law enforcement that a drive-thru customer was drunk. Appellant argued that the court in that case held that because the informant was a known employee and not an anonymous tipster, it was reliable and provided reasonable suspicion for a DUI traffic stop. Appellant argued that likewise, in this case, the son was a reliable informant regarding child abuse resulting from Appellee's drinking and therefore law enforcement had a reasonable suspicion to stop Appellee.

Finally, again citing to *Evans*, Appellant argued that the son's testimony that Appellee could not be awoken combined with the officer observing Appellee getting into his vehicle created a legitimate concern for the safety of the motoring public warranting a brief investigatory stop to determine whether Appellee was ill, tired, or driving under the influence. Appellant argued that appellate courts had upheld welfare check stops in situations that were less suspicious than were usually required for other types of criminal behavior.

Appellee argued that Appellant could not establish what law enforcement's basis was for stopping Appellee because the officer in question did not testify. Thus, Appellee continued, there was no testimony explaining what facts established a reasonable suspicion that a crime was being committed or whether the officer felt he even had a reasonable suspicion.

Appellee argued that even if the stop was for child abuse, the facts did not give rise to a reasonable suspicion. Appellee argued that the son testified that he did not see Appellee drinking and the son did not state that he had smelled any alcohol on Appellee's breath. The son did not say that Appellee was driving erratically after picking him up from school. The only testimony of what occurred that night was that Appellee fell asleep and the son could not wake him. This, Appellee continued, was not reasonable suspicion of child abuse.

On rebuttal, Appellant stated that "the son told the officer that his father was acting funny were his words, and so there was testimony that he was behaving oddly" and that he was already a half an hour late picking up his daughter, that he was looking for his son, and that the son said Appellee was acting "funny." Appellant argued that "there was more than enough for the officer to stop him at that time."

The trial court granted the motion to suppress. Appellant timely-appealed.

STANDARD OF REVIEW

Appellate review of a motion to suppress involves questions of both law and fact. *Rosenquist v. State*, 769 So. 2d 1051, 1052 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1675b]. The appellate court reviews the trial court's application of the law to the facts of the case pursuant to *a de novo* standard. *Id.*; *Ornelas v. U.S.*, 517 U.S. 690, 698 (1996); *State v. Petion*, 992 So. 2d 889, 894 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2505a]. A trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *See Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002) [27 Fla. L. Weekly S299a]. The reviewing court is bound by the trial court's factual findings if they are supported by competent, substantial evidence. *Id*.

LAW AND ANALYSIS

On appeal, Appellant argues that the trial court erred by granting Appellee's motion to suppress because law enforcement had three bases for conducting a traffic stop: (1) reasonable suspicion of neglect of a child, (2) reasonable suspicion of DUI, and (3) facts supporting a welfare check. None of these arguments warrant reversal.

1. Neglect of a Child

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the *specific legal argument* or ground to be argued on appeal or review must be part of that presentation if it to be considered preserved." *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) (emphasis added). Put another way: "Except in the case of fundamental error, appellate courts will not consider an issue that has not been presented to the lower court in a manner that specifically addresses the contentions asserted." *State v. Hunton*, 699 So. 2d 320, 321 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D2238c] (quoting *Nevels v. State*, 685 So. 2d 856, 857 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D2748b]). This also applies to a state appeal from an order granting a motion to suppress. *See Hunton*, 699 So. 2d at 321.

While the precise wording of the argument before the trial court

does not need to be identical to the initial brief, the specific legal error does need to be generally the same. *See Doherty v. State*, 640 So. 2d 1220, 1221 (Fla. 5th DCA 1994) ("the legal basis for the argument at the trial court level must be generally the same as the legal basis for the claim of error at the appellate level"); *Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005) [30 Fla. L. Weekly S729a] (holding that the defendant's argument before the trial court that he was provided misleading or confusing information regarding his *Miranda* rights was not sufficient to preserve for appellate review the argument that he was not advised of his *Miranda* right to have an attorney present during questioning).

Appellant argued before the trial court that law enforcement had a reasonable suspicion to stop Appellee to investigate child abuse. However, Appellant argued for the first time before this Court in the initial brief that law enforcement had a reasonable suspicion to stop Appellee to investigate neglect of a child. While they are found within the same statutory section, child abuse and neglect of a child are two separate offenses with their own distinct elements.

Child abuse describes intentional or affirmative actions taken against a child. *See* § 827.03(1)(b), Fla. Stat. (2017) (defining child abuse as "1. Intentional infliction of physical or mental injury upon a child; 2. An intentional act that could reasonably be expected to result in physical or mental injury to a child; or 3. Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child").

In contrast, neglect of a child describes omissions or failures to act. *See* §827.03(1)(e), Fla. Stat. (2017) (defining neglect of a child as "1. A caregiver's failure or omission to provide a child with care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or 2. A caregiver's failure to make a reasonable effort to protect the child from abuse, neglect, or exploitation by another person").

Because Appellant did not argue before the trial court that law enforcement had a reasonable suspicion to stop Appellee to investigate neglect of a child, the issue was not preserved for appellate review. It cannot be raised for the first time on appeal.

2. Driving Under the Influence

A similar problem precludes Appellant's DUI argument. Appellant did not argue before the trial court that law enforcement had a reasonable suspicion to stop Appellee for DUI. To the contrary, Appellant specifically argued to the trial court that law enforcement did not stop Appellee for DUI and that the DUI investigation did not begin until after the stop. *See Hearing Tr. pp. 43-44*. Therefore, this argument was not preserved for appellate review.

3. Welfare Check

Appellant argues that the law enforcement officer had sufficient grounds to stop Appellee for a welfare check. While properly raised before the trial court, this argument does not warrant reversal.

Generally, a welfare check is a consensual encounter and not an investigatory stop. Therefore, it does not violate the Fourth Amendment of the United States Constitution because it is not a seizure. *Dermio v. State*, 112 So. 3d 551, 556 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a]. In *Dermio*, the defendant was passed out in a parked car with the engine running. The law enforcement officer, concerned for the defendant's safety, approached the vehicle to check on the defendant's welfare. While the Second District Court of Appeal recognized that the law enforcement officer testified that she conducted a stop of an "investigatory" nature, the Second District held that this was not determinative because the officer "clearly testified that based on the time, location, Dermio's appearance, the fact that the car motor was running, and the fact the lights were on, she was concerned for Dermio's safety." *Id.* And while the officer's car blocked the defendant's vehicle, there was no seizure because the defendant was asleep and thus not aware that the officer had pulled up behind him. *Id.*

In the case below, however, there was a seizure because the law enforcement officer stopped Appellee's vehicle. Additionally, the law enforcement officer did not testify during the hearing to the facts and considerations that lead him to stop Appellee. Thus, there was no testimony that the law enforcement officer was concerned for Appellee's safety or was checking on his welfare.

CONCLUSION

Because there was no law enforcement testimony supporting a welfare check, the trial court did not err by granting Appellee's motion to suppress. Appellant's remaining arguments were not preserved below and therefore may not be raised for the first time on appeal. Accordingly, the trial court's order granting Appellee's motion to suppress is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (SHAWN CRANE, SUSAN G. BARTHLE, and KIMBERLY SHARPE BYRD, JJ.)

* * *

Criminal law—Petit theft—Limitation of actions—Although trial court erred in applying general one-year statute of limitation for second degree misdemeanor petit theft instead of five-year statute of limitations in section 812.035(10), and defendant concedes error, appellate court must affirm trial court's dismissal of charges because state failed to preserve argument for review and error is not fundamental

STATE OF FLORIDA, Appellant, v. JENNIFER APGAR REVERDES, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-81. L.T. Case No. 18-MM-6545. UCN Case No. 512019AP000081APAXWS. September 30, 2020. On appeal from Pasco County Court, Honorable Debra Roberts, Judge. Counsel: Stephen Josephik, Assistant State Attorney, for Appellant. Hannah G. Brannan, Office of Criminal Conflict and Civil Regional Counsel, for Appellee.

ORDER AND OPINION

The trial court applied the incorrect statute of limitations when it granted Appellee's motion to dismiss. However, because Appellant did not preserve its argument for appellate review, this Court is unable to accept Appellee's concession of error and the order of the trial court must be affirmed.

STATEMENT OF THE CASE AND FACTS

On December 11, 2018, Appellee was charged by Information with Petit Theft, a second-degree misdemeanor, in violation of section 812.014(3)(a), Florida Statutes (2017). An amended Information adding a second count of the same offense was filed on September 23, 2019. Both informations alleged dates of offense in October of 2017.

Appellee moved to dismiss the amended Information, arguing that the one-year statute of limitations for second-degree misdemeanors had been violated because the amended Information had been filed nearly two years after the alleged date of the offenses. *See* § 775.15(2)(d), Fla. Stat. (2017) (providing that a prosecution for a second-degree misdemeanor must be commenced within one year of the date of offense).

During the hearing, Appellant argued that the relevant date for statute of limitations purposes was the filing date of the original Information as the amended Information merely referred back to the original. Appellee countered that even using the filing date of the original Information, the statute of limitations was violated because the original Information had been filed more than a year after the alleged date of the offenses. Appellant did not refute the merits of that argument and instead countered that Appellee should not be allowed

to make the argument because the written motion to dismiss did not reference the original Information.

The trial court correctly noted that it was the non-movant Appellant that raised the issue of the original Information during the hearing. Appellant eventually conceded that the original Information was filed more than a year after the alleged date of the offenses. Because both informations were filed after the one-year statute of limitations under section 775.15(2)(d) had run, the trial court granted the motion to dismiss. Appellant timely-appealed.

STANDARD OF REVIEW

Where the applicability of the statute of limitations involves a pure question of law, the trial court's order is subject to de novo review. *See Robinson v. State*, 205 So. 3d 584, 590 (Fla. 2016) [41 Fla. L. Weekly S541a].

LAW AND ANALYSIS

Appellant's Initial Brief correctly argues that the trial court erred because it applied the incorrect statute of limitations. Where the charged offense is petit theft, the applicable statute of limitations is not section 775.15(2)(d). *See* § 812.035(10), Fla. Stat. (2017) ("Notwithstanding any other provision of law, a criminal. . . action or proceeding under ss. 812.012-812.037 or s. 812.081 may be commenced at any time within 5 years after the cause of action accrues"); *State v. Telesz*, 873 So. 2d 1236, 1237 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1179b] (reversing an order granting a motion to dismiss where the trial court applied the general two-year statute of limitations for first-degree misdemeanor petit theft instead of the five-year statute of limitations in section 812.035(10)).

Appellee concedes the error. Unfortunately, the Court cannot accept the concession. Where an error was not preserved for appellate review, an appellate court cannot accept a concession of error unless the error was fundamental. *See Elmer v. State*, 140 So. 3d 1132, 1134-35 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1309a] (affirming a restitution order even though the State conceded error because the error was not preserved and not fundamental). *See also Mapp v. State*, 18 So. 3d 33, 34-36 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1828a] (refusing to accept the State's concession that it had failed to provide the defendant notice of intent to seek a habitual offender sentence because the defendant had not preserved the issue be timely-raising it before the trial court), *reversed on other grounds*, 71 So. 3d 776 (Fla. 2011) [36 Fla. L. Weekly S290a] (holding that the issue was properly preserved in a Rule 3.800(b) motion). Errors involving the statute of limitations are not fundamental. *State v. Smith*, 241 So. 3d 53, 54-55 (Fla. 2018) [43 Fla. L. Weekly S177a].

While Appellant's statute of limitations argument is correct, Appellant failed to raise the argument before the trial court. Therefore the error was not preserved for appellate review. Because the error was not fundamental, this Court's hands are tied. The Court cannot accept Appellee's concession of error and the order of the trial court must be affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (DANIEL D. DISKEY, KIMBERLY SHARPE BYRD, and LAURALEE G. WESTINE, JJ.)

* * *

Appeals—Absence of transcript or record—Affirmance of lower court ruling

CHRISTOPHER P. CURTO, Appellant, v. AMERICAN HERITAGE REALTY, INC., Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 20-AP-7. L.T. Case No. 19-SC-3432. UCN Case No. 512020AP000007APAXWS. November 20, 2020. On appeal from Pasco County Court, Honorable Frank Grey, Judge. Counsel: Christopher Curto, Pro se, New Port Richey, Appellant. No response required, for Appellee.

ORDER AND OPINION

THIS MATTER comes before the Court *sua sponte* pursuant to Florida Rule of Appellate Procedure 9.315(a) ("After service of the initial brief in appeals under rule 9.110, 9.130, or 9.140 . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated").

Appellant filed a statement of claim against Appellee in small claims court seeking $5,000 for the cost of repair or replacement of a well on property Appellant had recently purchased. A trial on the claim was held. The trial court issued a final judgment finding for Appellee. Appellant timely-appealed.

The basis of Appellant's argument on appeal is that the trial court made errors regarding its findings of fact. Since the decision of the trial court comes to this appellate court with a presumption of correctness, this court must presume that the trial court's findings are correct unless Appellant can demonstrate that a reversible error was made. *Hirsch v. Hirsch,* 642 So. 2d 20 (Fla. 5th DCA 1994); *Casella v. Casella,* 569 So. 2d 848 (Fla. 4th DCA 1990). Significantly, what is missing from the appellate record is a transcript of the proceedings below or any record that would substantiate any of Appellant's claims. Additionally, there are no errors on the face of the trial court order.

It is therefore **ORDERED AND ADJUDGED** that the trial court's judgment is hereby summarily **AFFIRMED**. (DANIEL D. DISKEY, KIMBERLY SHARPE BYRD, and SHAWN CRANE, JJ.)

* * *

Traffic infractions—Defendant's claims that points were erroneously assessed on his driver's license because of trial court's judgment finding him guilty of improper backing and that there are inaccuracies in his driving record must be raised with Department of Highway Safety and Motor Vehicles, not with trial court—Trial court's judgment summarily affirmed

SCOTT KALHORN, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 20-AP-38. L.T. Case No. 20-TR-5505. UCN Case No. 512020AP000038APAXWS. March 11, 2021. On appeal from Pasco County Court, Traffic Court Hearing Officer. Counsel: Scott Kalhorn, Pro se, Spring Hill, Appellant. No response required, for Appellee.

ORDER AND OPINION

THIS MATTER comes before the Court *sua sponte* pursuant to Florida Rule of Appellate Procedure 9.315(a) ("After service of the initial brief in appeals under rule 9.110, 9.130, or 9.140 . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated").

This Court affirms the trial court's judgment without comment. This Court writes only to address Appellant's claims that the trial court erred by assessing four points on his driver license and that his driving record contains inaccuracies.

While the points on Appellant's driver license were assessed as a consequence of the trial court's judgment finding Appellant guilty of improper backing, a judgment now affirmed by this Court in this opinion, the points were assessed by the Florida Department of Highway Safety and Motor Vehicles (DHSMV), not the trial court. *See* § 318.14(8), Fla. Stat. (2020) (providing that it is the DHSMV's responsibility to enter points on a driver license after receiving a report that a traffic infraction is determined to have occurred). If Appellant believes that the DHSMV assessed an incorrect number of points on his driver license, he must raise this issue with the DHSMV.

Similarly, the DHSMV maintains driving records, not the trial court. § 322.20, Fla. Stat. (2020). Accordingly, if Appellant believes that his driving record is inaccurate he must raise this issue with the DHSMV.

It is therefore **ORDERED AND ADJUDGED** that the trial court's judgment is hereby summarily **AFFIRMED**. (DANIEL D. DISKEY, SHAWN CRANE, and LAURALEE WESTINE, JJ.)

* * *

Criminal law—Motion to withdraw plea—Counsel—Defendant not entitled to appointment of conflict-free counsel where allegations of motion were conclusively refuted by record

BARRY JOHN LEE, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-AP-70. L.T. Case No. 19-MM-0191. UCN Case No. 512019AP000070APAXWS. November 18, 2020. On appeal from Pasco County Court, Honorable Joseph Poblick, Judge. Counsel: Maria Christine Perinetti, Tampa, for Appellant. Justin L. Homburg, Assistant State Attorney, for Appellee.

ORDER AND OPINION

Appellant's argument that the trial court should have granted his motion to withdraw plea because the plea was not knowing and voluntarily given is without merit and the trial court's order is affirmed on that point without further comment. The Court writes only to address Appellant's argument that the trial court should have appointed him conflict-free counsel based upon his allegations that trial counsel misadvised him. A defendant is only entitled to the appointment of conflict-free counsel if the motion to withdraw plea creates an adversarial relationship with trial counsel *and* the defendant's allegations are not conclusively refuted by the record. *Sheppard v. State*, 17 So. 3d 275, 287 (Fla. 2009) [34 Fla. L. Weekly S477a]. Because Appellant's plea was knowing and voluntarily given, his motion was refuted by the record and he was not entitled to the appointment of conflict-free counsel.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED. (SHAWN CRANE, SUSAN G. BARTHLE, and KIMBERLY CAMPBELL, JJ.)

* * *

Municipal corporations—Unsafe structures—Demolition—Decision by city's unsafe structures board to adopt building department's recommendation that structure be demolished was supported by competent substantial evidence, and board did not depart from essential requirements of law—Any argument that board departed from essential requirements of law by failing to consider valuation criteria was waived where no objection was made during course of hearing—Even if issue were not waived, both calculation sheet and case resume were part of record

U.S. BANK NATIONAL ASSOCIATION, AS CO-TRUSTEE FOR MORTGAGE EQUITY CONVERSION ASSET TRUST 2011-1 a/k/a MORTGAGE EQUITY CONVERSION ASSET TRUST 2011-1, MORTGAGE-BACKED SECURITIES 2011-1 Appellant, v. CITY OF MIAMI, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-31-AP-01. August 30, 2021. On Appeal from the City of Miami Building Department Unsafe Structures Panel. Counsel: Michele R. Clancy, Dariel Abrahamy, and Jason Silver, Greenspoon Marder LLP, for Appellant. Victoria Mendez and John A. Greco, City of Miami, for Appellee.

(Before DARYL E. TRAWICK, LISA S. WALSH, and MARIA DE JESUS SANTOVENIA, JJ.)

OPINION

(PER CURIAM) This matter comes before this Court on appeal from an order of the City of Miami Unsafe Structures Panel ("Panel"). Appellant owns a one-story structure in the City of Miami. The City of Miami issued two notices to the Appellant regarding its property which the City of Miami Building Department deemed to be in an extreme state of disrepair. The notices warned that the structure would be demolished if it was not repaired. The Panel held an evidentiary hearing and adopted the Building Department's recommendation that the structure be demolished.

Review of an administrative agency decision is governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)). Appellant argues that the essential requirements of the law were not observed and that there was no competent substantial evidence to support the Panel's decision.[1]

Chapter 10, Article VI, Section 10-101(d) of the City of Miami Code sets out valuation criteria as follows:

> (d) Valuation criteria.
>
> (1) If the cost of completion, alteration, repair and/or replacement of an unsafe building or structure or part thereof exceeds 50 percent of its value, such building shall be demolished and removed from the premises. If the cost of completion, alteration, repair and/or replacement of an unsafe building or structure or part thereof does not exceed 50 percent of its value, such building or structure may be repaired and made safe, as provided herein.
>
> (2). For purposes of application of this formula, value shall be the estimated cost to replace the building in kind, excluding depreciation. The estimate shall be derived from multiplying the value of the square footage of construction used by the building department to calculate the applicable permit fee. That estimate shall be broken down on a percentage basis into an estimate of the following critical elements of construction, as applicable: structural, roofing, electrical, plumbing and mechanical, and other building components ("valuation of construction components"). The cost of completion, alteration, repair or replacement shall be estimated by application of the percentage of deterioration found on site for each of the critical elements of construction to the valuation of construction components for the structure, to arrive at an overall estimate cost to repair the affected structure. The appointing authority shall by administrative order provide a form for the application of the formula set forth above for the various types of construction.

Appellant argues that the Panel failed to consider the valuation criteria contained in Section 10-101(d) prior to voting to adopt the Building Department's recommendation. They maintain that the Panel only considered a Case Resume. This Resume was placed before the Panel along with the testimony of a Building Department representative and photo images displayed on a view screen, The Resume indicated that the deterioration of the structure was at 63%, and that the cost of repair ($87,740) exceeded the value of the property ($52,644). Demolition was recommended. Appellant asserts that no other evidence was placed before the Panel.

While a review of a video and the transcript of the hearing confirms that the evidence presented on the video screen was less than contained in the entire case file, we must consider the entire record. Part of that record is the Agenda for the June 4, 2021 Panel meeting (Appendix to Appellee's Brief, Tab 5). The agenda references documents that were a part of the case file, including the Resume, images, notices, and most importantly, calculations. The Calculation Sheet, contained at Tab 7 of the Appendix to Appellee's Answer Brief, included the square footage and construction cost per square foot of the structure, as well as the estimated percentages of deterioration of the property, including the interior, windows and door, the roof and the entire structure itself. The calculation sheet also indicated a replacement cost of $140,384, a repair cost of $87,740, and a present value of $52,644. The reference to various documents in the agenda signifies that both the Case Resume and Calculation Sheet were part of the record submitted to the panel. The hearing transcript indicates that all documents being presented as digital evidence were moved into and received as evidence. While there may have been no specific

reference to the calculation sheet during the hearing, there is nothing to indicate that the Panel did not receive, examine, and consider each of the documents placed into evidence during the hearing.

Indeed, no objection was made during the course of the hearing by Appellant that the City had failed to produce any evidence of the valuation criteria. Parties in administrative proceedings are required to make objections on the record to preserve any error for appellate review. Thus, any argument that the Panel departed from the essential requirements of law was waived. "It is well settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal." *Singer v. Borbua,* 497 So. 2d 279, 281 (Fla. 3d DCA 1986). *See City of Miami v. Cortes,* 995 So. 2d 604, 606 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2691d] (finding that property owners waived error by failing to object to evidence and asking to cross-examine witnesses); *Clear Channel Communications, Inc. v. City of North Bay Village,* 911 So. 2d 188, 190 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b] (affirming appellate division of Circuit Court's decision which held that petitioners failed to preserve their legal challenges for appellate review because they did not make contemporaneous objections before the city commission).

While we are cognizant that during the course of the hearing the City's attorney denied the existence of any "reports," a point which is at the core of Appellant's argument, this does not disprove that the calculation sheet was part of the record. Even if Appellant had not waived the issue of the Panel departing from the essential requirements of law by not considering valuation criteria, we find that both the Calculation Sheet and Case Resume were part of the record. As a result, this Court's decision in *Cutting Edge Real Estate Solutions LLC v. City of Miami, Building Department,* 28 Fla. L. Weekly Supp. 463c (Fla. 11th Cir. Ct. Aug. 11, 2020) is directly on point. In *Cutting Edge,* this Court held that the Unsafe Structures Panel followed the essential requirements of law because it considered the required valuation criteria. *Id.*

We conclude that the Panel followed the essential requirements of law and that there was substantial competent evidence to support the Panel's decision. As a result, the final decision of the Panel is hereby **AFFIRMED.** (TRAWICK, WALSH and SANTOVENIA JJ., concur.)

---

[1]In their Initial Brief, Appellant's argument centers on the failure to observe the essential requirements of law. Tangentially, they refer to the lack of competent substantial evidence, stating "[T]he Panel failed to consider evidence to support the valuation criteria." Appellant's Initial Brief, at page 2. While most of the argument regarding competent substantial evidence was raised in the Reply Brief, we will consider the passing reference to this issue in the Initial Brief as sufficient to preserve the issue. *See Parker-Cyrus v. Justice Admin. Com'n,* 160 So. 3d 926, 928 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D582a]. (citations omitted) (An argument may not be raised for the first time in a reply brief).

* * *

ERIC WATKINS, Appellant, v. CITY OF FORT LAUDERDALE, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE20-020796 (AP). L.T. Case No. FL00118689. July 29, 2021. Appeal from a decision by a City of Fort Lauderdale Florida Parking Citation Division Administrative Judge. Counsel: Eric Watkins, Pro se, North Lauderdale, Appellant. Robert M. Oldershaw, City of Fort Lauderdale City Attorney's Office, Fort Lauderdale, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the Administrative Judge's Disposition Order Affirming Parking Citation rendered on November 10, 2020 is hereby **AFFIRMED**. (BOWMAN, M. DAVIS, and ODOM, JJ., concur.)

* * *

Volume 29, Number 6
October 29, 2021
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household residents over age 14

CENTURY-NATIONAL INSURANCE COMPANY, Plaintiff, v. MYA RENEA BRIGHTMAN, KYLE P. BOONE, U.S. AUTO SALES, INC., and USAA GENERAL INDEMNITY COMPANY, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 2020-CA-006898. August 9, 2021. Eric C. Roberson, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Mya Renea Brightman, Pro se, Jacksonville, Defendant. Kyle P. Boone, Pro se, Jacksonville, Defendant.

ORDER ON PLAINTIFF, CENTURY-NATIONAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANTS, MYA RENEA BRIGHTMAN AND KYLE P. BOONE

THIS CAUSE having come before this Court at the hearing on August 4, 2021, on the Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, MYA RENEA BRIGHTMAN and KYLE P. BOONE, and the Court having considered the same, it is hereupon,

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

1. On December 10, 2020, the Plaintiff, Century-National Insurance Company filed the instant Action for Declaratory Judgment against the insured Defendant, Mya Renea Brightman, and the Defendants, Kyle P. Boone, U.S. Auto Sales, Inc., and USAA General Indemnity Company, regarding the policy rescission as a result of Mya Renea Brightman's material misrepresentations on the application for insurance dated November 21, 2019. Notwithstanding the coverage denial due to the policy rescission, claims were asserted against the subject insurance policy as a result of the two motor vehicle accidents which occurred on November 26, 2019 and February 14, 2020.

2. On July 8, 2021, this Court previously ruled that the Second Request for Admissions served on the Defendant, Mya Renea Brightman, were deemed admitted. Specifically, it was deemed admitted that Mya Renea Brightman failed to disclose on the application for insurance that her brother, Jacari Butler, and her mother, Renee Floyd, resided with her at 8050 103rd St, Jacksonville, FL 32210.

3. This Court finds that the Plaintiff, Century-National Insurance Company's application for insurance unambiguously required Mya Renea Brightman to disclose all persons in the household over 14 years of age at the time of the policy inception, that Plaintiff provided the required testimony to establish that Mya Renea Brightman's failure to disclose that her brother, Jacari Butler, and her mother, Renee Floyd, lived at the policy garaging address at the time of the application for insurance was a material misrepresentation because Plaintiff would not have issued the policy at the same premium. Specifically, this would have resulted in an increase to the policy premium, and thus, Plaintiff properly rescinded the subject insurance policy.

4. The Court finds there are no genuine issues of material fact as to Mya Renea Brightman and Kyle P. Boone. The Defendants, Mya Renea Brightman and Kyle P. Boone, did not appear at the Summary Judgment Hearing or file any summary judgment evidence.

5. With respect to Defendant, Mya Renea Brightman, a Clerk's Default was entered against him on January 26, 2021.

6. With respect to Defendant, Kyle P. Boone, a Judicial Default was entered against him on February 22, 2021.

7. The Defendants, U.S. Auto Sales, Inc., and USAA General Indemnity Company, entered into Joint Stipulations and were dismissed from this matter.

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

8. Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY's Motion for Final Summary Judgment against Defendants, MYA RENEA BRIGHTMAN and KYLE P. BOONE, is hereby **GRANTED.**

9. This Court ***hereby enters final judgment*** for Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, and against the Defendants, MYA RENEA BRIGHTMAN and KYLE P. BOONE.

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

11. This Court finds that the facts alleged by the Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the Motion for Final Summary Judgment, the transcript of the recorded statement of MYA RENEA BRIGHTMAN, and in the Affidavit of Tom Stoll, are not in dispute, which are as follows:

a. The CENTURY-NATIONAL INSURANCE COMPANY Policy of Insurance, bearing policy # PFV039586-00, is rescinded and is void *ab initio.*

b. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by CENTURY-NATIONAL INSURANCE COMPANY.

c. The Defendant, MYA RENEA BRIGHTMAN, failed to disclose that additional drivers and/or household members over the age of 14 lived within her household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # PFV039586-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

d. The Defendant, MYA RENEA BRIGHTMAN breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # PFV039586-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

e. The material misrepresentation of Defendant, MYA RENEA BRIGHTMAN on the application for insurance dated November 21, 2019, occurred prior to any Assignment of any personal injury protection ("PIP") Benefits to any medical provider, doctor and/or medical entity, under the policy of insurance, bearing policy # PFV039586-00, issued by CENTURY-NATIONAL INSURANCE COMPANY;

f. There is no insurance coverage for the named insured, MYA RENEA BRIGHTMAN for any property damage liability coverage, personal injury protection benefits coverage, rental reimbursement coverage, comprehensive coverage, or collision coverage, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

g. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, MYA RENEA BRIGHTMAN, for any claims made under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

h. Notwithstanding the rescission, the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, bearing policy # PFV039586-00, does not provide any bodily injury liability insurance coverage;

i. There is no personal injury protection ("PIP") insurance coverage for MYA RENEA BRIGHTMAN for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

j. There is no comprehensive insurance coverage for MYA RENEA BRIGHTMAN for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

k. There is no collision insurance coverage for MYA RENEA BRIGHTMAN for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

l. There is no comprehensive insurance coverage for U.S. AUTO SALES, INC. for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

m. There is no collision insurance coverage for U.S. AUTO SALES, INC. for the accident which occurred on November 26, 2019, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

n. 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 # PFV039586-00;

o. The Defendant, MYA RENEA BRIGHTMAN, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the November 26, 2019 accident;

p. The Defendant, U.S. AUTO SALES, INC,, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the November 26, 2019 accident;

q. 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 # PFV039586-00;

r. 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 # PFV039586-00;

s. 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 # PFV039586-00;

t. There is no rental reimbursement coverage for the accident which occurred on November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

u. There is no comprehensive coverage for the accident which occurred on November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

v. There is no collision coverage for the accident which occurred on November 26, 2019, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

w. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, owes no duty to defend and/or indemnify MYA RENEA BRIGHTMAN for any bodily injury claim for KYLE P. BOONE arising from the accident of February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

x. The Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, owes no duty to defend and/or indemnify MYA RENEA BRIGHTMAN for any property damage claim for KYLE P. BOONE arising from the accident of February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

y. There is no personal injury protection ("PIP") insurance coverage for MYA RENEA BRIGHTMAN for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

z. There is no comprehensive insurance coverage for MYA RENEA BRIGHTMAN for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

aa. There is no collision insurance coverage for MYA RENEA BRIGHTMAN for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

bb. There is no comprehensive insurance coverage for US AUTO SALES, INC. for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

cc. There is no collision insurance coverage for US AUTO SALES, INC. for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

dd. There is no bodily injury liability insurance coverage for KYLE P. BOONE for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

ee. There is no property damage liability insurance coverage for KYLE P. BOONE for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

ff. There is no property damage liability insurance coverage for USAA GENERAL INDEMNITY COMPANY for the accident which occurred on February 14, 2020, under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the case asserted in the Duval County Court, under Case No.: 16-2020-SC-024895 (USAA General Indemnity Company's Complaint as assignee of Kyle P. Boone against MYA RENEA BRIGHTMAN (Case No.: 16-2020-SC-024895));

gg. 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 February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, bearing policy # PFV039586-00;

hh. The Defendant, MYA RENEA BRIGHTMAN, is excluded from any insurance coverage under the policy of insurance issued by CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the February 14, 2020 accident;

ii. KYLE P. BOONE is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the February 14, 2020 accident;

jj. U.S. AUTO SALES, INC. is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the February 14, 2020 accident;

kk. USAA GENERAL INDEMNITY COMPANY is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00, for the February 14, 2020 accident, for the case asserted in the Duval County Court, under Case No.: 16-2020-SC-024895 (USAA General Indemnity Company's Complaint as assignee of KYLE P. BOONE against MYA RENEA BRIGHTMAN (Case No.: 16-2020-SC-024895));

ll. Since CENTURY-NATIONAL INSURANCE COMPANY is not obligated to provide any coverages or indemnity to any of the potential claimants, USAA GENERAL INDEMNITY COMPANY, shall have no rights of subrogation against CENTURY-NATIONAL INSURANCE COMPANY under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, bearing policy # PFV039586-00, for the February 14, 2020 motor vehicle accident, for the case asserted in the Duval County Court, under Case No.: 16-2020-SC-024895 (USAA General Indemnity Company's Complaint as assignee of KYLE P. BOONE against MYA RENEA BRIGHTMAN (Case No.: 16-2020-SC-024895));

mm. There is no insurance coverage for the motor vehicle accident which occurred on February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

nn. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00.

oo. There is no property damage liability coverage for the accident which occurred on February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

pp. There is no rental reimbursement coverage for the accident which occurred on February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

qq. There is no comprehensive coverage for the accident which occurred on February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

rr. There is no collision coverage for the accident which occurred on February 14, 2020, under the policy of insurance issued by Plaintiff, CENTURY-NATIONAL INSURANCE COMPANY, under policy # PFV039586-00;

ss. Since the policy of insurance issued to the Defendant, MYA RENEA BRIGHTMAN, bearing policy # PFV039586-00, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from MYA RENEA BRIGHTMAN to any medical provider, doctor and/or medical entity is void.

12. 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—Homeowners—Bad faith—Conditions precedent—Civil remedy notice that did not state specific policy language relevant to alleged bad faith violation, did not identify specific statutory provisions alleged to have been violated, and did not state with specificity facts and circumstances giving rise to alleged violation did not strictly or substantially comply with requirements of section 624.155(3)—No merit to argument that insurer waived its ability to challenge CRN by failing to identify defects in its response to CRN—Summary judgment entered in favor of insurer

THOMAS and JOANNE DEMASE, Plaintiffs, v. STATE FARM INSURANCE COMPANY, Defendant. Circuit Court, 5th Judicial Circuit in and for Hernando County. Case No. 15-1361-CA. July 14, 2021. Donald E. Scaglione, Judge. Counsel: Beaujeaux De Lapouyade, Shane S. Smith, and William F. Merlin, Jr., Merlin Law Group, P.A., Tampa, for Plaintiffs. Matthew J. Lavisky, Butler Weihmuller Katz Craig, LLP, Tampa, for Defendant.

ORDER AS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court at hearing on July 6, 2021 and the Court having reviewed the Court file, pleadings, filing attachments, as well as argument of counsel finds as follows:

1. Case filed November 3, 2015.
   This Court was assigned the case on January 9, 2019.
2. This case has previously been appealed pursuant to 5th DCA 16-2390 Mandate, Opinion of Reversal April 17, 2018 as to previous Court granting an Order of Dismissal. On May 18, 2016.
3. Defendant's Summary Judgment filed April 19, 2021; Notice of Hearing filed June 1, 2021.
   Plaintiff's Response filed June 16, 2021.
   Defendant's Reply filed June 22, 2021.
   Both parties submitted Notebooks on July 2, 2021.
4. This case falls under Florida Supreme Court SC20-1490 (December 31, 2020, Amended April 29, 2021)
5. As of May 1, 2021 (Fla. Sup. Ct. SC 20-1490), Florida adopted the federal summary judgment standard articulated in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). *See In re Amendments to Fla. R. Civ. P. 1.510,* 309 So.3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. In its Order dated May 14, 2021, this Court, adopted the text of Federal Rule of Civil Procedure 56 and set forth the new standard.
6. The New Rule's Application to Pending Cases

New rule 1.510 takes effect on May 1, 2021. This means that the new rule must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases. *Cf. Love v. State,* 286 So.3d 177, 187-88 (Fla. 2019) [44 Fla. L. Weekly S293a].

In cases where a summary judgment motion was denied under the pre-amendment rule, the court should give the parties a reasonable opportunity to file a renewed summary judgment motion under the new rule. *See Wilsonart, LLC v. Lopez,* 308 So.3d 961, 964 (Fla. 2020) [46 Fla. L. Weekly S2a]. In cases where a pending summary judgment motion has been briefed but not decided, the court should allow the parties a reasonable opportunity to amend their filings to comply with the new rule. Any pending rehearing of a summary judgment motion decided under the pre-amendment rule should be decided under the pre-amendment rule, subject of course to a party's ability to file a renewed motion for summary judgment under the new rule.

A party moving for summary judgment has the burden of demonstrating to the court that there are no material facts that are genuinely disputed and that the movant therefore is entitled to judgment as a matter of law. But a key question is what standard the court should apply to determine whether the movant has satisfied its burden.

The Supreme Court addressed this question in its 1986 decision in *Celotex Corporation v. Catrett.* That case involved an action charging that the death of plaintiff's husband resulted from exposure to asbestos products manufactured or distributed by defendants. Defendant moved for summary judgment on the ground that during discovery plaintiff had failed to produce any evidence to support the allegation that the decedent had been exposed to defendant's products—an issue on which plaintiff would bear the burden of proof at trial. Plaintiff then produced three documents, which defendant

challenged as inadmissible hearsay. The District court granted summary judgment and a divided panel of the District of Columbia Circuit reversed on the ground that the defendant had failed to meet its Rule 56 burden because it had not supported its motion with any evidence, so that plaintiff therefore had no obligation to respond with evidence. The Supreme Court reversed.

Although the Court issued a five-to-four decision, the majority and dissent both agreed as to how the summary-judgment burden of proof operates, they disagreed as to how the standard was applied to the facts of the case. Justice Rehnquist, writing for the majority, ruled that there was "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. This conclusion was bolstered by the recognition that courts may enter summary judgment sua sponte. As Justice Rehnquist noted,

> It would surly defy common sense to hold that the District Court could have entered summary judgment sua sponte in favor of the petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

The satisfaction of the moving party's summary judgment burden was influenced by the fact that the nonmovant would bear the burden of proof at trial. When that was so, the moving party could make a proper summary judgment motion in reliance on the pleadings and the allegation that the nonmovant had failed to establish an element essential to that party's case. Rule 56 then would require the opposing party to go beyond the pleadings to designate specific facts showing there was a genuine issue for trial. Justice Rehnquist concluded the majority's opinion with the policy justification that supported this conclusion.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

In the dissenting opinion by Justice Brennan, he elaborated more fully on the way in which the burden shifts between the parties to the action, as well as how it can be satisfied. Rule 56 first imposes a burden of production on the moving party to make a prima facie showing that it is entitled to summary judgment. That can be satisfied, in cases in which the ultimate burden of persuasion at trial rests on the nonmoving party, either by submitting affirmative evidence negating an essential element of .the nonmovant's claim or, as in Celotex, by demonstrating that the nonmoving party's evidence itself is insufficient to establish an essential element of its claim. As described by Justice Brennan, the moving party may make this showing by deposing the nonmoving party's witness, by establishing the inadequacy of documentary evidence or, if there is no evidence, by reviewing for the court what exists to show why that does not support a judgment for the nonmoving party. To this extent, the dissent agreed with the majority that the movant need not present affidavits or new evidence of its own to meet its initial burden, but may premise its summary judgment motion on an attack of the opponent's evidence. If it is successful in arguing that the nonmovant's evidence is insufficient, the burden shifts to that party to call evidence to the attention of the court to dispute that contention. The dissent argued, however, that in Celotex itself defendant had not met this initial burden because it had ignored supporting evidence clearly contained in the record and thus had not demonstrated that no evidence existed to support plaintiff's claim.

There are numerous ways in which the movant can satisfy its burden on summary judgment to show that there are no genuine issues of fact. Indeed, when Rule 56 was rewritten in 2010, a new subdivision (c) was included that explicitly provides that a movant must support its position that there is no genuine dispute of material facts by citing to materials in the record that demonstrate the absence of a dispute, by showing that those materials do not establish the presence of a genuine dispute, or, as in Celotex, by showing that the opposing party cannot produce admissible evidence to support a material fact. In short, the movant may discharge the Rule 56 burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the opposing party. This may occur, for example, if a movant, by means of uncontroverted affidavits or by using any of the other materials specified in Rule 56(c), completely explores and establishes the facts, thereby demonstrating the absence of any genuine dispute as to the facts and securing the entry of summary judgment. If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless, and the movant is entitled to a judgment as a matter of law.

Indeed, applying this principle, even if the movant's own evidentiary material reveals an issue of credibility, summary judgment still may be warranted if it also appears that the party opposing the motion cannot prevail in any event so that the issue or credibility is immaterial.

Situations in which credibility issues are unimportant because the adversary cannot prevail occasionally result the interplay between the burden of proof on the summary judgment motion and the burden of persuasion at trial. For example, in *Dyer v. MacDougall,* the allegations in a complaint in a slander action were countered by affidavits signed by all of the witnesses to the supposed defamation, each denying that the wrong had occurred. Plaintiff was unable to resist defendant's motion for summary judgment since even if he succeeded in impeaching the credibility of defendant's witnesses at trial, the court concluded that he nevertheless would be unable to discharge his burden of persuasion the issue of slander. Thus, defendant had demonstrated that a trial would be useless and summary judgment appropriate; there would be no competent evidence that could support a verdict for plaintiff, especially since he could not impeach the testimony of the witnesses to the alleged defamation if he called them to testify at trial.

Finally, it is important to note that, as established in Celotex, it is not necessary for the movant to introduce any evidence in order to prevail on summary judgment, at least in cases in which the nonmoving party will bear the burden of proof al trial. The movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him. On the other hand, the party moving for summary judgment cannot sustain its burden merely by denying the allegations in the opponent's pleadings, or merely by asserting that the nonmovant lacks evidence to support its claim. The movant must show why the opponent's allegations of fact are insufficient to support the claim for relief as a matter of law or why the court should conclude that its opponent lacks sufficient evidence. Remember that in Celotex itself discovery was completed, and the only evidence plaintiff produced was found to be inadmissible hearsay.

In contrast, if the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing. If the movant fails to make that initial showing, the court must deny the motion, even if the opposing party has not introduced contradictory evidence in response.

In meeting its burden, it is important to note that despite the usual rule that all doubts are resolved against the moving party, there is one inference to which the movant is entitled. If the movant presents

credible evidence that, if not controverted at trial, would entitle the movant to a Rule 50 judgment as a matter of law, that evidence must be accepted as true on a summary judgment motion when the party opposing the motion does not offer counter-affidavits or other evidentiary material supporting the opposing contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(d) why he is unable to present facts justifying opposition to the motion.

The amendment adopted by the Florida Supreme Court in SC20-1490 largely replaces the text of existing rule 1.510 with the text of Federal rule 56. New Rule 1.510(a) will also include the following sentence: "The summary judgment standard provided for in this rule shall be construed and applied in accordance with the Federal Summary Judgment Standard."

In the December 31, 2020, decision amending rule 1,510, the Court made it clear that adopting the federal summary judgment standard means that Florida will now adhere to the principles established in the *Celotex* trilogy. In the broadest sense, those cases stand for the proposition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action." *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). More specifically, though, embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state. *In re Amends. to Fla. Rule of Civ. Pro. 1.510,* 309 So.3d at 192-93.

Those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson,* 477 U.S. at 251 (noting that "the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id*. at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments,* 76 Fla. Bar J., Feb. 2002, at 26; *see also Anderson,* 477 U.S. at 255.

Those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under Celotex and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.*, 915 F.3d 987, 997 (5th Cir. 2019).

Those applying new rule 1.510 must recognize that 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." *Anderson,* 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

The new rule will continue to require adherence to "the federal summary judgment standard," which itself cannot be understood apart from the Celotex trilogy. But the Court removed the textual reference to the cases themselves. The Court recognized that "30 years of practice under the has refined and added to the trilogy." Gensler & Mulligan, supra. And naturally, courts applying the new rule must be guided not only by the Celotex but by the overall body of case law interpreting federal rule 56.

In any event, the Court in adopting the text of federal rule 56 almost verbatim has made it unnecessary to list specific cases in new rule 1.510. That is because our act of transplanting Federal Rule 56 brings with it the "old soil" of case law interpreting that rule. *See Fla. Hwy. Patrol v. Jackson,* 288 So.3d 1179, 1183 (Fla. 2020) [45 Fla. L. Weekly S32a] ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947))).

7. This lawsuit arises out of a property insurance claim. The amended complaint confirms that State Farm fully paid the insurance claim. The amended complaint alleges State Farm acted in bad faith.

This lawsuit is based on the CRN attached to the amended complaint. Plaintiffs filed the CRN on August 27, 2014. *Id.* On September 10, 2014, State Farm's counsel sent a letter to Plaintiffs' counsel. The letter explained the history of the claim and requested additional information to understand the allegations in the CRN. On October 16, 2014, State Farm's counsel send a second letter to Plaintiffs' counsel requesting this information. On October 24, 2014, State Farm responded to the CRN.

8. Section 624.155, which created a cause of action for first-party bad faith, is in derogation of the common law. *Talat Enterprises, Inc. v. Aetna Case & Sur. Co.,* 753 So.2d 1278, 1283 (Fla. 2000) [25 Fla. L. Weekly S172a]. Therefore, it must be construed strictly. *Id.* Like any statute in derogation of the common law, Plaintiffs, as the parties seeking the benefit of the statute, must demonstrate strict compliance with the statute's provisions. *Ady v. Am. Honda Fin. Corp.,* 675 So.2d 577, 581 (Fla. 1996) [21 Fla. L. Weekly S130a]. Arguments about "substantial compliance" "are without merit and are unsupported by both statute and precedent." *Bollinger v. State Farm Mut. Auto. Ins. Co.,* 538 Fed. Appx. 857, 866 (11th Cir. 2013).

The statute requires, as a condition precedent to suit, that the complainant serve the insurer and the Department of Financial Services with specific notice of the allegations that might form the basis of a later lawsuit for bad faith. § 624.155(3), Fla. Stat. That notice is in the form of a CRN. The requirements of the CRN are found in the statute:

> (b) The notice shall be one form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
>
> 2. The facts and circumstances giving rise to the violation.
>
> 3. The name of any individual involved in the violation.
>
> 4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
>
> 5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

The statute says the complainant "***shall***" do these things. " '***Shall***' is normally interpreted as a mandatory term that creates an obligation

impervious to judicial discretion." *In re Buggs ex rel. Rengifo,* 122 So.3d 519, 519 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2132b]. That is particularly true where, as here, the court is reviewing a statute in derogation of the common law requiring strict construction and strict compliance.

Defendant alleges the CRN failed to comply with the statutory requirements, for the reasons set out below.

A. The CRN did not state with specificity the specific policy language relevant to the alleged violation.

Section 624.155(3)(b)4. requires the CRN to state with specificity "reference to specific policy language that is relevant to the violation, if any." The section of the CRN that purports to do so said:

> SEE SUBJECT POLICY:
> STATE FARM FLORIDA INSURANCE COMPANY POLICY NO: 80-Q7-4769-7
> COVERAGE A - DWELLING
> ALL ADDITIONAL COVERAGE PROVISIONS
> ALL COVERAGE(S) PROVIDED BY ENDORSEMENT OR RIDER
> THE DECLARATIONS PAGE
> LOSS PAYMENT OR SETTLEMENT PROVISION
> DUTIES IN EVENT OF LOSS POLICY PROVISION
> THE INSURANCE POLICY'S DEFINITION SECTION
> THE INSURANCE POLICY'S EXCLUSION OF COVERAGE PROVISIONS
> ALL INSURANCE POLICY PROVISIONS THAT PROVIDE COVERAGE TO THE INSURED PROPERTY
> ALL POLICY PROVISIONS.

That is not specific. Nor is its "policy language." Instead, it references the entire policy.

In *Julien,* the Fourth District Court of Appeal was presented with an identical CRN that "referenced the entire policy." The CRN in Julien said:

> See Subject Policy:
> UNITED PROPERTY & CASUALTY INSURANCE COMPANY POLICY NO.: UHC [ ]
> Coverage A - Dwelling
> Coverage B - Other Structures
> Coverage C - Personal Property
> Coverage D - Loss of Use / Additional Living Expenses
> All Optional Coverage provisions
> All Additional Coverage provisions
> All Coverage(s) provided by Endorsement or Rider
> The Declarations Page
> Loss Payment or Settlement provision
> Duties in Event of Loss Policy provision
> The insurance policy's definition section
> The insurance policy's exclusion of coverage provisions All insurance policy provisions that provide coverage to the insured property
> All policy provisions.

311 So.3d at 875.

The CRN in *Julien* included verbatim the same language as in the CRN by Plaintiffs here. The Fourth District concluded that the CRN failed to satisfy the requirement to identify the specific policy provisions relevant to the alleged violations. Instead, like here, "Julien's civil remedy notice, it seems, listed . . . every policy provision available to him as the insured." *Id.* The Fourth District concluded that the CRN in *Julien* "listed nearly all policy sections" and, thus, Julien "failed to satisfy the requirement that the insured identify the specific policy provision relevant to Universal Property's alleged violation." *Id.* Accordingly, the Fourth District affirmed the trial court's order dismissing the lawsuit with prejudice.

The Defendant alleges the *Julien* opinion is on-point, dispositive, and binds this Court. *See Pardo v. State,* 596 So.2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts."). State Farm is entitled to summary judgment because the CRN did not identify the specific policy provision relevant to the alleged violation, but, instead, listed nearly all policy sections. *See also Fonollosa v. American Integrity Ins. Co. of Fla.,* 2021 WL 506267, at *5 (Fla.11th J. Cir. Ct. February 4, 2021) [28 Fla. L. Weekly Supp. 1094a] (dismissing bad faith count with prejudice because, among other reasons, the CRN "failed to reference the specific policy language relevant to the alleged violation.").

B. The CRN did not state with specificity the statutory provisions allegedly violated.

Section 624.155(3)(b)1 requires that a CRN state with specificity "[t]he statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated." Plaintiffs' CRN included 15 statutory provisions and 22 administrative codes. The CRN listed Florida Statues §§ 626.9541 (1)(i)(4) and 626.9541 (1)(i)(3)(i) but did not include the specific language of these statutes. Section 626.9541 (1)(i)(3)(i) could not possibly apply to this homeowners insurance claim because this statute proscribes "[f]ailing to pay personal injury protection insurance claims within the time periods required by s. 627.736(4)(b)." Further, the narrative section of the CRN failed to provide a factual explanation for Plaintiffs' apparent allegation that State Farm violated *37* statutory provisions and administrative codes. The reason the CRN does not provide an explanation for the inclusion of these statutes and administrative codes is because, like in *Julien,* the CRN lists numerous statutory provisions without regard to whether or not they apply.

Defendant again alleges that *Julien* is on-point and dispositive. In *Julien,* the CRN "included fourteen statutory provisions followed by twenty-one sections of the Florida Administrative Code." 311 So.3d at 875. The Fourth District concluded that Julien had "listed every statutory provision. . .available to him as the insured." *Id.* The Fourth District held that Julien had failed to identify that specific statute relevant to the alleged violation. Accordingly, the Fourth District affirmed the trial court's order dismissing the lawsuit with prejudice. *See also Rousso v. Liberty Surplus Ins. Corp.,* 10-CV-20554, 2010 WL 7367059, at *5 (S.D. Fla. Aug. 13, 2010) ("In short, the civil remedy notice reflects a shotgun-blast effort to hit a lot of targets with a single salvo. This approach is contrary to the purpose of the statute.").

Here, like in *Julien,* the CRN did not identify the specific statutory provisions allegedly violated, but, instead, indiscriminately listed numerous statutory provisions, including one that has no relevance to a homeowners insurance claim. Accordingly, the CRN is invalid because it did not comply with by § 624.155(3)(b)1.

C. The CRN failed to identify the person most responsible for the alleged violations.

Section 624.155(3)(b)3 requires that a CRN state with specificity "[t]he name of any individual involved in the violation." Plaintiffs' CRN named numerous persons and included "all adjusters, supervisors, management and individuals associated with or retained by State Farm Florida Insurance Compan (sic)." Thus, in the same way the CRN in *Julien* was invalid for including the entire insurance policy, the CRN here is invalid for including every single person "associated with or retained by" State Farm. Cf. *Julien,* 311 So.3d at 875.

D. The CRN failed to state with specificity the facts and circumstances giving rise to the alleged violation.

Section 624.155(3)(b)3 requires that a CRN state with specificity "the facts and circumstances giving rise to the violation." Plaintiffs' CRN contains vague generalities that could pertain to any insurance

claim, but do not pertain to any particular one. It provides nine conclusory allegations but does not provide facts to support these conclusions.

The CRN generally describes the insurance claim, but none of the facts about the insurance claim indicates any wrongdoing by State Farm. The CRN explains that State Farm investigated the claim, acknowledged sinkhole activity, paid for repairs, and participated in Neutral Evaluation. After describing the background of the claim, the CRN resorts again to conclusory allegations devoid of factual support.

A CRN must "specifically inform the insurer of the facts underlying the alleged violations [and] the corrective action that the insurer needed to take to remedy the alleged violations." *Rousso,* 2010 WL 7367059, at *4.

> The civil remedy notice must reflect a good-faith effort to inform the insurer of how it has fallen short of its obligations under the policy end what it can do to fix its shortcomings. The civil remedy notice is not the place for posturing or advocacy, and an effort to overstate a claim in a civil remedy notice may end up undermining it.

Id. At *5.

Rather than complying with the statute, Plaintiffs' CRN "is vague and 'shotgun' in nature—hardly the type of specific notice required by the statute that would allow [State Farm] an opportunity to cure." *Heritage Corp. of S. Florida v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 580 F. Supp. 2d 1294, 1300 (S.D. Fla. 2008) [21 Fla. L. Weekly Fed. D367a], *aff'd,* 361 Fed. Appx. 986 (11th Cir. 2010). The CRN included numerous statutes State Farm allegedly violated but did not include specific facts to support these allegations. The CRN by Plaintiffs is materially indistinguishable from the CRN in *Rousso.* In *Rousso* the court stated:

> The Plaintiffs' civil remedy notice appears to be an effort to cover a lot of possibilities, some of which may not apply. For instance, one of the stated reasons for the notice was "unsatisfactory settlement offer." But the remainder of the notice fails to discuss any settlement offer, inadequate or otherwise. There is also no mention of a denied claim, even though one of the reasons for the issuance of the notice was "claim denial." Similarly there is no discussion of how the insurer violated § 626.9541(1)(i)(2) by making a material misrepresentation, § 626.9541(1)(i)(3)(a) by failing to adopt and implement standards for investigating claims, § 626.9541(1)(i)(3)(c) by failing to acknowledge and act promptly upon communications regarding claims, § 626.9541(1)(i)(3)(g) by failing to promptly notify the insured of any additional information necessary to process the claim, or § 626.9541(1)(i)(3)(c) by failing to clearly explain the nature of requested information and why that information is necessary.

2010 WL 7367059, at*5.

The court in *Rousso* then found the CRN was invalid. It held:

> the civil remedy notice reflects a shotgun-blast effort to hit a lot of targets with a single salvo. This approach is contrary to the purpose of the statute.

Id.

The same defects in the CRN in *Rousso* exist here. Thus, for the same reasons as in *Rousso,* the CRN by Plaintiffs did not state with specificity the facts and circumstances giving rise to the alleged violation, as required by S 624.155(3)(b)3. *See Fonollosa v. American Integrity Ins. Co. of Fla.*, 2021 WL 506267, at *5 (Fla. 11th J. Cir. Ct. February 4, 2021) [28 Fla. L. Weekly Supp. 1094a](dismissing bad faith lawsuit where "the CRN contained a list of statutes followed by a statement of 'facts' that consisted entirely of conclusory statements that merely paraphrased language from the statutes.").

8. Plaintiff alleges that the issues before this Court are two-fold. First, the issue is whether Defendant waived its right to raise its objections to the legal sufficiency of Plaintiffs' Civil Remedy Notice. Second, the issue is whether Plaintiffs' Civil Remedy Notice is legally sufficient under § 644.155, *Fla. Stat.*

9. As briefly stated by the Defendant in its Reply, the issue for the Court is whether Plaintiffs' CRN complied with the requirements of § 624.155(3). The answer to that question is controlled by *Julien v. United Prop. & Cas. Ins. Co.,* 311 So.3d 875 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D486d]. State Farm raised the invalidity of the CRN as an affirmative defense. Plaintiffs did not file a reply.

Plaintiffs raise now, for the first time in their response to Defendant's Summary Judgment, avoidances to a properly pleaded affirmative defense.

Florida Rule of Civil Procedure 1.100 provides: "If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance." "The Committee Notes associated with the 1972 amendment of Rule 1.100(a) specify that a reply is 'mandatory when a party seeks to avoid an affirmative defense in an answer or third-party answer' in order to avoid the procedural problems that existed prior to 1972." *Frisbie v. Carolina Cas. Ins. Co.,* 162 So.3d 1079, 1081 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D917b]. The contention that a party has waived an affirmative defense is an avoidance which must be pleaded. *Gamero v. Foremost Ins. Co.,* 208 So.3d 1195, 1197 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D158b]. Plaintiffs did not plead any avoidances to State Farm's affirmative defenses. Consequently, this Court cannot consider any such avoidances "raised for the first time in opposition to [State Farm's] motion for summary judgment. *Id.*

10. The requirements for a CRN are found in § 624.155(3):

> (b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
>
> 2. The facts and circumstances giving rise to the violation.
>
> 3. The name of any individual involved in the violation.
>
> 4. Reference to specific policy language that is relevant to the violation, if any, If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
>
> 5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

The statute twice uses the mandatory term "shall" and multiple times mandates specificity in a CRN. Statutory interpretation "begins with the statutory text and ends there as well if the text is unambiguous." *McNulty v. Bowser,* 233 So.3d 1277, 1279 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D121a] (citing *BedRoc Ltd, LLC v. United States,* 541 U.S. 176, 183 (2004) [17 Fla. L. Weekly Fed. S213a]). A comparison between Plaintiffs' CRN and the statute reveals that Plaintiffs did not comply with the statute. On this point, there is no discretion because *Julien* is binding. *See Pardo v. State,* 596 So.2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts.").

11. Plaintiffs argue that they "substantially" complied with § 624.155(3) and that is sufficient. Plaintiffs are incorrect, as strict compliance with the statute is required. Specifically, § 624.155 is in derogation of the common law rule that precluded a lawsuit for first-party bad faith. "Because this statute is in derogation of the common law, it must be strictly construed." *Talat Enterprises, Inc. v. Atena Cas. & Sur. Co.,* 753 So.2d 1278, 1283 (Fla. 2000) [25 Fla. L. Weekly S172a]; *see also Julien,* 311 So.3d at 878 ("Because the statute is in derogation of the common law, we strictly construe the statutory requirements."). "It is a rule of statutory construction that any statute in derogation of the common law requires strict compliance with its

provisions by one seeking to avail himself of its benefits." *Florida Steel Corp. v. Adaptable Developments, Inc.,* 503 So.2d 1232, 1234 (Fla. 1986); *accord Ady v. Am. Honda Fin. Corp.,* 675 So.2d 577, 581 (Fla. 1996) [21 Fla. L. Weekly S130a]. As a result, and as explained in *Bollinger v. State Farm Mut. Auto. Ins. Co.,* 538 Fed. Appx 857, 866 (11th Cir. 2013), arguments about "substantial compliance" "are without merit and are unsupported by both statute and precedent." The *Bollinger* court also explained that the "contention that § 624.155 is a remedial statute that, like other unrelated remedial statutes, should be liberally construed to protect the public interest is clearly foreclosed by the Florida Supreme Court's Talat decision." *Id.*

Plaintiffs argue for substantial compliance based on federal court orders. However, *Julien* is binding on this Court. Federal court orders are not. *Kogan v. Israel,* 211 So.3d 101, 108 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D248a]. To the extent Plaintiffs argue that a federal trial court order endorsed a "substantial compliance" test, the Defendant states that this Court should follow the Eleventh Circuit Court of Appeals, which rejected this argument. *Bollinger,* 538 Fed. Appx. at 866.

In any event, even if substantial compliance was the test, Plaintiffs did not comply substantially or otherwise with § 624.155(3). Once again, *Julien* is on point because it found that a CRN with the identical defects that exist in Plaintiffs' CRN did not comply with § 624.155(3). Thus, under whatever test, *Julien* confirms that the CRN by Plaintiffs does not comply with that statute.

12. State Farm did not waive its ability to raise the defects in the CRN

Plaintiffs argue that State Farm waived its ability to challenge defects in Plaintiffs' CRN because State Farm did not identify the defects in its response to the CRN. However, in the context of compliance with § 624.155(3), arguments about "waiver are without merit and are unsupported by both statute and precedent." *Bollinger,* 538 Fed. Appx. at 866.

Plaintiffs cite *Bay v. United Services Auto. Ass'n,* 305 So.3d 294 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2380a], but that case is inapposite. The issue in that case was whether the defendant had received a CRN at all. The defendant was United Services Automobile Association ("USAA"). However, the CRN was filed against USAA Casualty Insurance Company. USAA responded to the CRN but did not dispute that the CRN had named a different entity. Because USAA had responded to the CRN, the court concluded that USAA had waived the argument that it did not receive the CRN. The *Bay* case does not require an insurer to identify each defect in a CRN or hold that an insurer waives any defect not identified in the response.

What is more, § 624.155(3)(b) requires that the Department of Financial Services be given written notice in the form of a CRN of the information required by the statute. As in *Bollinger,* Plaintiff "has not attempted to address how, even if State Farm were capable of waiving the notice requirement on its own behalf, State Farm could likewise waive the requirement on behalf of the Florida Department of Financial Services." 538 Fed. Appx. at 866.

Defendant stated that The Honorable Edward Nicholas dismantled the same arguments made by Plaintiffs here, based on the same cases, in *Cassella v. The Travelers Home and Marine Ins. Co.* 2016-CA-001904, in the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida. In connection with dismissing a claim for bad faith with prejudice, Judge Nicholas explained.

> Let me speak briefly about the waiver issue. For purposes of appeal, there is no question that the Defendant here responded. Clearly they denied the request. Clearly they made a counter offer. There is no question that there was receipt if the CRN. There is no question that they responded to it. There is no question that they did not respond by contesting the nature of the CRN or the alleged deficiencies within this CRN. I reviewed the *Bey* (sic) case several times. And will find that it's a lacerative. But it doesn't specifically indicate—Well, let me put it this way, *Bey* (sic) was a dispute over receipt of the CRN. It became clear in that case that the insurance company, the Defendant, could not legitimately claim that they did not receive it, even despite some issues with the CRN. That case was not about a flawed CRN or a CRN that did not comply strictly with the statute. Also, as a side, potentially problematic, and we'll also let the appellate court wrestle with this one, if they choose to, is the failure of the requirement that the Department of Financial Services be given notice in the form of the CRN as required by statute. Clearly, the Defendant here cannot waive the department's compliance or receipt.

Accordingly, Plaintiffs cannot rely on waiver here. But even if waiver applied in this context, Plaintiffs find no refuge in that doctrine. State Farm thrice asked Plaintiffs for additional information to understand the allegations. That information was never provided. State Farm waived nothing.

13. Plaintiffs argue that a CRN is valid as a matter of law if the Department of Financial Services "accepts" it. This argument is foreclosed by *Julien* because the Fourth District considered and rejected it. *See Julien,* 311 So.3d at 879-80 ("[W]e reject Julien's argument that the Department's failure to return the civil remedy notice suggested the notice was legally sufficient.").

The CRN website says: "The Department does not involve itself in Civil Remedy Notices of Insurer Violation filed via this system as such actions are not within the scope of its statutory authority." The website "accepts" a CRN after doing nothing more than verifying that "the required [blank] fields on the form contain data." The Legislature cannot delegate power to an administrative body to exercise unrestricted discretion in applying a law. *Mahon v. Sarasota Cnty.,* 177 So.2d 665, 667 (Fla. 1965). The Department's website states it applies no standards to determine whether a CRN meets the statutory requirements.

Based upon the foregoing, the Court Grants the Defendant's Motion for Summary Judgment.

* * *

Mortgages—Foreclosure—Standing—Trustee of mortgagee has standing to pursue action for accounting and foreclosure of mortgage—Complaint that alleges that all conditions precedent have been met and indicates that trustee lent money to defendant to purchase property that was secured by mortgage properly alleges valid cause of action—Motion to dismiss is denied

SIMON OTTEWELL, as Trustee for the Business Solutions of Hillsborough, LLC, Plaintiff, v. ADAM C. MAYO, Defendant. Circuit Court, 5th Judicial Circuit in and for Sumter County. Case No. 2020-CA-630. February 8, 2021. Mary P. Hatcher, Judge. Counsel: Steven C. Fraser, Steven C. Fraser, P.A., Hallandale Beach, for Plaintiff. Stephen J. Stanley, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS COURT having considered Defendant's Motion to Dismiss, filed on December 31, 2020; Plaintiff's Response in Opposition to Motion to Dismiss, filed on January 22, 2021; and having reviewed the record in this case, finds as follows:

A. On November 30, 2020, the Plaintiff filed the Complaint to Foreclose Mortgage, which alleged a claim for accounting and foreclosure.

B. In the Motion to Dismiss, Defendant asserts the mortgage attached to the Complaint is defective since there is no indication as to who was signing as Mortgagor, Mortgagee, or Grantor; the Mortgagee is not Plaintiff; and Plaintiff failed to comply with conditions precedent.

C. Plaintiff maintains the Complaint is legally sufficient.

D. Florida law is well-settled that the trial court's standard of review regarding a motion to dismiss is as follows:

> The purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. The trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.

Huet v. Mike Shad Ford, Inc., 915 So.2d 723, 725 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2728b]

Thus, this Court must confine its gaze to the four corners of the Complaint, "accept as true" the Plaintiff's allegations, and determine whether the Plaintiff has properly alleged a valid cause of action against the Defendant.

E. Pursuant to Section 673.1101(3)(b)(1), Florida Statutes, when an instrument is payable to a trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named. Consequently, Plaintiff as trustee for the mortgagee has sufficient standing to pursue this action.

F. Pursuant to Fla. R. Civ. P. 1.120(c), a plaintiff may broadly assert that it has complied with all conditions precedent. *See also Wilmington Sav. Fund Soc'y, FSB v. Contreras,* 278 So. 3d 744, 748 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1925c], *reh'g denied* (Sept. 5, 2019). Substantial compliance with conditions precedent is all that is required in the foreclosure context. Absent some prejudice, the breach of a condition precedent does not constitute a defense to the enforcement of an otherwise valid contract. *Fed. Nat. Mortg. Ass'n v. Hawthorne,* 197 So. 3d 1237, 1240 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1800a] (internal citations omitted). Plaintiff asserted all conditions precedent have been fulfilled or occurred.

G. The Court finds the Complaint and the mortgage is sufficiently clear to indicate Plaintiff loaned money to Defendant to purchase the property that was sufficiently secured by a mortgage.

Based upon the foregoing, it is hereby;

ORDERED and ADJUDGED as follows:

1. Defendant's Motion to Dismiss is hereby DENIED.

2. Defendant has twenty (20) days from the date of this Order to serve and file a response to Plaintiff's Complaint to Foreclose Mortgage.

* * *

Insurance—Commercial vehicle—Coverage—Summary judgment—Discussion of summary judgment standard under amended rule 1.510—Denial of coverage was proper where drivers involved in accidents did not meet definition of insured drivers under policy and vehicles they were driving did not meet definition of covered autos listed in policy

INTEGON PREFERRED INSURANCE COMPANY, Plaintiff, v. SOUTHEAST UNDERGROUND SERVICES INC., et al., Defendants. Circuit Court, 5th Judicial Circuit in and for Hernando County. Case No. 20-CA-1015. July 28, 2021. Donald E. Scaglione, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Stephanie A. Giagnorio, Saxe, Doernberger & Vita, P.C., Naples, for Defendant United Rentals, Inc.; William D. Horgan, Pennington, P.A., Tallahassee, for Defendant DBI Services, LLC; and Ronald William Causey, Pro se, Spring Hill and Jeffrey Richard Smith, Pro se, Foley, AL, Defendants.

AMENDED
ORDER AS TO PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANTS SOUTHEAST UNDERGOUND SERIVICE, INC, JEFFREY RICHARD SMITH, RONALD WILLIAM CAUSEY, IVETTE CARIDAD BONET, TIMMIE DWAYNE PERRY, DBI SERVICES, LLC AND UNITED RENTALS, INC.
(Amended only to add missing page (pg 21)

THIS MATTER having come before the Court at Hearing on July 20, 2021 and the Court having reviewed the file, pleadings, as well as argument of counsel finds as follows:

1. The Case was filed December 29, 2020.
   Plaintiff's Summary Judgment was filed May 19, 2021.
   Notice of Hearing filed May 26, 2021 for hearing of July 20, 2021.
   Defendant's Response to Summary Judgment filed June 29, 2021.
   (see also Defendant's Motion to Dismiss filed June 29, 2021, disposed by separate Order pursuant to Motion Practice)
2. This Case is under Florida Supreme Court SC 20-1490 (December 31, 2020) and Amended SC-1490 (April 29, 2021).

The New Rule's Application to Pending Cases

New rule 1.510 takes effect on May 1, 2021. This means that the new rule must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases. *Cf. Love v. State,* 286 So.3d 177, 187-88 (Fla. 2019) [44 Fla. L. Weekly S293a].

In cases where a summary judgment motion was denied under the pre-amendment rule, the court should give the parties a reasonable opportunity to file a renewed summary judgment motion under the new rule. *See Wilsonart, LLC v. Lopez,* 308 So.3d 961, 964 (Fla. 2020) [46 Fla. L. Weekly S2a]. In cases where a pending summary judgment motion has been briefed but not decided, the court should allow the parties a reasonable opportunity to amend their filings to comply with the new rule. Any pending rehearing of a summary judgment motion decided under the pre-amendment rule should be decided under the pre-amendment rule, subject of course to a party's ability to file a renewed motion for summary judgment under the new rule.

A party moving for summary judgment has the burden of demonstrating to the court that there are no material facts that are genuinely disputed and that the movant therefore is entitled to judgment as a matter of law. But a key question is what standard the court should apply to determine whether the movant has satisfied its burden.

The Supreme Court addressed this question in its 1986 decision in *Celotex Corporation v. Catrett.* That case involved an action charging that the death of plaintiff's husband resulted from exposure to asbestos products manufactured or distributed by defendants. Defendant moved for summary judgment on the ground that during discovery plaintiff had failed to produce any evidence to support the allegation that the decedent had been exposed to defendant's products—an issue on which plaintiff would bear the burden of proof at trial. Plaintiff then produced three documents, which defendant challenged as inadmissible hearsay. The District court granted summary judgment and a divided panel of the District of Columbia Circuit reversed on the ground that the defendant had failed to meet its Rule 56 burden because it had not supported its motion with any evidence, so that plaintiff therefore had no obligation to respond with evidence. The Supreme Court reversed.

Although the Court issued a five-to-four decision, the majority and dissent both agreed as to how the summary-judgment burden of proof operates, they disagreed as to how the standard was applied to the facts of the case. Justice Rehnquist, writing for the majority, ruled that

there was "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. This conclusion was bolstered by the recognition that courts may enter summary judgment sua sponte. As Justice Rehnquist noted,

> It would surely defy common sense to hold that the District Court could have entered summary judgment sua sponte in favor of the petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

The satisfaction of the moving party's summary judgment burden was influenced by the fact that the nonmovant would bear the burden of proof at trial. When that was so, the moving party could make a proper summary judgment motion in reliance on the pleadings and the allegation that the nonmovant had failed to establish an element essential to that party's case. Rule 56 then would require the opposing party to go beyond the pleadings to designate specific facts showing there was a genuine issue for trial. Justice Rehnquist concluded the majority's opinion with the policy justification that supported this conclusion.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

In the dissenting opinion by Justice Brennan, he elaborated more fully on the way in which the burden shifts between the parties to the action, as well as how it can be satisfied. Rule 56 first imposes a burden of production on the moving party to make a prima facie showing that it is entitled to summary judgment. That can be satisfied, in cases in which the ultimate burden of persuasion at trial rests on the nonmoving party, either by submitting affirmative evidence negating an essential element of the nonmovant's claim or, as in Celotex, by demonstrating that the nonmoving party's evidence itself is insufficient to establish an essential element of its claim. As described by Justice Brennan, the moving party may make this showing by deposing the nonmoving party's witness, by establishing the inadequacy of documentary evidence or, if there is no evidence, by reviewing for the court what exists to show why that does not support a judgment for the nonmoving party. To this extent, the dissent agreed with the majority that the movant need not present affidavits or new evidence of its own to meet its initial burden, but may premise its summary judgment motion on an attack of the opponent's evidence. If it is successful in arguing that the nonmovant's evidence is insufficient, the burden shifts to that party to call evidence to the attention of the court to dispute that contention. The dissent argued, however, that in Celotex itself defendant had not met this initial burden because it had ignored supporting evidence clearly contained in the record and thus had not demonstrated that no evidence existed to support plaintiff's claim.

There are numerous ways in which the movant can satisfy its burden on summary judgment to show that there are no genuine issues of fact. Indeed, when Rule 56 was rewritten in 2010, a new subdivision (c) was included that explicitly provides that a movant must support its position that there is no genuine dispute of material facts by citing to materials in the record that demonstrate the absence of a dispute, by showing that those materials do not establish the presence of a genuine dispute, or, as in Celotex, by showing that the opposing party cannot produce admissible evidence to support a material fact. In short, the movant may discharge the Rule 56 burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the opposing party. This may occur, for example, if a movant, by means of uncontroverted affidavits or by using any of the other materials specified in Rule 56(c), completely explores and establishes the facts, thereby demonstrating the absence of any genuine dispute as to the facts and securing the entry of summary judgment. If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless, and the movant is entitled to a judgment as a matter of law.

Indeed, applying this principle, even if the movant's own evidentiary material reveals an issue of credibility, summary judgment still may be warranted if it also appears that the party opposing the motion cannot prevail in any event so that the issue or credibility is immaterial.

Situations in which credibility issues are unimportant because the adversary cannot prevail occasionally result the interplay between the burden of proof on the summary judgment motion and the burden of persuasion at trial. For example, in *Dyer v. MacDougall,* the allegations in a complaint in a slander action were countered by affidavits signed by all of the witnesses to the supposed defamation, each denying that the wrong had occurred. Plaintiff was unable to resist defendant's motion for summary judgment since even if he succeeded in impeaching the credibility of defendant's witnesses at trial, the court concluded that he nevertheless would be unable to discharge his burden of persuasion the issue of slander. Thus, defendant had demonstrated that a trial would be useless and summary judgment appropriate; there would be no competent evidence that could support a verdict for plaintiff, especially since he could not impeach the testimony of the witnesses to the alleged defamation if he called them to testify at trial.

Finally, it is important to note that, as established in Celotex, it is not necessary for the movant to introduce any evidence in order to prevail on summary judgment, at least in cases in which the nonmoving party will bear the burden of proof al trial. The movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him. On the other hand, the party moving for summary judgment cannot sustain its burden merely by denying the allegations in the opponent's pleadings, or merely by asserting that the nonmovant lacks evidence to support its claim. The movant must show why the opponent's allegations of fact are insufficient to support the claim for relief as a matter of law or why the court should conclude that its opponent lacks sufficient evidence. Remember that in Celotex itself discovery was completed, and the only evidence plaintiff produced was found to be inadmissible hearsay.

In contrast, if the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing. If the movant fails to make that initial showing, the court must deny the motion, even if the opposing party has not introduced contradictory evidence in response.

In meeting its burden, it is important to note that despite the usual rule that all doubts are resolved against the moving party, there is one inference to which the movant is entitled. If the movant presents credible evidence that, if not controverted at trial, would entitle the movant to a Rule 50 judgment as a matter of law, that evidence must be accepted as true on a summary judgment motion when the party opposing the motion does not offer counter-affidavits or other evidentiary material supporting the opposing contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(d) why he is unable to present facts justifying opposition to the motion.

The amendment adopted by the Florida Supreme Court in SC20-

1490 largely replaces the text of existing rule 1.510 with the text of Federal rule 56. New Rule 1.510(a) will also include the following sentence: "The summary judgment standard provided for in this rule shall be construed and applied in accordance with the Federal Summary Judgment Standard."

In the December 31, 2020, decision amending rule 1,510, the Court made it clear that adopting the federal summary judgment standard means that Florida will now adhere to the principles established in the *Celotex* trilogy. In the broadest sense, those cases stand for the proposition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action." *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). More specifically, though, embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state. *In re Amends. to Fla. Rule of Civ. Pro. 1.510,* 309 So.3d at 192-93.

Those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson,* 477 U.S. at 251 (noting that "the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id*. at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments,* 76 Fla. Bar J., Feb. 2002, at 26; *see also Anderson,* 477 U.S. at 255.

Those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under Celotex and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.,* 915 F.3d 987, 997 (5th Cir. 2019).

Those applying new rule 1.510 must recognize that 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." *Anderson,* 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

The new rule will continue to require adherence to "the federal summary judgment standard," which itself cannot be understood apart from the Celotex trilogy. But the Court removed the textual reference to the cases themselves. The Court recognized that "30 years of practice under the has refined and added to the trilogy." Gensler & Mulligan, supra. And naturally, courts applying the new rule must be guided not only by the Celotex but by the overall body of case law interpreting federal rule 56.

In any event, the Court in adopting the text of federal rule 56 almost verbatim has made it unnecessary to list specific cases in new rule 1.510. That is because our act of transplanting Federal Rule 56 brings with it the "old soil" of case law interpreting that rule. *See Fla. Hwy. Patrol v. Jackson,* 288 So.3d 1179, 1183 (Fla. 2020) [45 Fla. L. Weekly S32a] ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947))).

3. The only Defendant remaining that Summary Judgment applies to is United Rentals, Inc.
   The Court notes Flex Fleet Rental, LLC and DBI Services, LLC have been Dismissed.
   Southeast Underground Services, Inc., Ivette Caridad Bonet, Jeffrey Richard Smith and Timmie Dewayne Perry have been Defaulted.
   Ronald William Causey did not appear at Summary Judgment nor did he file any paperwork other than a pro-se Answer.

Thus, the Court Grants Summary Judgment as to Defendants Southeast Underground Services, Inc., Ivette Caradad Bonet, Jeffery Richard Smith, Ronald William Causey and Timmy Dewayne Perry.

4. On December 15, 2020, the Plaintiff, Integon Preferred Insurance Company filed a Complaint for Declaratory Judgment against the Defendants, Southeast Underground Services, Inc., Jeffrey Richard Smith, Ronald William Causey, Ivette Caridad Bonet, Timmie Dewayne Perry, Flex Fleet Rental, LLC, DBI Services, LLC and United Rentals, Inc.

5a. The Plaintiff, Integon Preferred Insurance Company, issued a commercial policy of insurance, bearing policy # XXXXXX8813 to the Defendant, Southeast Underground Services, Inc., effective May 14, 2019 through May 14, 2020, which was subsequently amended, effective May 14, 2019 through May 14, 2020.

5b. The policy of insurance, bearing policy # XXXXXX8813, was issued and underwritten by Integon Preferred Insurance Company.

5c. The policy of insurance provided coverage to Southeast Underground Services, Inc. and Jeffrey Richard Smith for a 1999 Ford F450 Super Duty (VIN #1FDXF46F4XEE58388). Ansco & Associates, LLC was an additional insured and a contractual liability additional insured on the policy of insurance.

5d. The policy of insurance, bearing policy # XXXXXX8813 provided the following coverages: bodily injury/property damage—combined single limit, personal injury protection benefits coverage, collision coverage and comprehensive coverage.

5e. The policy of insurance described herein was in full force and effect on the date of the subject accident.

5f. The Defendant, Jeffrey Richard Smith, is the owner of the named insured Defendant, Southeast Underground Services, Inc.

5g. On or about May 14, 2019, the Defendant, Jeffrey Richard Smith on behalf of the Defendant, Southeast Underground Services, Inc. completed an application for insurance with Plaintiff, Integon Preferred Insurance Company.

5h. On or about July 11, 2019, Ronald William Causey was operating the 2017 Ford F350 (VIN #: 1FD8W3HT9HED35429) attached to a rental trailer, when he was involved in an accident with multiple motor vehicles and a guard rail. The insured 2017 Ford F350 (VIN #: 1FD8W3HT9HED35429) was owned by Flex Fleet Rental, Inc. The rental trailer was owned by Ronald Anthony Crump. The first opposing motor vehicle was owned and operated by Ivette Caridad Bonet and occupied by Timmie Dewayne Perry. The second opposing motor vehicle was owned and operated by an Unknown Person. The guard rail is owned by DBI Services, LLC.

5i. In addition, on or about October 15, 2019, Mark Stephen Thomas, Jr. was operating the 2015 Ford (VIN #: 1FT8W3B67FEA55609) attached to a rental trailer, when he was involved in an accident with an opposing motor vehicle in the state of North Carolina. The 2015 Ford (VIN #: 1FT8W3B67FEA55609) was owned by United Rentals, Inc. The rental trailer was owned by an Unknown Person. The opposing motor vehicle was owned and operated by Eddie Saint Parsons, II.

5j. During the investigation of the facts and circumstances surrounding the motor vehicle accident, it was determined that the insured Defendant, Southeast Underground Services, Inc. failed to report these claims to the carrier, and the Defendant, Ronald William Causey has failed to appear for Examinations Under Oath. Additionally, it was determined that the insured, Southeast Underground Services Inc. failed to advise the carrier of the business location now being in North Carolina and failed to maintain the one-hundred-mile radius from Spring Hill, FL. Furthermore, it was determined that the 2017 Ford F350 (VIN #: 1FD8W3HT9HED35429) and 2015 Ford (VIN #: 1FT8W3B67FEA55609) were not "covered autos" being operated by, Ronald William Causey and Mark Stephen Thomas, Jr., who were not listed as additional drivers on the declarations page under the policy of insurance issued to Southeast Underground Services, Inc.

5k. Jeffrey Richard Smith initialed page six of the pertinent application, which provides as follows:

"I agree all answers to all questions in this Application are true and correct. I understand, recognize, and agree said answers are given and made for the purpose of inducing the Company to issue the policy for which I have applied. I also agree to pay any surcharges appliable under the Company rules which are necessitated by inaccurate statements. I further agree that ALL persons of eligible driving age or permit age who live with me, or who are employed in my business, as well as ALL operators who regularly operate my vehicles and do not reside in my household, are shown above. I agree that my principal residence and place of vehicle garaging is correctly shown above and is in the state for which I am applying for insurance at least 10 months each year. I understand the Company may declare that no coverage will be provided or afforded if said answers on this application are false or misleading, and materially affect the risk which the Company assumes by issuing this policy. In addition, I understand that I have a continuing duty to notify the Company of any changes of (1) address; (2) location of vehicles; (3) members of my household of eligible driving age or permit age; (4) operators of any vehicle listed on the policy; or (5) use of any vehicles listed on the policy. I understand the Company may declare that no coverage will be provided or afforded if I do not comply with my continuing duty of advising the Company of any changes as noted above which materially affect the risk the Company assumes by issuing this policy."

5l. The policy of insurance issued to Southeast Underground Services, Inc. provides in pertinent part:

DUTIES AFTER AN ACCIDENT OR LOSS —FILING A CLAIM

GENERAL DUTIES

A. We do not provide coverage under this Policy unless you have paid the required premium when due. Failure to give notice as required may affect coverage provided under this Policy. Failure to comply with any of the duties in this Policy may result in denial of coverage and relieve us of all duties to investigate, settle, defend, pay any judgment or otherwise honor any claims made by an insured or against an insured.

B. We must be notified promptly of how, when and where the accident or loss happened. Notice should include the following:

1. All known facts and circumstances. This notice to us should include all known names, addresses and telephone numbers of any injured persons and witnesses.

2. All known license plate information of vehicles involved or vehicle descriptions; and

3. All known driver's license information of persons involved.

C. Any person, organization or entity claiming any coverage under this Policy must:

1. Cooperate with us in the investigation, settlement or defense of any claim or lawsuit and assist us in:

a. Making settlements;

b. Obtaining or authorizing us to obtain or secure evidence;

c. Giving evidence;

d. Obtaining the attendance of witnesses at hearings and depositions; and

e. The conduct of lawsuits.

2 ...

3 ...

4 ...

5. Submit to examinations under oath by us or our representative as often as we reasonably require. These examinations will take place at a reasonable location of our choice and outside the presence of any witness, person or entity making a claim due to the same accident or loss, or any other person other than your attorney. We may:

a. Also require an examination under oath from any family member or employee who may be able to assist us in obtaining relevant information even if that person is not claiming benefits under this Policy; and

b. . . .

6. Give us written and recorded statements as often as we reasonably request.

7. . . .

5m. In this case, the Defendant, Jeffrey Richard Smith, on behalf of the named insured Defendant, Southeast Underground Services, Inc. failed to report these claims to the Plaintiff, Integon Preferred Insurance Company and the Defendant, Ronald William Causey has failed to appear for multiple Examinations Under Oath.

6a. The policy of insurance issued to Southeast Underground Services, Inc. reads 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 from inception or rescind this Policy if you or a family member:

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

2. Concealed, omitted or mispresented any material facts or circumstance or engaged in any fraudulent conduct;

In the Application for this insurance or when renewing this Policy, requesting reinstatement of this Policy or applying for any coverage under this policy.

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 the verbal or written Application all persons residing in your household or regular operators of a covered auto.

B. This Policy shall be void if you fail to notify us of any change to the Policy that materially affects our acceptance or rating of this risk.

C. If we void this Policy, the Policy will be void from its inception, and we will not be liable for any claims or damages that would otherwise be covered.

D. We may cancel this Policy and/or may not provide coverage under this Policy if you, or a family member or anyone else seeking coverage under this Policy concealed or misrepresented any material fact or circumstance or engaged in fraudulent conduct in connection with the presentation or settlement of a claim. This includes, but is not limited to, misrepresentation concerning a covered auto or your interest in a covered auto.

E. We may, at our sole discretion, void or rescind this Policy for fraud or misrepresentation even after the occurrence of an accident or loss. This means we will not be liable for any claims or damages which would otherwise be covered.

F. If we make a payment under this Policy for a loss or accident to you or to a person seeking coverage under this Policy which we later discover was obtained through fraud, concealment or misrepresentation by you or the person seeking coverage under this Policy, we reserve the right, at our sole discretion, to recover such payment made or incurred.

6b. In this case, the Defendant, Jeffrey Richard Smith, on behalf of the named insured Defendant, Southeast Underground Services, Inc. failed to advise the carrier of the business location now being in North Carolina and failed to maintain the one-hundred-mile radius from Spring Hill, FL to the Plaintiff, Integon Preferred Insurance Company.

6c. Applying the insurance policy language to the facts of this case, by failing to disclose the change in location of the business, the insured Defendant, Southeast Underground Services, Inc. failed to notify the carrier of any change to the policy that materially affects the acceptance or rating of this risk.

7. Under Part A > Liability Coverage of the policy of insurance, the policy reads as follows:

INSURING AGREEMENT

A. Subject to the limit of liability shows on the Declarations Page, if you pay us the premium for Liability Coverage, we will pay compensatory damages for which an insured is legally liability due to bodily injury or property damage caused by an accident that arises out of the ownership, maintenance or use of an auto covered under this PART A. Damages include prejudgment interest awarded against an insured subject to our limits of liability for this PART A. We will not pay for punitive or exemplary damages.

B. We will settle or defend, as we consider appropriate, any claim or lawsuit asking for these damages. If we defend, we will choose the counsel of our choice, which may include an in-house counsel. In addition to our limits of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or by settlement. We have no duty to:

1. Defend any lawsuit;

2. Settle any claim; or

3. Pay any judgment; for bodily injury or property damage not covered under this policy.

ADDITIONAL DEFINITIONS—PART A—LIABILITY COVERAGE

When used in this PART A:

1. The definition of auto shall also include mobile equipment but only while being carried or towed by a covered auto.

2. "Insured" means:

a. You for the ownership. maintenance or use of a covered auto.

b. Any additional driver listed on your Declarations Page, but only while using a covered auto.

c. A permissive operator.

d. For the use of a covered auto, any person or organizations, but only with respect to the legal liability for acts or omissions of a person for whom coverage is afforded under this PART A.

3. The following are not insureds under this PART A:

a. . . .

b. . . .

c. . . .

d. . . .

e. The owner or anyone else from whom you hire or borrow a covered auto unless the covered auto is a trailer connected to a covered auto you own.

f. . . .

g. Any person who is an undisclosed operator.

Under Part A DENIALS, the policy reads as follows:

A. . . .

B. We do not provide Liability Coverage for, nor do we have a duty to defend, any insured for bodily injury or property damage arising out of the ownership, maintenance, or use of:

1. . . .

2. Any vehicle, other than a covered auto, that is:

a. . . .

b. Furnished or available for your regular use.

3. Any auto, other than a covered auto, that is:

a. . . .

b. Furnished or available for the regular use of any family member. However, this denial B.3. does not apply to you.

4. A covered auto that:

a. Is being rented or leased, subleased, loaned or given by you or a family member to another party in exchange for money, value, goods, services, compensation or reimbursement;

b. Has been given in exchange for compensation;

c. Is under a conditional sales agreement by you to another; or

d. . . .

On page 1, "Additional auto" is defined as follows:

C. "Additional auto" means an auto that you acquire in addition to the auto(s) shown on the Declaration Page, if:

1. No other Insurance applies to the acquired auto;

2. Within thirty (30) calendar days after you become the owner of the additional auto, you ask us to add the additional auto to your Policy;

3. The additional auto is eligible for coverage pursuant to our underwriting criteria;

4. If the auto is used in your business, we already insure all autos owned by you that are used in your business and are eligible for coverage pursuant to our underwriting criteria; and

5. If the auto is not used in your business, we already insure all autos you own that are eligible for coverage pursuant to our underwriting criteria.

If you ask us to insure the additional auto within thirty (30) calendar days after you acquire the auto and we agree to insure it, any coverage we provide for the additional auto is subject to the following conditions:

1. On the date you become the owner, an additional auto will have the broadest coverage we provide on any auto shows on the Declarations

2. Any coverage you ask us to add to the auto or any increase of limits of liability shall not begin until after:

a. We agree to add the coverage or increase the limits; and

b. You pay any additional premium when due. On page 2, "Covered auto" is defined as follows:

G. "Covered auto" means:

1. Any auto described in the Declarations Page for which a premium charge is shown unless you have asked us to delete that auto from the Policy.

2. A newly acquired auto.

3. Any auto not owned by you which is:

a. Driven by you or a listed driver; and

b. used on a temporary basis as a substitute for any auto described in this definition which is out of service no longer than thirty (30) days because of its:

i. Breakdown;

ii. Repair,
iii. Servicing;
iv. Loss; or
v. Destruction.

The auto being used as a temporary substitute must be eligible for coverage pursuant to our underwriting criteria.

On page 4, "Replacement auto" is defined as follows:

AA. "Replacement auto" means an auto that you acquire during the current policy term that has taken the place of an auto shows on the Declarations Page. Any we provide for a replacement auto is subject to the following terms:

1. No other insurance applies to the replacement auto, and we insure all autos that you own.

2. On the date you become the owner of a replacement auto, if coverage applies under this Policy, that replacement auto will have the same coverage as the auto shown on your Declaration Page that is being replaced

3. The deductible that applies to a replacement auto shall be the same as the auto it replaced.

4. All coverage we provide for the replacement auto ends thirty (30) calendar days after you become the owner if you do not ask us to insure it within those thirty (30) calendar days,

5. Any coverage you ask us to add to the auto or any increase of limits of liability shall not begin until after:

a. We agree to add the coverage or increase the limits; and

b. You pay any additional premium when due.

6. The replacement auto is eligible for coverage pursuant to our underwriting citeria.

"Employee" is defined as follows:

L. "Employee" means anyone for which the employer will pay for his or her services and has the authority to direct performance. This includes direct staff, independent contractors, leased workers and temporary workers.

"Family Member" is defined as follows:

M. "Family member" means, if you are an individual:

1. A person related to you by blood, marriage or adoption who resides in your household; or

2. A ward or foster child or stepchild who resides in your household; at the time of the accident or loss.

"Permissive operator" is defined as follows:

U. "Permissive operator" means any person using a covered auto with and within the scope of your express permission provided such person:

1. Has a valid driver's license at the time of the accident; and

2. Is not an undisclosed operator. "Undisclosed operator" is defined as follows:

DD. "Undisclosed operator" means:

1. A family member;
2. A person who resides in your household;
3. A regular operator, or
4. Your employee;

who has a driver's license or permit but who is not listed on your Policy:

a. At the time of application;
b. At the time the person obtains a valid driver's license or permit;
c. Within thirty (30) days of residing in your household or
d. Within thirty (30) days of becoming your employee.

An undisclosed operator also includes any person shows on the Declaration Page as a non-driver.

"You" and "your" are defined as follows:

FF. "You" and "your" mean the person or organization shows on the Declarations Page as the named insured.

7a. In this case, Ronald William Causey and Mark Stephen Thomas Jr., the operators of the 2017 Ford F350 (VIN #: 1FD8W3HT9HED35429) and 2015 Ford (VIN #: 1FT8W3B67FEA55609) involved in the subject accidents were not listed as additional drivers on the declarations page under the policy of insurance issued to the Defendant, Southeast Underground Services, Inc.

7b. The subject insurance policy only provides coverage for any "covered auto" listed on the policy. The only 'covered auto" listed on this policy is the 1999 Ford F450 Super Duty. The 2017 Ford F350 and 2015 Ford involved in the subject accidents do not meet the definition of "covered autos" nor do they meet the definition of an additional and/or replacement auto.

7c. Applying the insurance policy language to the facts of this case, Ronald William Causey and Mark Stephen Thomas, Jr., the operators of the 2017 Ford F350 and 2015 Ford were not insured drivers, as they were not listed as additional drivers and the 2017 Ford F350 and 2015 Ford were not listed as "covered autos" on the declarations page under the terms of the policy of insurance issued to the Defendant, Southeast Underground Services, Inc.

8. Additionally, under endorsement 10143 (01012014) for the policy of insurance issued to Southeast Underground Services, Inc., it provides in pertinent part:

PART A LIABILITY COVERAGE

INSURING AGREEMENT

The following is added to the INSURING AGREEMENT:

If you pay us the premium for Any Auto Coverage, then the definition of "covered auto" under PART A > LIABILITY COVERAGE means any auto eligible for coverage pursuant to our underwriting criteria.

ADDITIONAL DEFINITIONS—PART A > LIABILITY COVERAGE

A. The definition of "Insured" under PART A > LIABILITY COVERAGE is deleted and replaced by the following: "Insured" means:

a. You, while using a covered auto.

b. A driver listed on the Declaration Page while using:

i. Any auto described on the Declarations Page for which a premium charge is shown;
ii. Any replacement auto;
iii. Any additional auto;
iv. Any temporary substitute auto; or
v. A covered auto within the scope of your business.

c. Anyone using a covered auto within the scope of your business and with, and within the scope of, your permission.

B. The following definition is added and only applies to PART A > LIABILITY COVERAGE:

"Temporary substitute auto" means any auto not owned by you which is:

a. Driven by you or a listed driver and

b. Used as a temporary substitute for any auto described on the Declarations Page, any replacement auto, or any additional auto which is out of service no longer than thirty (30) days because of its:

i. Breakdown;
ii. Repair;
iii. Servicing;
iv. Loss; or
v. Destruction

The temporary substitute auto must be eligible for coverage pursuant to our underwriting criteria.

LIMITS OF LIABILITY

All language in the LIMITS OF LIABILITY section of your Policy referencing a permissive operator is deleted.

9. Moreover, under endorsement 10146 (01012014) for the policy of insurance issued to Southeast Underground Services, Inc., it provides in pertinent part:

PART A>LIABILITY COVERAGE

ADDITIONAL DEFINITIONS. PART A> LIABILITY COVERAGE

The definition of "Insured" in PART A is deleted and replaced with the following: "Insured", in this PART A, means:

a. You, as the renter of a hired auto, in the same manner as if you were the owner.

b. The owner of a hired auto.

c. Any lessee of whom you are a sub-lessee.

d. Any agent or employee of such owner or lessee, while the hired auto is being used in your business or by you for personal or pleasure purposes. However, the hired auto's owner, or anyone else from whom it is rented or leased is not an insured for liability resulting from defects or faulty workmanship.

The following definitions are added to Part A.

"Covered auto" means hired autos for this PART A only.

"Hired auto" means, in this endorsement, an auto which is not owned by you, registered in your name, or borrowed from your employees and which is obtained under a short-term rental agreement not to exceed thirty (30) days. The hired auto must be eligible for coverage pursuant to our underwriting criteria.

OTHER INSURANCE

The insurance provided by this endorsement is excess over any other valid and collectible insurance whether primary, excess or contingent.

10. Furthermore, under endorsement 10149 (01012014) for the policy of insurance issued to Southeast Underground Services, Inc., it provides in pertinent part:

PART LIABILITY COVERAGE

PART A> LIABILITY COVERAGE is revised as follows:

INSURING AGREEMENT

If you pay us the premium for Non-Ownership Liability Coverage, we agree with you that the insurance provided under PART A> LIABILITY COVERAGE section of your Policy for a covered auto applies to any non-owned auto used in your business by you or any of your employees subject to the following provisions:

ADDITIONAL DEFINITIONS—PART A > LIABILITY COVERAGE

The definition of insured under PART A > LIABILITY COVERAGE applies to the insurance provided by Non-Ownership Liability Coverage endorsement except that none of the following is an insured with respect to a non-owned auto:

1. The owner of a non-owned auto and any agent or employee of that owner; or

2. An executive officer of yours with respect to an auto owned by him or a member of his household.

The following definition is added:

"Non-owned auto", when used in this endorsement, means an auto which is not:

1. Owned by you;

2. Registered in your name;

3. Hired by you; or

4. Used under contract on your behalf.

The non-owned auto must be eligible for coverage pursuant to our underwriting criteria.

DENIALS

The following denial is added:

The insurance proved by this endorsement does not apply to bodily injury and property damage arising out of the ownership, maintenance or use of a non-owned auto used in the conduct of any partnership or joint venture of which you are a partner or member, and which is not shows as the named insured on the Declaration Page.

OTHER INSURANCE

The insurance provided by this endorsement is excess over any other valid and collectible insurance whether primary, excess or contingent.

11. Florida Statute § 86.021 states in pertinent part:

Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

12. Plaintiff's Summary Judgment Evidence:

A. Copy of the Declarations Pages;

B. Copy of the Insurance Policy;

C. Copy of the signed Application for Insurance;

D. Copy of the police report for the July 11, 2019 motor vehicle accident;

E. Copy of the police report for the October 15, 2019 motor vehicle accident;

F. Copy of the Affidavit of Angela Valliere;

13. Standard of Review Pursuant to Plaintiff

Fla. R. Civ. P. 1.510 states in relevant part:

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(5) Timing for Supporting Factual Positions. At the time of filing a motion for summary judgment, the movant must also serve the movant's supporting factual position as provided in subdivision (1) above. At least 20 days before the time fixed for the hearing, the nonmovant must serve a response that includes the nonmovant's factual position as provided in subdivision (1) above.

See In re: Amendments to Fla. Rule of Civ. Procedure 1.510., 2021 Fla. LEXIS 682, Supreme Court of Florida, April 29, 2021, No. SC20-1490 [46 Fla. L. Weekly S95a].

Pursuant to the Amendment to the Fla. Rule of Civ. Procedure 1.510, as of May 1, 2021, the amendment largely replaces the text of existing Rule 1.510 with the text of Federal Rule 56.

"First, those applying new Rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson,* 477 U.S. at 251 (noting that

"the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id.* at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." *Thomas Logue & Javier Alberto Soto, Florida Should Adopt the Celotex Standard for Summary Judgments,* 76 Fla. Bar J., Feb. 2002, at 26; see also *Anderson*, 477 U.S. at 255." *See In Re: Amendments to Fla. Rule of Civ. Procedure 1.510,* 2021 Fla. LEXIS 682 *9-10 2021 WL 1684095 [46 Fla. L. Weekly S95a].

"Second, those applying new Rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the non-movants case. Under Celotex and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[If] the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant [*11] for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.,* 915 F.3d 987, 997 (5th Cir. 2019)." *See In Re: Amendments to Fla. Rule of Civ. Procedure 1.510,* 2021 Fla. Lexis 682, *10-11 2021 WL 1684095 [46 Fla. L. Weekly S95a].

"And third, those applying new Rule 1.510 must recognize that 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." *Anderson,* 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) [20 Fla. L. Weekly Fed. S225a]. In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure* S 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard)." *See In Re: Amendments to Fla. Rule of Civ. Procedure 1.510.* 2021 Fla. LEXIS 6822021 WL 1684095 [46 Fla. L. Weekly S95a].

14. The First District Court of Appeal provided in *Grissom v. Commercial Union Ins. Co.,* that "[t]he duty to defend is separate and apart from the duty to indemnify and the insurer is required to defend the suit even if the true facts later show there is no coverage." *Grissom v. Commercial Union Ins. Co.,* 610 So.2d 1299, 1307 (Fla. 1st DCA 1992). Furthermore, "[a] duty to defend does not create coverage where coverage does not exist." *Colony Ins. Co. v. G & E Tires & Serv., Inc.,* 777 So.2d 1034, 1038 (Fla. DCA 2000) [26 Fla. L. Weekly D75a].

In *Knapp v. Commonwealth Land Title Ins. Co.,* 'Where the insurer provided its insured a defense under a reservation of rights, specifically reserving the right to seek reimbursement for attorneys' fees incurred in defending claims not covered under the policy, the court held: The courts should be consistent in encouraging insurance companies to properly meet their duty to defend its insured against third party claims and minimize unnecessary claims to enforce policy coverage. However, where an insurer has properly met its duty and subsequently successfully challenges policy coverage, it should be entitled to the full benefit of such a challenge and be reimbursed for the benefits it bestowed, in good faith, to its insured." *Knapp v. Commonwealth Land Title Ins. Co.,* 932 F. Supp. 1169, 1172 (D. Minn. 1996).

Further, in determining the meaning of "policy provisions, we apply the settled rule that insurance policies are to be construed liberally in favor of the insured and strictly against the insurer, and that whenever the language is susceptible of two or more constructions, the court must adopt that which is most favorable to the insured. *Robertson v. United Services Auto. Ass'n*, 330 So.2d 745, 746 (Fla. DCA), cert. denied, 342 So.2d 1104 (Fla. 1976).

15. Therefore, Ronald William Causey and Mark Stephen Thomas Jr., the operators of the 2017 Ford F350 (VIN #: 1FD8W3HT9HED35429) and 2015 Ford (VIN #: 1FT8W3B67FEA55609) involved in the subject accidents were not listed as additional drivers on the declarations page under the policy of insurance issued to the Defendant, Southeast Underground Services, Inc. The subject insurance policy only provides coverage for any "covered auto" listed on the policy. The only "covered auto" listed on this policy is the 1999 Ford F450 Super Duty. The 2017 Ford F350 and 2015 Ford involved in the subject accidents do not meet the definition of "covered autos" nor do they meet the definition of an additional and/or replacement auto. Coverage would only be afforded if a person defined by the policy was an insured operating a "covered auto".

Thus, Ronald William Causey and Mark Stephen Thomas Jr., the operators of the 2017 Ford F350 and 2015 Ford at the time of the loss do not meet the definition of an insured driver under the policy of insurance and the 2017 Ford F350 and 2015 Ford involved in the subject motor vehicles do not meet the definition of "covered autos" under the policy of insurance. Accordingly, the denial of insurance coverage is proper based on Ronald William Causey and Mark Stephen Thomas Jr., the operators involved in the subject motor vehicle accidents, not constituting as insured drivers under the policy of insurance and the 2017 Ford F350 and 2015 Ford not constituting as additional and/or replacement autos for the insured vehicle.

Therefore, the Court finds:

A. There is no property damage liability coverage and/or bodily injury liability coverage for the July 11, 2019 and October 15, 2019 motor vehicle accidents under the policy issued by Integon Preferred Insurance Company since Ronald William Causey and Mark Stephen Thomas Jr., are not an "insured driver" on the declarations page and the unlisted 2017 Ford F350 and 2015 Ford are not a "covered auto", pursuant to the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

B. There is no insurance coverage for the named insured, Southeast Underground Services, Inc. for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

C. There is no insurance coverage for the named insured, Jeffrey Richard Smith for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

D. There is no insurance coverage for the Defendant, Ronald William Causey for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

E. There is no insurance coverage for the Defendant, United

Rental, Inc. for any bodily injury liability coverage, property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

F. The Plaintiff, Integon Preferred Insurance Company, has no duty to defend and/or indemnify the insured, Southeast Underground Services, Inc., for any claims made under the policy of insurance issued by Integon Preferred Insurance Company under policy # XXXXXX8813;

G. The Plaintiff, Integon Preferred Insurance Company has no duty to defend and/or indemnify the insured, Jeffrey Richard Smith for any claims made under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

H. The Plaintiff, Integon Preferred Insurance Company, has no duty to defend and/or indemnify the Defendant, Ronald William Causey, for any claims made under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

I. The Plaintiff, Integon Preferred Insurance Company, has no duty to defend and/or indemnify the Defendant, United Rentals, Inc., for any claims made under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

J. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc., for any bodily injury claim for Ivette Caridad Bonet arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

K. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any bodily injury claim for Ivette Caridad Bonet arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

L. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Ronald William Causey for any bodily injury claim for Ivette Caridad Bonet arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

M. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc. for any bodily injury claim for Timmie Dewayne Perry arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

N. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any bodily injury claim for Timmie Dewayne Perry arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

O. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Ronald William Causey for any bodily injury claim for Timmie Dewayne Perry arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

P. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc., for any bodily injury claim for an Unknown Person arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

Q. The Plaintiff, INTEGON PREFERRED INSURANCE COMPANY, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any bodily injury claim for an Unknown Person arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

R. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Ronald William Causey for any bodily injury claim for an Unknown Person arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

S. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc. for any property damage claim for Ivette Caridad Bonet arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

T. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any property damage claim for Ivette Caridad Bonet arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

U. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Ronald William Causey for any property damage claim for Ivette Caridad Bonet arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

V. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc. for any property damage claim for an Unknown Person arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

W. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any property damage claim for an Unknown Person arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

X. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Ronald William Causey for any property damage claim for an Unknown Person arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

Y. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc. for any property damage claim for DBI Services, LLC arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

Z. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any property damage claim for DBI Services, LLC arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

aa. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Ronald William Causey for any property damage claim for DBI Services, LLC arising from the accident of July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy

XXXXXX8813;

bb. There is no personal injury protection ("PIP") insurance coverage for Ronald William Causey for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

cc. There is no collision insurance coverage for Ronald Anthony Crump for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

dd. There is no comprehensive insurance coverage for Ronald Anthony Crump for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ee. There is no insurance coverage for any property damage claim for DBI Services, LLC for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ff. There is no insurance coverage for any property damage claim for Ivette Caridad Bonet for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

gg. There is no insurance coverage for any property damage claim for an Unknown Person for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

hh. There is no insurance coverage for any bodily injury claim for Ivette Caridad Bonet for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ii. There is no insurance coverage for any bodily injury claim for Timmie Dewayne Perry for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

jj. There is no insurance coverage for any bodily injury claim for an Unknown Person for the accident which occurred on July 11, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

kk. The Defendant, Southeast Underground Services, Inc., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

ll. The Defendant, Jeffrey Richard Smith, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

mm. The Defendant, Ronald William Causey, is excluded from insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

nn. The Defendant, Timmie Dewayne Perry, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

oo. The Defendant, Ivette Caridad Bonet, is excluded from insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

pp. The Defendant, DBI Services, LLC, is excluded from insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

qq. Ronald Anthony Crump is excluded from insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

rr. An Unknown Person is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813, for the July 11, 2019 accident;

ss. Progressive American Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813, for the July 11, 2019 accident;

tt. Since Integon Preferred 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 Integon Preferred Insurance Company under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, bearing policy # XXXXXX8813, for the July 11, 2019 motor vehicle accident;

uu. There is no insurance coverage for the motor vehicle accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

vv. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

ww. There is no bodily injury liability coverage for the accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

xx. There is no property damage liability coverage for the accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

yy. There is no collision coverage for the accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

zz. There is no comprehensive coverage for the accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

aaa. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc. for any bodily injury claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

bbb. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any bodily injury claim for Eddie Saint Parsons II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ccc. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify, United Rental, Inc. for any bodily injury claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ddd. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Mark Stephen Thomas, Jr. for any bodily injury claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

eee. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Southeast Underground Services, Inc. for any property damage claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

fff. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Jeffrey Richard Smith for any property damage claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ggg. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify United Rentals, Inc. for any property damage claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

hhh. The Plaintiff, Integon Preferred Insurance Company, owes no duty to defend and/or indemnify Mark Stephen Thomas, Jr. for any property damage claim for Eddie Saint Parsons, II arising from the accident of October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

iii. There is no personal injury protection ("PIP") insurance coverage for Mark Stephen Thomas, Jr. for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

jjj. There is no collision insurance coverage for United Rentals, Inc. for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

kkk. There is no comprehensive insurance coverage for United Rentals, Inc. for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

lll. There is no collision insurance coverage for an Unknown Person for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

mmm. There is no comprehensive insurance coverage for an Unknown Person for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

nnn. There is no insurance coverage for any property damage claim for Eddie Saint Parsons, II for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ooo. There is no insurance coverage for any bodily injury claim for Eddie Saint Parsons, II for the accident which occurred on October 15, 2019, under the policy of insurance issued by Integon Preferred Insurance Company, under policy # XXXXXX8813;

ppp. The Defendant, Southeast Underground Services, Inc., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

qqq. The Defendant, Jeffrey Richard Smith, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

rrr. The Defendant, United Rentals, Inc., is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

sss. Mark Stephen Thomas, Jr., is excluded from insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

ttt. Eddie Saint Parsons, II, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, policy # XXXXXX8813;

uuu. An Unknown Person is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813, for the October 15, 2019 accident;

vvv. Geico General Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813, for the October 15, 2019 accident;

www. Since Integon Preferred 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 Integon Preferred Insurance Company under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, bearing policy # XXXXXX8813, for the October 15, 2019 motor vehicle accident;

xxx. There is no insurance coverage for the motor vehicle accident which occurred on October 15, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

yyy. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on October 15, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

zzz. There is no bodily injury liability coverage for the accident which occurred on October 15, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

aaaa. There is no property damage liability coverage for the accident which occurred on October 15, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

bbbb. There is no collision coverage for the accident which occurred on July 11, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

cccc. There is no comprehensive coverage for the accident which occurred on October 15, 2019, under the policy of insurance issued by Plaintiff, Integon Preferred Insurance Company, under policy # XXXXXX8813;

The remaining parties to submit a Judgment/stipulated Final Judgment pursuant to this summary Judgment Order.

* * *

Criminal law—DUI manslaughter—Possession of cocaine—Post conviction relief—Counsel—Ineffectiveness—Given state of law at the time and information available to counsel, failure to file motion to suppress warrantless blood draw based on lack of consent by defendant or lack of exigent circumstances constituted deficient performance—Evidence not sufficient to permit court to conclude that exigent circumstances existed based on dissipation of alcohol in defendant's blood during time needed to obtain warrant—State's argument that fact that victim died, combined with dissipation of alcohol in defendant's blood, constituted exigent circumstances is foreclosed by contrary holding by district court of appeals—Good faith exception to exclusionary rule not bar to suppression—Court concludes that defendant would have succeeded on motion to suppress and that court would have suppressed evidence of his blood alcohol content from trial—Prejudice—Without BAC number in evidence, state would not have been able to call its expert to testify as to specific effects a person could feel at that BAC level and could not argue that defendant was suffering from those specific effects and ask the jury to draw inference that defendant's high level of intoxication was the reason victim died—Extensive discussion of *Missouri v. McNeely*

STATE OF FLORIDA, v. TROY E. DONNELLY, Person ID: 1416974, Defendant.

Circuit Court, 6th Judicial Circuit in and for Pinellas County, Criminal Division. Case No. 15-01644-CF, Division A. August 27, 2021. Nancy Moate Ley, Judge. Counsel: Sara Waechter, Assistant State Attorney, for State. Robert David Malove and Dwight Gibiser, Law Office of Robert David Malove, P.A., Ft. Lauderdale, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF; DIRECTIONS TO CLERK

THIS CAUSE came before the Court on Defendant's *pro se* "Motion to Vacate and Set Aside Judgment and Conviction," filed on August 26, 2019, and his "Supplemental Motion to Vacate and Set Aside Judgment and Sentence with Incorporated Memorandum of Law," filed by counsel on January 16, 2020, both pursuant to Florida Rule of Criminal Procedure 3.850. On September 27, 2019, and January 23, 2020, the Court issued orders denying in part and directing the State to respond in part to Defendant's motions.[1] The State filed its response on May 29, 2020. Defendant filed a reply on June 30, 2020. On July 15, 2020, the Court granted an evidentiary hearing on four claims. The Court held the hearing on July 16, 2021. Having reviewed the motions, the State's response, Defendant's reply, the testimony at the evidentiary hearing, the record, and applicable law, the Court finds as follows:

PROCEDURAL HISTORY

On March 10, 2015, the State charged Defendant by information with DUI manslaughter (count one) and unlawful possession of cocaine (count two), stemming from an incident that occurred on February 13, 2015. The Court severed the counts for trial on March 29, 2017. On April 4, 2017, Defendant proceeded to trial on count one. The jury found him guilty, and on May 4, 2017, the Court sentenced Defendant to 15 years' imprisonment. On May 5, 2017, Defendant pled guilty to count two, and the Court sentenced Defendant to five years' imprisonment, concurrent to count one. (Ex. A, Judgments and Sentences). Defendant appealed, and the Second District Court of Appeal affirmed per curiam. *Donnelly v. State,* 275 So. 3d 1195 (Fla. 2d DCA 2019). Defendant then filed the instant motion.

GROUNDS FOR RELIEF

In his motions, Defendant raised nine claims of ineffective assistance of counsel, one claim that the Court lacked jurisdiction, and one claim of cumulative error. In its September 27, 2019, and January 23, 2020, orders, the Court denied all claims except grounds three, four, eight, ten, and eleven. At the evidentiary hearing, Defendant withdrew grounds three, four, ten, and eleven, and proceeded on ground eight only.

Defendant claims that trial counsel rendered ineffective assistance by failing to file a motion to suppress the blood evidence seized pursuant to section 316.1933(1), Florida Statutes (2015), without a warrant or Defendant's consent. Defendant argues that he refused to consent to a blood draw, and that his refusal was not honored and his blood taken by force. He contends that no reasonable attorney would have failed to file a motion to suppress the blood draw because, in light of *Missouri v. McNeely,* the State would have been unable to show that a bona fide exigent circumstance existed to justify the warrantless blood draw.

For substantially similar reasons, Defendant argues that a motion to suppress the blood evidence would have been granted. Defendant notes that the State waited two-and-a-half to three-and-a-half hours to seize Defendant's blood, showing that no exigency existed based on the dissipation of alcohol in Defendant's blood. Defendant also argues that the State could not create its own exigency by relying on outdated warrant-application procedures that trial counsel described as "laborious" and "unnecessarily long."

Defendant contends that counsel's failure to move to suppress the blood draw prejudiced him. He contends that the BAC evidence was the "most damaging piece of evidence"—in his view, the State used the BAC evidence to prove impairment, to bolster its case regarding the other signs of impairment, and to bolster its case regarding causation through testimony about the effects of BAC on driving and reaction time—and that had it been suppressed, there is a reasonable probability that the outcome of the proceeding would have been different.

In response, the State contends that counsel made a reasonable decision not to file a motion to suppress because (1) she reasonably believed it would not have been granted, and (2) other evidence supported a finding that Defendant was impaired. The State also argues that the decision was a reasonable strategic decision because counsel developed a strategy to focus on the issue of causation. The State further contends that the motion would have failed because exigent circumstances did exist: in the State's view, the dissipation of alcohol in Defendant's blood constituted a *per se* exigency that eliminated the need to conduct a fact-specific inquiry because this was a manslaughter case. In neither its written response nor its arguments at the hearing did the State put forward an argument that, if counsel did render deficient performance by failing to seek suppression of the blood evidence, then Defendant was not prejudiced at trial by its admission.

In their written pleadings, both parties addressed the issue of whether the good-faith exception to the exclusionary rule would prevent suppression if the seizure of Defendant's blood were deemed unconstitutional. The State argued that it would apply because the officers relied on section 316.1933 in good faith. Defendant argued that it would not apply because *McNeely* had called the statute's application into question, and therefore it could not be relied upon in good faith. Neither party presented testimony or additional argument at the hearing on this issue.

TESTIMONY AT THE EVIDENTIARY HEARING

The Court held the evidentiary hearing on July 16, 2021. Dwight Gibiser appeared on behalf of Defendant, and Sara Waechter appeared on behalf of the State. At the start of the hearing, Defendant withdrew grounds three, four, ten, and eleven, and proceeded on ground eight only. (Tr 4-6.) Defendant testified and called trial counsel, Lynley Flagler, to testify at the hearing. No other witnesses testified, and the parties presented no other non-record evidence.

Defendant testified that law enforcement arrested him for DUI Manslaughter in February 2015. (Tr 8.) At the scene of the crash that led to his arrest, law enforcement officers asked that he provide a blood sample, and he refused. (Tr 8.) Law enforcement then took a blood sample without his consent and without a search warrant after threatening to seize it by force. (Tr 8-9.) He retained Ms. Flagler to represent him, and she moved to suppress his statements made at the scene but did not move to suppress the blood evidence. (Tr 8.) He did not ask Ms. Flagler to file a motion to suppress the blood draw, but also stated that he was unaware of the law surrounding blood draws. (Tr 10.)

Ms. Flagler testified that Defendant retained her to represent him in February 2016, about a year after he had been arrested for DUI Manslaughter. (Tr 11-12.) The scope of her representation was "everything through a jury trial." (Tr 11.) She received and reviewed the discovery in the case from Defendant's previous attorney. (Tr 13-14.) She was aware that law enforcement had not obtained any search warrants in the case. (Tr 14.)

The State's theory at the time she took the case was that the victim had been crossing the street, and Defendant's vehicle struck him after he had traversed about three-fourths of the street. (Tr 15.) Ms. Flagler "never felt that Mr. Donnelly's blood-alcohol content had anything to do with the death of the victim in this case." (Tr 15.) She "always felt and still feel[s] that the victim had stepped out in front of oncoming

traffic." (Tr 15.) But she acknowledged that, "[b]y necessity of the jury instructions," the State presented to the jury that Defendant's 0.18 blood alcohol concentration (BAC) "contributed to the death" of the victim. (Tr 15.)

Law enforcement took two non-consensual blood draws in this case. (Tr 16.) Those blood draws showed a BAC of 0.18 at 10:07 p.m. and 0.16 at 11:16 p.m. (Tr 16-17.) The Court instructed the jury on the presumption in DUI cases that a BAC of 0.08 or higher is sufficient evidence in and of itself to show that a person is impaired. Ms. Flagler testified that a defendant is "basically trying to overcome" a finding of impairment "[b]ecause of the presumption." (Tr 19-20.) Ms. Flagler conceded in her opening statement at trial that the element of impairment was not in dispute. (Tr 20-21.) Instead, she focused on what she felt was the "main issue of the entire case": causation. (Tr 21, 46.) Law enforcement believed that the victim "clearly had been in the road for quite a long time period" crossing the street, and that Defendant "had to have been under the influence because he didn't see him." (Tr 23.) However, she worked to demonstrate that the victim had stepped into the road from the opposite, much shorter, direction. (Tr 23.)

Ms. Flagler was aware that the State presented testimony from its expert about the effects that a 0:18 BAC would have on the human body, such as impaired motor functions, ability to operate a vehicle, and reaction times, and how those diminished faculties could contribute to the crash. (Tr 23.) She acknowledged that the State would not have been able to elicit that testimony if the BAC number had been suppressed. (Tr 24.) She acknowledged that it would be "a lot easier" to defend a case without a BAC number: "if you can have your dream case, you would prefer not to have high levels in a DUI manslaughter," or "any levels at all." (Tr 25.)

Ms. Flagler did not file a motion to suppress the blood evidence in this case. (Tr 26, 47.) She explained that she chose not to because

> I did not feel it would be very successful, to be honest with you. And I also felt that the major issue in the case was a causation issue. You know, again, there was other evidence that the State had to show intoxication, mainly his video. And a lot of the statements came in, you know, about comments he had made. He didn't look horrible on the video, but he did not look great on the video either. I wouldn't [s]ay it was a dream video by any stretch of the imagination. There were observations the officers made that kind of supported findings of impairment. Again, we litigated those issues at trial.
>
> We—you know, but at the end of the day, there were other things that the State could rely on other than the blood draw. And because the main issue in the case was did this gentleman, the named victim, step out in front of Mr. Donnelly, that was really where all the focus on the case was.

(Tr 27.) She testified that she was aware of the decisions in *Missouri v. McNeely* and *State v. Liles,* and their effect on the need for a warrant in the context of section 316.1933, Florida Statutes—specifically, that a warrant would be required absent a showing by the State of exigent circumstances. (Tr 28-30, 34-36.) She was not aware of any Florida case holding section 316.1933 unconstitutional, but understood *McNeely* to have "changed the way that that statute was looked at." (Tr 48, 50.) She was aware that law enforcement never sought a warrant in this case. (Tr 29, 34.)

She "felt that a motion to suppress would not be successful" based on the information from depositions as well as her "knowledge of how specifically the State Attorney's Office obtained warrants." (Tr 47.) She explained her understanding of the warrant-application process:

> [C]andidly, the way that the warrants are set up through the Pinellas County State Attorney's Office, it's a very slow laborious process which takes multiple supervisors as well as prosecutors. So the fact that Ms. Sullivan or any prosecutor for that matter was at the scene; you know, they would have had to come back to the office. They have to wake people up. They have to get them back to the office. They have to have, you know, somebody come and type. There's all these people that are—you know, have to come together in order for the State Attorney's Office to type a warrant.
>
> So in a lot of jurisdictions, law enforcement is the one that's obtaining the warrant. And law enforcement is the one that's going directly to the judge with a warrant. But in Pinellas County, they oversee all that information.
>
> So first you have to get the prosecutor to the scene. Then you have to communicate that fact to the prosecutor. Then the prosecutor has to call the office. Then the prosecutor has to call a supervisor. Then the person from—that's going to type it up from the typing pool has to be contacted. The supervisor has to be come in. Everybody meets back at the State Attorney's Office. They review this warrant. A duty judge has to be woken up. It is a very long, unnecessarily long process, given, you know, modern technology in today's society.
>
> But back then, which was pre-COVID, you have to understand, the Pinellas County State Attorney's Office did not have emails. They had—we couldn't email anybody at their office. We had to send a fax to a central fax machine that had to be turned on before we sent it. So I knew that because I actually had worked at the Pinellas County State Attorney's Office for over nine years. I was actually a member of the DUI manslaughter squad at the State Attorney's Office. And I knew the process that was involved. And I knew the testimony that would be elicited about how long how it was going to take to get this warrant.

(Tr 36-38.) She also testified that

> the prosecuting attorney was the one that would draft the warrant as opposed to the police which that does sometimes shorten the timeframe for getting the warrant [instead of when] the police, you know, draft them solely and then go directly to the judge. You're kind of cutting out a middle man, if you will. But in Pinellas County, you know, everybody works together, the police and the State Attorney's Office. And then a lot of times they go to the judge's house together as well.

(Tr 47-48.)

She testified that she "knew that the likelihood of the judge granting that motion" to suppress the blood evidence was "very slim," based on the State's warrant-application procedures. (Tr 38.) When asked if not seeking suppression of the blood evidence was a "strategic decision," she explained that "it was certainly just a decision that was made in the case." (Tr 27-28; *see also* Tr 49.) She explained that she did not feel that such a motion would be successful based on the county's warrant-application procedures. (Tr 49.) She also knew that the State could present other evidence of Defendant's impairment in the form of video evidence, statements, and testimony about the officer's observations, which would have included testimony from Corporal Blair about "bloodshot watery eyes, slurred speech, odor of alcohol," and "the fact that the defendant had urinated himself" (Tr 49, 53.) Ms. Flagler commented that none of those indicators of impairment were "earth-shattering," but the jury would have heard that testimony. (Tr 53.)

RECORD EVIDENCE

Both Defendant and the State directed the Court to portions of the record to support their respective arguments on ground eight. Defendant referred the Court to the depositions of Jeffrey Hays, Deputy James Wilhelm, Detective Trenton Taylor, and Corporal Ronald Blair. The State referred the Court to the deposition of Sergeant Keith Williams, as well as those of Detective Taylor and Corporal Blair. The Court recites the salient portions of those depositions to outline the information available to counsel about the investigation, and then recites the material facts elicited at trial.

Investigation

The crash in this case occurred at approximately 7:30 p.m. on

February 13, 2015, on 58th Street southbound near Kenneth City. (Ex. B, Trial Transcript, at 285.) The call for the major accident investigation team (MAIT) went out at 8:00 p.m. (Ex. B, at 285.) Lieutenant Lazaris, the MAIT leader, sent Sergeant Williams to the scene and advised him that it was serious-injury crash. (Ex. C, Deposition of Sergeant Keith Williams, at 7.) When Sergeant Williams arrived, "there were several officers and deputies on scene already," at least one of whom advised him that Defendant showed signs of impairment. (Ex. C, at 7.) The victim had already been transported to the hospital by the time Sergeant Williams arrived. (Ex. C, at 8.)

Sergeant Williams assigned Deputy James Wilhelm to lead the investigation. (Ex. C, at 8.) Deputy Wilhelm arrived on scene at 8:38p.m., over an hour after the crash had been reported. (Ex. D, Deposition of Deputy James Wilhelm, at 8.) When he arrived, he saw Detective Trenton Taylor talking to Defendant, and another officer, Corporal Montgomery, canvassing for witnesses. (Ex. D, at 8.) In addition to Detective Taylor, Corporal Montgomery, and himself, at least six other officers were also on scene. (*See* Ex. D, at 14-15.)

Because the victim had already been transported to the hospital and the streets were blocked off, "it wasn't a flurry of activity, but there was some activity going on." (Ex. D, at 8.) At that time, Defendant was obligated to remain to answer questions as part of the traffic crash investigation. (Ex. D, at 11.) Deputy Wilhelm met with Sergeant Williams and Lieutenant Lazaris and decided that the team would take photographs of the scene while Detective Taylor talked with Defendant, and then he surveyed the scene. (Ex. D, at 12, 15-16.)

Deputy Wilhelm determined that Defendant's Jeep had been travelling south along 58th Street and struck the victim "towards the right side of the front of the vehicle." (Ex. D, at 19.) Based on statements relayed to him from witnesses, he believed that the victim had been crossing the street east-to-west (left to right, or driver's side to passenger side) and had been three-quarters of the way across when Defendant's vehicle struck him, but nothing about the crash itself made that evident. (Ex. D, at 20-21.) The roadway was well lit. (Ex. D, at 21.) Deputy Wilhelm did not have any reason to believe, when he arrived on scene, that Defendant was impaired or that he had caused the crash. (Ex D, at 19.) Shortly after arriving on scene, Deputy Wilhelm learned that the victim had died. (Ex. D, at 28.)

Detective Taylor responded to the scene at the direction of Sergeant Williams. (Ex. F, Deposition of Detective Trenton Taylor, at 6-7.) When he made contact with Sergeant Williams, he observed Defendant talking to another deputy. (Ex. F, at 8.) Sergeant Williams directed him to interview Defendant as part of the crash investigation, which he explained was always kept separate from any DUI investigation. (Ex. F, at 10, 20.)

Detective Taylor made contact with Defendant at approximately 8:50 p.m. (Ex. F, at 10, 20.) He noted that Defendant was very nervous and that he "assumed he was going to be arrested, and be held responsible for what happened." (Ex. F, at 11.) Defendant showed indications of impairment: watery, red eyes; slurred speech; unsteady balance; odor of alcoholic beverages about his person; and his emotions were extreme, varying between "very excited and upset to being almost despondent." (Ex. F, at 11, 16-17.) He had also urinated in his pants. (Ex. F, at 11.) Detective Taylor advised Defendant that he may be asked to give a blood sample. (Ex. F, at 19.) Detective Taylor "knew there would be impairment there" during the DUI investigation. (Ex. F, at 24.) After speaking to Defendant, Detective Taylor advised Sergeant Williams and Deputy Wilhelm about his observations. (Ex. D, at 27-28; Ex. F, at 21.)

Sergeant Williams called Corporal Ronald Blair to the scene around 8:00p.m. (Ex. C, at 285; Ex. E, Deposition of Corporal Ronald Blair, at 5.) When he arrived shortly thereafter, Sergeant Williams gave him "a run down of the situation, vehicle hit a pedestrian, pedestrian passed away, and they were conducting a traffic investigation at the current time, and asked [him] to conduct a DUI investigation, if necessary, after the crash investigation was complete." (Ex. E, at 7-8.) At around 9:00 to 9:15 p.m., Deputy Wilhelm assigned Corporal Blair to take over the DUI investigation, and called an Assistant State Attorney to the scene. (Ex. D, at 30-32.)

Corporal Blair began his DUI investigation approximately 90 minutes after arriving on scene, at 9:38p.m. by Deputy West's COBAN video system. (Ex. E, at 8-9.) Upon making contact with Defendant, Corporal Blair noticed that Defendant's eyes were watery and bloodshot, he had an odor of an alcoholic beverage on his breath, and he had urinated his pants. (Ex. E, at 10.) He believed that Defendant was under the influence of alcohol based on the totality of the indicators of impairment he observed. (Ex. E, at 11.)

After spending 15-20 minutes with Defendant, Corporal Blair met back with Deputy Wilhelm to brief him. (Ex. E, at 15; Ex. D, at 33.) In Deputy Wilhelm's opinion, had Defendant not been impaired the crash would not have occurred. (Ex. D, at 36.) He explained that

> it was a very well-lit area, it was a low speed crash, there was no signage, no foliage, no environmental factors, no weather factors, the Jeep was in perfect working condition, the headlights were on, and that was proven by hot shock that we found during the inspection, the brakes were fine, there's no reason he should have hit that person.

(Ex. D, at 36.) He believed that Defendant's being under the influence of alcohol was "a contributing factor" to the crash. (Ex. D, at 36.)

Deputy Wilhelm directed Corporal Blair to take a blood sample. (Ex. . E, at 15; Ex. D, at 33.) "[I]t was a nonconsensual blood draw." (Ex. E, at 15.) At 10:07 p.m., the paramedic took two blood samples from Defendant. (Ex. B, at 423; Ex. E, at 15-16.) At 11:16 p.m., another paramedic took two more blood samples. (Ex. E, at 17.) Corporal Blair arrested Defendant for DUI Manslaughter at 11:38 p.m. and transported him to Central Breath Testing. (Ex. E, at 18.) After being arrested, Defendant refused to perform field sobriety tests or provide a breath sample. (Ex. B, at 332-33.)

Ms. Flagler also took the deposition of Jeffrey Hays, the chief toxicologist of the Pinellas County Forensic Lab. He tested both blood samples that were taken from Defendant and obtained results of 0.182 and 0.160 for BAC. (Ex. G, Deposition of Jeffrey Hays, at 15.) He opined that the BAC would have been "considerably higher at the time of the accident," probably around 0.24 given that the sample was taken three hours after the crash. (Ex. G, at 16.) He stated that someone with a high concentration of alcohol in their system would not be able to function efficiently. (Ex. G, at 19.) Even a functioning alcoholic would have impairment regarding motor control, ability to react to stimulus, and judgment. (Ex. G, at 20.) In general terms, "with alcohol this high, a person would have slower reaction times and would be experiencing other effects" such as "ability to concentrate" and react to stimuli. (Ex. G, at 20.) Ms. Flagler posed the hypothetical question whether a driver's BAC would "cause" a crash where a pedestrian stepped off of a curb and into oncoming traffic, and Mr. Hays indicated that it "would probably have a large influence on it." (Ex. G, at 22.) The driver's high BAC would "inhibit his ability to react if somebody stepped off the curb," and "he may not even notice because [his] peripheral vision is diminished." (Ex. G, at 23.) A high BAC "would definitely limit the person's ability to react and respond," "[s]o all of those things . . . could have contributed to the accident." (Ex. G, at 23.)

Trial

The State's primary evidence of Defendant's guilt at trial came from Corporal Blair, Mr. Hays, Dr. Noel Palma and Sean Davis.[2] Corporal Blair arrived around 8:00 p.m. and was directed to conduct a DUI investigation if one needed to be conducted. (Ex. B, at 287.) He noted that Defendant's vehicle was at a stop off the road and had

suffered damage to the passenger-side front end consistent with striking a pedestrian. (Ex. B, at 296-98.) He testified that it could be difficult to pinpoint the exact location of impact in a vehicle-pedestrian crash. (Ex. B, at 301.) He explained some of the evidence he would look at to determine the location of impact. (Ex. B, at 301-08.) He explained that, based on the evidence, he believed that Defendant's vehicle struck the pedestrian on the west side of the road, but he could not say where the victim was when he was struck or whether or not the pedestrian was in the road. (Ex. B, at 402-03, 409-10.) Defendnat later called Corporal Stephen West, who testified that the "it's a good probability [the impact] was in the road." (Ex. B, at 771.)

Corporal Blair eventually began a criminal investigation into Defendant. (Ex. B, at 312.) He observed that Defendant's eyes were bloodshot and watery, that he had an odor of alcohol on his breath, and that he had urinated himself. (Ex. B, at 312-13.) Defendant refused to perform field sobriety tests, refused to submit to a breath test, and refused to submit to a blood draw. (Ex. B, at 315-17, 332-33, 380-81.) Corporal Blair testified at length about the compelled blood draw and the procedures involved. (*See* Ex. B, at 317-30.) After seizing the blood samples from Defendant, Corporal Blair placed him under arrest and transported him to Central Breath Testing. (Ex. B, at 331.) During transport, he told Defendant that the victim had died. (Ex. B, at 331.)

The State introduced a video of Defendant's interaction with Corporal Blair at the scene. (*See* Ex. B, at 337-45; State's Trial Exhibit 5.)[3] In the video, Defendant tells Corporal Blair that he had "two beers earlier" and that "you guys are going to give me a DUI." (Ex. B, at 339.) He states "I don't believe I can pass a breathalyzer," but also states "I'm not shit-faced. I'm not drunk." (Ex. B, at 339.) He states that he had been crying for some time and urinated himself while waiting at the scene as directed. (Ex. B, at 340-41.) He tells Corporal Blair "You're going to put me under arrest," and explains that he will not perform field sobriety tests because "I don't feel that I could leave here regardless if I take the field sobriety tests or not. I don't feel that I'm going to be able to walk away." (Ex. B, at 341.) After being taken to Central Breath Testing, Defendant states that he "killed somebody tonight," that his "life is ruined," and that he is not "accepting or dealing with this . . . too well right now."[4] (Ex. B, at 342-43.) Corporal Blair ultimately opined that Defendant "was under the influence of alcohol to the extent his normal faculties were impaired" and that Defendant's impairment caused or contributed to the victim's death. (Ex. B, at 350.)

Mr. Hays testified that he tested the blood samples taken from Defendant for BAC. (Ex. B, at 431-34.) The blood sample taken at 10:16 p.m. showed a BAC of 0.18. (Ex. B, at 434-35.) The sample taken at 11:16 p.m. showed a BAC of 0.16. (Ex. B, at 434-35.) He testified about absorption, peak alcohol concentration, and dissipation. (*See* Ex. B, at 436-38.) He opined that Defendant's BAC would have been at least 0.18 at the time of the crash, three hours prior to the first blood draw. (Ex. B, at 440-41.) He explained that, with enough information, he could determine Defendant's BAC at the time of the crash through the process of retrograde extrapolation, but he did not have that information here. (Ex. B, at 455-56.) He also explained the general effects that a person would feel at a BAC as high as Defendant's in this case:

> People with concentrations of alcohol at that level, they will be experiencing emotional changes, mood changes. Their ability to react to stimulus will be diminished. Reaction times will be longer. They will not be able to process sensory input. Their thinking is slower. Their ability to react to something, that once they've realized something isn't the same, it takes them longer to react to that. Vision, peripheral vision goes, is diminished at that level. You can start seeing double at that level. And then again being able to process what you're seeing takes longer.

(Ex. B, at 460-62.)

Sean Davis shared a dormitory with Defendant in the Pinellas County Jail while they were incarcerated. (Ex. B, at 634.) He had 11 felony convictions and three convictions for misdemeanor crimes of false statement or dishonesty. (Ex. B, at 628.) He was facing 23 charges in three open cases for, among other things, grand theft and various forms of unlicensed contracting, as well as violations of probation for scheme to defraud and grand theft. (Ex. B, at 629-32.) His potential exposure if convicted was 113 years, and the minimum sentence under the guidelines was 55.8 months. (Ex. B, at 632.) He testified that he had not been offered any leniency for testifying in Defendant's case, but he was aware that it was a possibility. (Ex. B, at 633, 667.)

Mr. Davis shared the same cell area as Defendant. (Ex. B, at 634.) Although he had access to Defendant's discovery materials, he stated that he never looked at them. (Ex. B, at 641-48.) He testified that Defendant told him that, on the night of the crash, he "went to a bar, started drinking, and he went to another bar after that one and continued drinking." (Ex. B, at 635.) He then decided to purchase something and met someone at the Tobacco King strip mall. (Ex. B, at 635.) Afterwards, he "pulled out of the parking lot rather excitedly, I guess, and he floored it." (Ex. B, at 636.)

> When he turned on to the main street there, he floored the vehicle in his words. And he was looking down as soon as he floored it, and he was going—I'm using the mannerisms he used when he was telling me. He looked down and when he looked down, that's when he thought he might have went on the outside of the lane. And that's when he heard a loud crack, the person that he hit. And he said that—I guess he was assuming he was bending down because the headlight is where it had the biological matter, I guess is the way to describe it, on the headlight or on the truck.
>
> As he—after he hit him, he stopped. He realized that he—the guy had a large hole in his head. He started in his words freaking out a little bit. He went back, and he went back to the vehicle. I guess at that time he was going to—I don't know if he was—the purchase that he made, he kept it on his person, I guess. And that's when he called police for the accident.

(Ex. B, at 637.) Mr. Davis testified that he and Defendant had "three to four detailed conversations about" the crash. (Ex. B, at 638.) Defendant also told him that he "wasn't happy with the police investigations" and that he was "intoxicated." (Ex. B, at 638.) Mr. Davis acknowledged that he reached out to the prosecutor with this information. (Ex. B, at 639.)

Dr. Noel Palma testified that the cause of the victim's death was the traffic collision. (Ex. B, at 510.) The victim suffered a number of injuries in the collision consistent with a pedestrian-to-vehicle collision, but Dr. Palma could not use those findings to explicate how the crash occurred. (Ex. B, at 500-06.) He indicated there were too many other factors to determine on which side of the victim the initial impact occurred. (Ex. B, at 506-07.)

Denise Cao testified for the defense. She worked as a bartender at a bar adjacent to the scene of the crash. (Ex. B, at 739-42.) On the evening of the incident, she saw an individual standing on the curb on the opposite side of the street from the scene of the crash. (Ex. B, at 742-44.) She noted that he appeared "very wobbly," "off-balance, teetering." (Ex. B, at 744.) "Not too long after that," about 20 minutes, police and emergency medical personnel arrived. (Ex. B, at 745, 755.) She knew Defendant as an "acquaintance," but he had not been drinking in her bar that night. (Ex. B, at 747.)

Professor William Lee also testified for the defense. He opined that, based on his analysis, the victim had his back to the vehicle when it collided with him, which suggested that the victim was walking

along the road southbound when the collision occurred. (Ex. B, at 822-23.) He explained that the evidence showed that the victim went onto the hood of the car and then fell off of the passenger side of the vehicle. (Ex. B, at 823.) It appeared to him that the collision occurred in the roadway itself, and that Defendant did not veer off the road to collide with the victim. (Ex. B, at 824-26, 860-61.) But, he noted, the evidence "doesn't really say one way or the other" whether the victim was already in the roadway or stepped out just prior to the collision. (Ex. B, at 827-28.)

ANALYSIS

Florida Rule of Criminal Procedure 3.850 permits a defendant to challenge the legality of his or her conviction via a timely filed motion for postconviction relief. *See* Fla. R. Crim. P. 3.850. In a motion for postconviction relief, the defendant bears the burden of establishing a *prima facie* case based on a legally valid claim. *See Griffin v. State,* 866 So. 2d 1, 9 (Fla. 2003) [28 Fla. L. Weekly S723a].

In his motions, Defendant raised nine claims of ineffective assistance of counsel, one claim that the Court lacked jurisdiction, and one claim of cumulative error. In its September 27, 2019, and January 23, 2020, orders, the Court denied all claims except grounds three, four, eight, ten, and eleven. At the evidentiary hearing, Defendant withdrew grounds three, four, ten, and eleven, and proceeded on ground eight only. Therefore the Court dismisses grounds three, four, ten, and eleven with prejudice, and turns to ground eight.

Legal Standards for Claims of Ineffective Assistance of Counsel

"At an evidentiary hearing, the defendant [has] the burden of presenting evidence and the burden of proof in support of his or her motion, unless otherwise provided by law." Fla. R. Crim. P. 3.850(f)(8)(B); *see also Campbell v. State,* 247 So. 3d 102, 106 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1315b].

Claims of ineffective assistance of counsel are analyzed under the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668, 694 (1984). To prevail on such a claim, a defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Jones v. State,* 998 So. 2d 573, 582 (Fla. 2008) [33 Fla. L. Weekly S622a]. To satisfy the deficiency prong, the defendant must identify specific acts or omissions by counsel that fell below a standard of reasonableness under prevailing professional norms. *Jones,* 998 So. 2d at 582. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. *Haliburton v. Singletary,* 691 So. 2d 466, 470 (Fla. 1997) [22 Fla. L. Weekly S36f]. A "reasonable probability" is a probability that is "sufficient to undermine confidence in the outcome." *Id.* (quoting *Cruse v. State,* 588 So. 2d 983, 987 (Fla. 1991)).

The Supreme Court has articulated the specific requirements necessary to sustain a claim that counsel rendered ineffective assistance by failing to file a motion to suppress under the Fourth Amendment:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the **defendant must also prove that his Fourth Amendment claim is meritorious** and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) (emphasis added). "Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim . . ., a good Fourth Amendment claim alone will not earn" a defendant postconviction relief. *Id.* at 382.

Legal Standards under the Fourth Amendment

Constitutionality of the Blood Draw

Defendant's claim rests on the application of U.S. Supreme Court precedent to section 316.1933, Florida Statutes, which justified the warrantless seizure of Defendant's blood in this case. Section 316.1933(1)(a) states that:

> 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 . . . 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 . . . .

In *Missouri v. McNeely,* 569 U.S. 141 (2013) [24 Fla. L. Weekly Fed. S150a], decided almost 20 months prior to the crash and subsequent blood draw in this case, the Supreme Court held that the dissipation of alcohol in the bloodstream does not, on its own, constitute an exigency justifying the warrantless taking of blood. *Id.* at 165. The *McNeely* Court observed that a warrantless search in exigent circumstances is reasonable when "there is compelling need for official action and no time to secure a warrant." *Id.* at 149 (quoting *Michigan v. Tyler,* 436 U.S. 499, 509 (1978)). But although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152-53. The key holding of *McNeely* was that something more than dissipation of alcohol in the blood was required to justify a warrantless blood draw, and, in most cases, that "something more" would be insufficient time to get a warrant. "The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case." *Id.* at 164.

As Florida courts have explained, the "exigent circumstances" exception to the warrant requirement necessarily requires that insufficient time exist to get a warrant: "Some set of facts must exist that precludes taking the time to secure a warrant." *Lee v. State,* 856 So. 2d 1133, 1136 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2458a]; *see also Herring v. State,* 168 So. 3d 240, 243-44 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1221a]. "[I]f time to get a warrant exists, the enforcement agency must use that time to obtain the warrant." *Hornblower v. State,* 351 So. 2d 716, 718 (Fla. 1977). The Florida Supreme Court added: "Law enforcement officers may not sit and wait . . . (when they could be seeking a warrant), then utilize their self-imposed delay to create exigent circumstances." *Hornblower,* 351 So. 2d at 719. The state bears the burden to demonstrate that "procurement of a warrant was not feasible because 'the exigencies of the situation made that course imperative.' " *Id.* at 717.

Following the blood draw in this case, but prior to trial, the Fifth District applied the holding of *McNeely* to section 316.1933(1). In *State v. Liles,* 191 So. 3d 484 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D892a], the Fifth District held that "[a]fter *McNeely,* law enforcement must obtain a warrant or later show that exigent circumstances prevented them from doing so" when relying on section 316.1933 to draw blood over a suspect's objection. *Liles,* 191 So. 3d at 489. *Liles* involved a similar situation to this case: Liles was involved in a fatal traffic accident, showed signs of impairment due to alcohol, refused to consent to a blood draw requested pursuant to section 316.1933(1),

and police drew his blood over his objection.

The Fifth District concluded that the State "failed to present sufficient evidence that exigent circumstances existed to support the warrantless blood draws under the totality of the circumstances," observing that "the State made no effort to do so, as the blood draws were based solely on the officers' reliance on section 316.1933(1)." *Liles,* 191 So. 3d at 488. The Fifth District explained that "[t]o comply with *McNeely,* the statute must assume the blood draw will be obtained with a warrant, absent consent or proof of exigent circumstances." In light of *McNeely,* the Fifth District interpreted section 316.1933 "as a directive to law enforcement to obtain blood samples in serious and deadly crashes when probable cause exists to suggest impaired driving" in compliance with the Fourth Amendment.

No district court of appeal issued a decision conflicting with *Liles* prior to Defendant's trial, and none have issued since. *See McGraw v. State,* 245 So. 3d 760, 769 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1122b], *vacated on other grounds,* 289 So. 3d 836 (Fla. 2019) [45 Fla. L. Weekly S74a] ("We agree with *Liles*'s conclusion that when a defendant specifically withdraws his or her consent, the state cannot compel a blood draw."); *Aguilar v. State,* 239 So. 3d 108, 112 n.4 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D309a] (distinguishing *Liles* because, in *Liles,* "the State had failed to present sufficient evidence to the trial court that exigent circumstances existed even though it had the burden of doing so"). Therefore, at the time of the trial in this case, the Court would have been obligated to follow the *Liles* precedent. *See Pardo v. State,* 596 So. 2d 665 (Fla. 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts).

Only three other Florida cases have specifically considered what facts constitute exigent circumstance under *McNeely,* and all three issued after *Liles* and Defendant's trial.[5]

In *State v. Goodman,* 229 So. 3d 366 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2285b], the Fourth District determined that exigent circumstances existed to justify a warrantless blood draw. Goodman "ran a stop sign without braking and 't-boned' the victim. . . . The force of the impact pushed the victim's Hyundai through the intersection and into a nearby canal, where it came to rest upside down. [Goodman] did not remain on the scene or assist the victim, who ultimately drowned." *Id.* at 369-70. Goodman then "absented himself from the scene for over an hour," only to later return and go "to the hospital for treatment of his own injuries" before law enforcement discovered the victim's vehicle and body. *Id.* at 381. "By the time the homicide investigator arrived and then went to the hospital, nearly four hours had passed since the time of the crash, but less than two hours from the time the body was discovered. The investigator testified that it would have taken an additional two hours to obtain a search warrant." *Id.* at 381. The trial court found that exigent circumstances were present, and the Fourth District agreed. *Id.* at 381.

In *Aguilar v. State,* 239 So. 3d 108 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D309a], the Third District determined that exigent circumstances existed to justify a warrantless blood draw.

> Aguilar's accident occurred at approximately 4:22 a.m. on a Sunday. The accident was serious, resulting in the instantaneous death of one pedestrian, and caused serious bodily injuries to two more pedestrians. The accident occurred at the scene of a prior accident, further complicating the accident scene investigation. Aguilar himself was seriously injured, taken to a hospital for treatment, and induced into a coma and intubated. At both the accident scene and later at the hospital, Aguilar smelled of alcohol and exhibited symptoms consistent with drunkenness. The blood sample was taken at 5:42 a.m., about ninety minutes after the accident. And the testimony provided by the State was that a warrant would have taken *at least* four hours to obtain from the time the process began.

Id. at 112. The Fourth District distinguished *Liles* because, in *Liles,* "the State had failed to present sufficient evidence to the trial court that exigent circumstances existed even though it had the burden of doing so," while the State in Aguilar's case "met its evidentiary burden regarding the existence of exigent circumstances." *Id.* at 112 n.4.

In *Dusan v. State,* No. 5D19-2987, 2021 WL 1931440 (Fla. 5th DCA May 14, 2021) [46 Fla. L. Weekly D1117a], the Fifth District determined that "the State failed to meet its burden at the suppression hearing of showing that the procurement of a warrant was not feasible due to the exigencies of the situation." *Id.* at *2. The crash occurred "shortly before midnight." *Id.* at *1. When the primary investigator arrived at approximately 12:30 a.m., "[f]ive deputy sheriffs along with emergency medical responders were already at the accident scene." *Id.* at *1. "Within thirty minutes" of his arrival on scene, two more troopers arrived, "one of whom was a traffic homicide investigator." *Id.* at *1. The investigator quickly learned that the crash involved serious physical injury and that Dusan was the driver. *Id.* at *1. The investigator conducted a DUI investigation, determined that Dusan was impaired, and placed her under arrest at 2:17 a.m. *Id.* at *1-*2. "While still at the crash scene, [Dusan] refused [the investigator's] two requests for a voluntary blood draw." *Id.* at *2. He then drove Dusan to a nearby hospital, where a blood draw was conducted at 3:02 a.m. *Id.* at *2. "Neither [the investigator] nor any of the seven other law enforcement officers on the scene made any effort whatsoever to obtain a warrant to require [Dusan] to submit to the blood draw. *Id.* at *2.

The State urged the court to adopt "a per se rule that exigent circumstances categorically exist in all injury causing drunk-driving investigations," which the Fifth District rejected. *Id.* at *2. The Fifth District also rejected the State's argument that exigent circumstances existed:

> Here, there were eight law enforcement officers on the scene. According to the evidence, none of them made any attempt to find out who the on-call assistant State Attorney was nor which judge might be available nearby or anywhere in Brevard County in order to secure a warrant. None of the officers attempted to make contact with any department's legal advisor. Clearly, the law enforcement officers, including [the investigator], were on notice very early in the investigation that a forensic blood draw would be required given the severity of the victim's injuries which was directly communicated by on-scene medical personnel. Under *McNeely* those circumstances would not excuse obtaining a warrant for the forensic blood draw, and they do not do so here.

Id. at *3.

Good Faith Exception to the Exclusionary Rule

Both parties briefed the good faith exception to the exclusionary rule and its effect on the suppression of the BAC evidence, although neither party addressed it at the hearing.

"[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful," exclusion is not warranted. *Davis v. United States,* 564 U.S. 229, 238 (2011) [22 Fla. L. Weekly Fed. S1144a]. One application of the good-faith exception is for "searches conducted in reasonable reliance on subsequently invalidated statutes." *Id.* at 239. The Fifth District held in *Liles* that, because the seizure at issue had occurred prior to the Supreme Court's decision in *McNeely,* "it was reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)." *Liles,* 191 So. 3d at 489-90.

However, the Supreme Court decided *McNeely* almost 20 months prior to the seizure at issue in this case. The Fifth District recently held, in a case involving a blood draw conducted after *McNeely* but

before *Liles,* that the good faith exception was inapplicable. *See Dusan,* 2021 WL 1931440, at *2. The Fifth District has also explained that "the good faith exception cannot be applied where the police officer's acts occur subsequent to a binding appellate court decision which determines that such acts are violative of the Fourth Amendment." *Campbell v. State,* 288 So. 3d 739, 741 (Fla. 5th DCA 2019) [45 Fla. L. Weekly D11e] (citing *Carpenter v. State,* 228 So. 3d 535, 538 (Fla. 2017) [42 Fla. L. Weekly S888b]).[6]

Application to this Case

Given the nature of the claim in this case, the Court addresses it in three distinct steps, as *Kimmelman* requires: (1) whether counsel performed deficiently in failing to file the motion to suppress; (2) whether the claim Defendant alleges counsel should have raised in the motion to suppress would have been meritorious; and (3) whether counsel's failure to file the motion to suppress prejudiced Defendant.

Deficient Performance

Defendant contends that no reasonable attorney would have failed to file a motion to suppress the blood draw because, in light of *Missouri v. McNeely,* the State would have been unable to show that a bona fide exigent circumstance existed to justify the warrantless blood draw. The State contends that counsel made a reasonable decision not to file a motion to suppress because (1) she reasonably believed it would not have been granted, and (2) other evidence supported a finding that Defendant was impaired.[7] The State also argues that the decision was a reasonable strategic decision because counsel developed a strategy to focus on the issue of causation.

To satisfy the deficiency prong, a defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Griffin v. State,* 866 So. 2d 1, 8 (Fla. 2003) [28 Fla. L. Weekly S723a]. A defendant must identify specific acts or omissions by counsel that fell below a standard of reasonableness under prevailing professional norms. *Jones,* 998 So. 2d at 582; *Maxwell v. Wainwright,* 490 So. 2d 927, 932 (Fla. 1986). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Hampton v. State,* 219 So. 3d 760, 770 (Fla. 2017) [42 Fla. L. Weekly S536a] (quoting *Strickland,* 466 U.S. at 689). The defendant must overcome the presumption that the challenged action "might be considered sound trial strategy" under the circumstances. *Strickland,* 466 U.S. at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91 (1955)). "Mere unhappiness or anger with the representation of counsel, or disagreement with regard to counsel's strategic decisions, does not render counsel ineffective." *Taylor,* 87 So. 3d at 758. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland,* 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. A court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

The depositions taken in this case showed that at least nine law enforcement officers were on scene within an hour of the crash in addition to an unknown number of patrol deputies who had arrived earlier. The depositions also showed that the DUI investigation did not begin until approximately two hours after the crash, after an Assistant State Attorney arrived on scene. The deposition of Mr. Hays also included his testimony, which the State would elicit at trial, that the high BAC Defendant had would cause additional side effects, such as double vision and loss of peripheral vision, that would make him more likely to be unable to avoid the crash.

Here, counsel knew of controlling caselaw that "changed the way" section 316.1933 operated and required a showing of exigent circumstances when law enforcement seized blood without a warrant or consent. She was aware of the necessary facts of the investigation timeline, the number of officers involved, that police made no attempt to obtain a warrant, and that police relied on section 316.1933 to justify the warrantless, nonconsensual seizure of Defendant's blood. She was aware that the State's warrant-application process was "laborious," but she did not testify to any specific timeframes that would have been involved in this incident, which occurred in the early evening. She also knew that countering the State's evidence of impairment would be much easier without a high BAC number to deal with.

Based on her knowledge of the case at the time a motion to suppress would have been filed, the Court finds that Ms. Flagler's decision not to file a motion to suppress the blood evidence constitutes deficient performance. *Liles* squarely held that section 316.1933 required a showing of exigent circumstances, and well-established caselaw, of which effective counsel would have been aware, had held that police "may not sit and wait . . . (when they could be seeking a warrant), then utilize their self-imposed delay to create exigent circumstances." *Hornblower,* 351 So. 2d at 719. The information she had gathered revealed no rush from law enforcement to collect evidence of Defendant's BAC, given that the officers on scene—despite information upon their arrival that Defendant was the driver, showed signs of impairment, and that the victim had died—did not proceed to a DUI investigation for over 90 minutes and did not utilize that time to begin the warrant process. Although counsel noted that the State had other evidence of impairment, she also conceded that the case would have been better for the defense without the BAC evidence. Moreover, the BAC evidence was relevant to whether Defendant caused the accident—the main issue on which counsel stated she was focused—as Mr. Hays explained at his deposition.

Ms. Flagler's generalized knowledge that the State could present evidence that its warrant-application process was laborious and involved a number of steps is not sufficient to render her failure to file the motion to suppress a reasonable decision. For one, she did not testify to any specific knowledge about the procedures that may have been in place that Friday evening. She identified four individuals who would need to be involved—the prosecutor on scene, a supervisor, a typist, and the duty judge—in addition to the investigators on scene, but did not testify as to any specific knowledge about how long it would have taken to summon them and to complete the warrant-application process. For two, counsel was, or should have been, aware that the Supreme Court had explained there is "no plausible justification for an exception to the warrant requirement" if multiple officers are involved and one of them can take steps to secure a warrant without "significantly increas[ing] the delay before the blood test is conducted." *McNeely,* 569 U.S. at 154. Here, there were at least nine officers on scene—Ms. Flagler should have known that she could argue that the State's failure to even engage in the warrant-application process with so many officers available would not justify its reliance on exigent circumstances.[8] For those reasons, her understanding of the warrant-application process does not make her belief that the motion would fail a reasonable one.

Moreover, general considerations of litigating DUI cases militate against finding counsel's decision not to file a motion to suppress reasonable. As Ms. Flagler acknowledged, it is far better to litigate a DUI case without evidence of BAC than to do so with it. Counsel had caselaw in hand explaining that the State would need to justify this search based on exigent circumstances. The delay in investigating the

DUI portion of the crash made it appear that the circumstances were not exigent. Counsel could not have known whether the State would justify its warrantless seizure by presenting detailed evidence of its "unnecessarily long" and "laborious" warrant-application process or by trying to succeed on a *per se* approach;[9] in any event, then-existing caselaw gave counsel a roadmap to succeed against either theory.

The Court also cannot conclude that the decision not to file the motion to suppress the blood draw was a strategic decision. Ms. Flagler twice refused to agree that her decision was "strategic" and never gave any strategic reason for not filing the motion. Her explicit reason for not filing the motion was that she did not believe it would succeed, not that she believed allowing the State to present evidence of Defendant's high BAC gave her a strategic advantage.

Nor can the Court see any strategic value in not filing an even potentially meritorious motion to suppress where a case is headed to trial, a motion to suppress is already being filed involving much the same facts, and where the State will bear the burden under controlling caselaw to justify the seizure. The Court cannot conclude that counsel had to focus on issues of causation to the exclusion of challenging any other evidence. Moreover, such a strategy would have been flawed because the BAC evidence provided evidence of causation. Even under the State's argument that counsel chose to focus on issues of causation and allow the BAC evidence to be admitted, the decision not to challenge the BAC evidence was could not have been a reasonable strategic decision because the BAC evidence provided evidence of causation.

Given the state of the law at the time and the information available to counsel, the Court concludes that counsel's failure to file a motion to suppress the blood draw in this case constitutes deficient performance.

Merits of the Fourth Amendment Claim

Defendant argues that a motion to suppress the blood evidence would have been granted. Defendant notes that the State waited two-and-a-half to three-and-a-half hours to seize Defendant's blood, showing that no exigency existed based on the dissipation of alcohol in Defendant's blood. Defendant also argues that the State could not create its own exigency by relying on outdated procedures that trial counsel described as "laborious" and "unnecessarily long." The State contends that the motion would have failed because exigent circumstances did exist: in the State's view, the dissipation of alcohol in Defendant's blood constituted a *per se* exigency that eliminated the need to conduct a fact-specific inquiry because this was a manslaughter case.

Defendant bears the burden to demonstrate that "his Fourth Amendment claim is meritorious." *Kimmelman,* 477 U.S. at 375. The record evidence shows that at least nine law enforcement officers were on scene, and the first responding officers observed that Defendant was showing signs of impairment from alcohol. At least one later-responding officer, Detective Taylor, spoke to Defendant within 90 minutes of the crash and opined that he believed Defendant to be under the influence of alcohol based on specifically identified indicators of impairment. In that same time frame, Deputy Wilhelm and Corporal Blair both were made aware of the victim's injuries and death, and both determined that Defendant's vehicle struck the victim. Thus, within an hour and a half of the crash, at the latest, law enforcement collectively had information that Defendant was impaired by alcohol and had struck and killed the victim, although the record indicates that this understanding likely came together much earlier. Thereafter, no one on scene made any effort to obtain a warrant, instead waiting another 30 minutes to begin a separate DUI investigation and then another 40 minutes until obtaining a blood sample.

On that evidence, the Court cannot find that exigent circumstances existed due to the time needed to obtain a warrant. Without evidence as to how long it would have taken to procure a warrant, the Court is left with the facts that a number of officers were on scene and that no one sought a warrant. The Fifth District, in *Dusan,* 2021 WL 1931440, held, on nearly identical facts, that the State had failed to show an exigent circumstance existed. Although that case had not been decided at the time of Defendant's trial, it represents an application of *McNeely* and *Liles* to a specific set of facts that the Court cannot ignore.[10]

The evidence that Defendant presented, through counsel, of the State's warrant-application procedures in Pinellas County—that three individuals would need to be involved in addition to the investigators on scene to type up the warrant application and then that a judge would need to be located to sign the warrant—does not change the analysis. First, that evidence represented trial counsel's understanding of the process, not specific evidence of the process in place the night of the crash. Although that information is relevant and material to the assessment of whether counsel performed deficiently, it carries less weight in the determining whether the State could have proven that exigent circumstances existed at a motion to suppress hearing. And second, even incorporating counsel's understanding of the process into the determination of whether the State could have proven that exigent circumstances existed, neither Defendant nor the State presented evidence as to *how long* the process would have taken or whether the process could have been expedited given the severity of the case and the importance of preserving the blood evidence. The Court cannot infer from counsel's testimony whether the process would have taken one hour, four hours, or seven hours, and the Court will not speculate from a silent record. Without a more specific time frame, the Court cannot conclude from counsel's testimony about her understanding of the State's warrant-application process that the State could have proven that exigent circumstances existed.

The State also argues that the fact that the victim died, combined with the dissipation of alcohol in Defendant's blood, constitutes an exigent circumstance. That argument is foreclosed by *Liles.* In that case, the Fifth District "decline[d] to adopt the State's argument that *McNeely* does not apply in these cases," *i.e.* fatal crashes where blood is drawn in reliance on section 316.1933, and held that the State must obtain a warrant, "absent consent or proof of exigent circumstances" in order to comply with section 316.1933 and *McNeely.* 191 So. 3d at 489. In the absence of contravening caselaw from the Second District Court of Appeal or any other district, this Court is bound, and would have been bound at the time of Defendant's trial, by the decision in *Liles.* Therefore, this argument fails.

The Court also finds that the good faith exception to the exclusionary rule would not prevent suppression in this case. As the Fifth District explained in *Liles,* "**before *McNeely***, it was reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)." *Liles,* 191 So. 3d at 489 (emphasis added). That was so because "the primary purpose of the exclusionary rule is to deter future unlawful police conduct;" accordingly, "the rule has not been applied in certain circumstances, such as when an officer acts in objectively reasonable reliance on a subsequently invalidated statute." *Liles,* 191 So. 3d at 489. Here however, the language in *McNeely* made clear that warrantless blood draws would require justification:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment **mandates** that they do so. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber,* not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

McNeely, 569 U.S. at 152-53 (emphasis added; internal citations omitted). The Supreme Court decided *McNeely* over a year and a half before the seizure in this case. The language used in *McNeely* makes its application to section 316.1933 straightforward—such that no Florida District Court of Appeal has held that *McNeely* left intact law enforcement's ability to seize blood evidence in fatal traffic crashes pursuant to section 316.1933 without a warrant or a showing of exigent circumstances. The Fifth District also recently held that the good faith exception to the exclusionary rule would not apply to warrantless blood draws that occurred after *McNeely. See Dusan,* 2021 WL 1931440, at *3. Again, although that case was decided after the trial in this case, it represents an application of pre-existing law to a specific set of facts that has not been contradicted. In the absence of any evidence showing that a good faith effort was made to comply with both the holding of *McNeely* and the requirements of section 316.1933 in drawing Defendant's blood, the Court concludes that the good faith exception to the exclusionary rule would not apply to the seizure in this case.

Based on the evidence presented at the evidentiary hearing, the Court concludes that Defendant has proven that his Fourth Amendment claim is meritorious. He would have succeeded on a motion to suppress the blood evidence, and the Court would have suppressed the evidence of his BAC from trial.

Prejudice

Having found that counsel performed deficiently by failing to file a motion to suppress the blood evidence and that Defendant's Fourth Amendment claim is meritorious, the Court turns to prejudice—whether there is a reasonable probability of a different result at trial without the blood evidence.

Defendant argues that there is a reasonable probability of a different result because the blood evidence was "the most damaging piece of evidence" at trial. In his view, the blood evidence forced counsel to concede an element of the crime because his BAC, as revealed by the blood evidence, exceeded the legal limit. The BAC allowed the State to have an expert testify about the effects of such a high BAC on Defendant's ability to drive and react, drawing a line from impairment to causation. He argues that the presence of the BAC evidence made counsel's arguments rebutting the other signs of impairment weaker and less credible. Lastly, the BAC evidence worked to explain those other signs of impairment and bolstered the State's case as to causation. In short, Defendant appears to argue that the BAC evidence provided a foundation upon which the State built the rest of its case. The State makes no independent argument regarding prejudice.

To satisfy the prejudice prong, a defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial. *Griffin,* 866 So. 2d at 8. In other words, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Jones,* 998 So. 2d at 582. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland,* 466 U.S. at 694.

The State relied heavily on the blood evidence at trial. In its nine-page opening statement, the State used the word "blood" in relation to the samples taken from Defendant twenty times, and spent almost four pages discussing the importance of those samples. (*See* Ex. B, at 234-42.) Three of its seven witnesses, the two paramedics and Mr. Hays, testified solely about the blood evidence. In its closing arguments, the State connected Defendant's BAC to the signs of impairment he showed and used it to show that it had proven the impairment element. (*See* Ex. B, at 926-28,931, 978, 986).

Without the BAC evidence, the evidence of impairment would have been limited to Corporal Blair's observations, Defendant's refusals, the informant's testimony about Defendant's statements, and the video. Corporal Blair's lengthy testimony about the compelled blood draw and the procedures involved would have been excluded. (*See* Ex. B, at 317-30.) The combination of observations, refusals, informant testimony, and the video would give the jury sufficient evidence to find that Defendant was impaired by alcohol at the time of the crash, but given the importance of BAC evidence in any DUI prosecution, it is hard to say that there is no reasonable probability of a different result on the element of impairment had the blood evidence been suppressed.

But the State did not use the evidence of BAC just to show impairment. The State used that evidence to buttress its proof on the element of causation. Regarding causation, the State presented the testimony of Mr. Davis. He testified that Defendant told him he was not looking at the road when the collision occurred and "he thought he might have went on the outside of the lane." (Ex. B, at 637.) The State argued that the physical evidence was consistent with that statement. (Ex. B, at 688-89.) However, Professor Lee explained that the crash occurred in the roadway itself, meaning the victim was either in the road or stepped into it, undermining the State's reliance on the informant for its theory of the crash. (Ex. B, at 824-28, 860-61.)

In its closing arguments, the State connected Defendant's high BAC to the sorts of impairment that could have led to the crash:

> When you get to a blood alcohol level .182 and .160, you're going to have slowed reaction time. Your vision could be doubled. You could have trouble just in general with peripheral vision, and that's all, of course, goes to his normal faculty to drive an automobile. It's very unique with this definition that to drive an automobile common sense will tell you that you have to be able to see, to hear, make judgments, judge distances.
>
> And when we get to what Dr. Bill Lee and officers testified to is that if the defendant had been able to do all these faculties, to see, to hear, judge distances, make judgments, act in emergencies—-remember, Dr. Bill Lee said there was about 50 feet from where that right-hand turn that the defendant made to where the crash scene was, that the lighting was good enough, that if he—that he would have been able to see the victim.

(Ex. B, at 927.)

> Jeff Hays talked about at a .181 or .160 the effects that has on somebody's motor functions, and he told you it has great effects. At that level you could be seeing double. You could lose peripheral vision. Where is Mark Ehrhardt in the road that night? He's not walking down the center. He's over here somewhere on the west side of this roadway. You lose peripheral vision. Your reaction time is slower. If you were impaired and you see someone and you start trying to brake but your reaction time is impaired by the alcohol, you caused or contributed. You are a contributory factor to that crash. And Jeff Hays told you that at the time he was at least at .181, two times the legal limit.

(Ex. B, at 986-87.) Without the blood evidence, the State would not have been able to argue that Defendant was suffering a particular set of symptoms due to a high BAC that would have prevented him from seeing and reacting as well as a sober person—particularly that, at a BAC of 0.18, he would have loss of peripheral vision, double vision, and extremely slowed reaction times. Thus the State used the BAC evidence not just to show that Defendant was impaired, but also to show that he caused or contributed to the death of the victim.

Without the BAC number in evidence, the State would not have been able to call Mr. Hays to testify as to the specific effects a person could feel at that BAC level, nor argue that Defendant was suffering those specific effects and ask the jury to draw the inference that Defendant's high level of intoxication was the reason that the victim

died. Given that the State used the blood evidence to bolster its evidence on the causation element, the Court finds that, had counsel moved to suppress the blood evidence and succeeded in suppressing it, there is a reasonable probability that the result of the proceeding would have been different.

Conclusion

Based on the foregoing, the Court concludes that Defendant's claim satisfies both prongs of *Strickland,* and the additional requirement of *Kimmelman* that he prove his Fourth Amendment claim meritorious. *See Strickland,* 466 U.S. at 687; *Kimmelman,* 477 U.S. at 375. The Court finds that the only appropriate remedy is to grant Defendant a new trial on Count One. Therefore, ground eight of Defendant's Motion for Postconviction Relief is granted and the judgment and sentence for Count One are vacated. The Court will address the matters of bond and appointment of counsel at a status check to be scheduled as soon as practicable.

Accordingly it is,

ORDERED AND ADJUDGED that **GROUND EIGHT** of Defendant's Motion is hereby **GRANTED**.

IT IS FURTHER ORDERED AND ADJUDGED that **GROUNDS THREE, FOUR, TEN, and ELEVEN** of Defendant's Motion are hereby **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's conviction and sentence on **Count One of case number 15-01644-CF** are hereby **VACATED**. The State and defense counsel shall confer and contact this Court within 15 days to set a status check. The State shall arrange for Defendant's transportation to the status check and any further hearings.

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED TO AMEND the Judgment and Sentence filed May 4, 2017, and recorded on May 12, 2017, in OFF REC BK: 19627, PG: 412-415, in **case number 15-01644-CF** to **vacate the judgment and sentence for count one**. The clerk shall then forward a certified copy of the newly amended Judgment and Sentence to the Department of Corrections, attention: Sentence Structure, 501 South Calhoun Street, Tallahassee, FL 32399-2500.

DEFENDANT IS HEREBY NOTIFIED that this is a final order, and he has thirty (30) days from the date of this order in which to file an appeal, should he choose to do so.

---

[1]The Court hereby adopts and incorporates by reference its September 27, 2019, Order and its January 23, 2020, Order.

[2]Four other witnesses testified for the State: the two paramedics who drew Defendant's blood, a forensic technician who authenticated the photographs of the scene, and Denise Rotunda who testified about the absence of drugs in the victim's system.

[3]State's Trial Exhibit 5 is currently held in evidence by the Clerk. As it is not a documentary exhibit, the Court does not attach it, but incorporates it into the record for this proceeding by reference.

[4]In the video, Defendant appears steady while standing and does not appear to sway. He is emotionally volatile. It is difficult to tell whether Defendant slurred his speech while speaking.

[5]In one additional case, *State v. Quintanilla,* 276 So. 3d 941 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1764a], the Third District stated that "the State firmly demonstrated the existence of exigent circumstances," but Quintanilla did not challenge the blood draw on that basis in the trial court, and the Third District's analysis does not address exigent circumstances in any detail.

[6]*Campbell* involved the reading of the statutorily required implied consent warning in section 316.1932(1) (2016). The trial court had found that police violated Campbell's constitutional rights because the warning informed him that he may face criminal penalties for refusing a breath test, and the Supreme Court had held similar warnings unconstitutional in *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016) [26 Fla. L. Weekly Fed. S300a]. The trial court ruled that the good faith exception applied because *Birchfield* had been decided "a day or two" prior to Campbell's arrest. The Fifth District concluded that the amount of time was immaterial; because it had been decided prior to the arrest, the good faith exception did not apply. *Campbell,* 288 So. 3d at 741-42

[7]The State does not urge the Court to find that counsel could have reasonably concluded that the good faith exception to the exclusionary rule would have operated to prevent suppression in this case, and counsel did not give any testimony that the good faith exception entered into her assessment of the issue. Therefore, the Court does not consider the good-faith exception in assessing whether counsel reasonably believed that the motion would be denied.

[8]The Court notes that such an argument would have succeeded. The Fifth District agreed with this argument, on very similar facts, in *Dusan v. State,* No. 5D19-2987, 2021 WL 1931440 (Fla. 5th DCA May 14, 2021) [46 Fla. L. Weekly D1117a]. Although the Court does not consider *Dusan* in determining that counsel performed deficiently, it does demonstrate that *McNeely* provided a roadmap to making the argument that the sheer number of people involved in the investigation limits the State in asserting that exigent circumstances gave it insufficient time to obtain a warrant.

[9]The State urged a *per se* approach in its response to this motion, and in both *Liles* and *Dusan.*

[10]Although Defendant bears the burden of proving that his Fourth Amendment claim is meritorious, had the motion been filed prior to trial, the State would have borne the burden of proving the existence of exigent circumstances. *See Dusan,* 2021 WL 1931440, at *2 ("It is the State's burden to prove that such an exception to the warrant requirement, in this case exigent circumstances, applies."). In this posture, Defendant bears the burden of showing that the State would have been unable to prove that an exception to the warrant requirement applied. However, the Court does not read *Kimmelman* to require a defendant to anticipatorily present all the evidence that the State would or should have presented in order to succeed on his claim. The State had an equal opportunity at the evidentiary hearing to present evidence if it believed the evidence insufficient to show that the State would have proven an exception to the warrant requirement and did not do so.

* * *

Civil procedure—Discovery—Dash-cam video

ROBERT CARROLL, Plaintiff, v. CAITLIN ALEXANDRA MOREJON and AMERICAN MEDICAL RESPONSE AMBULANCE SERVICE, INC., Defendants. Circuit Court, 6th Judicial Circuit in and for Pasco County, Civil Division. Case No. 2021-CA-000764. July 22, 2021. Declan P. Mansfield, Judge.

ORDER GRANTING PLAINTIFF'S REQUEST FOR PRODCUTION OF DASH CAM VIDEO PRIOR TO PLAINTIFF'S DEPOSITION

THIS CAUSE comes before the Court on July 22, 2021, upon Plaintiff, ROBERT CARROLL's request to compel Defendants to produce the dash cam video prior to Plaintiff's deposition. Upon review and consideration, and the Court being fully advised in the premises, it is ORDERED AND ADJUDGED that:

1. Plaintiff's request to compel Defendants to produce the dash cam video prior to Plaintiff's deposition is hereby GRANTED.

2. Defendants must produce the dash cam video by July 28, 2021.

* * *

Torts—Evidence—Criminal charge and incarceration of plaintiff—Evidence regarding plaintiff's pending murder charge is not admissible for impeachment purposes in tort trial—Question of admissibility of evidence of plaintiff's current incarceration pending criminal trial is deferred until tort trial to allow court to better evaluate probative value of and consider possible measures to mitigate potential prejudice of that evidence in light of evidence and argument offered to advance plaintiff's claims of loss of capacity for enjoyment of life, lost wages, and loss of earning capacity—Ruling on admissibility of documents from plaintiff's criminal file to attack credibility of his claimed income and assets is also deferred

AKEEFE GARRETT, Plaintiff, v. KEITH RE JOHNSON and KREJ LEASING INC., Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2015-CA-001414-O, Division 39. July 22, 2021. Vincent Falcone III, Judge. Counsel: Jeremy Markman, for Plaintiff. Steven G. Mason, Steven G. Mason, P.A., Altamonte Springs; and Shyamie Dixit, Dixit Law Firm, Tampa, for Defendant.

ORDER ON PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE, ARGUMENT, QUESTIONING OR TESTIMONY REGARDING PENDING CRIMINAL CHARGE

THIS CAUSE, having come on to be heard before the Court on July 21, 2021 on Plaintiff's Motion in Limine to Exclude Evidence,

Argument, Questioning or Testimony Regarding Pending Criminal Charge (the "Motion") and the Court having reviewed the Motion, having heard argument of counsel, and being otherwise duly advised in the premises, hereby

ORDERS AND ADJUDGES AS FOLLOWS:

1. The Motion is **GRANTED IN PART** to the extent that Defendants shall not offer evidence, argument, questioning, or testimony regarding the pending criminal charge against Plaintiff for impeachment purposes. Absent a conviction, the pending charge against Plaintiff is not admissible for impeachment pursuant to Section 90.610, *Florida Statutes.*

2. Beyond the typical issue of use of a criminal conviction for impeachment, the question of admissibility of the pending charge and the present incarceration of Plaintiff pending trial is a difficult issue. Section 90.610 makes clear that the provision is intended only address the question of impeachment by way of criminal history, and "[n]othing in th[e] section affects the admissibility of evidence under s. 90.404 . . . ." Fla. Stat. § 90.610(3). Section 90.404, in turn, permits "evidence of other crimes, wrongs, or acts" to be admitted "when relevant to prove a material fact in issue." Fla. Stat. § 90.404(2)(a). Plaintiff seeks damages for, among other things, loss of capacity for the enjoyment of life, lost wages, and loss of earning capacity. By seeking these categories of damages, Plaintiff will at least potentially put at issue his current state of incarceration to the extent that his confinement affects the claimed amount of damages.[1]

3. Militating against admissibility of Plaintiff's current incarceration, however, are at least two weighty considerations. The first is the high risk of unfair prejudice if the jury learns that Plaintiff either been charged with murder or is currently incarcerated, even without disclosing the nature of the charge. The second is that gauging the impact of Plaintiff's incarceration would invite the jury to engage in harmful speculation. While several courts have allowed a party's past criminal history to be admitted to address these kinds of damages,[2] evidence of ongoing incarceration pending trial implicates far more difficult considerations. In contrast to situations in which evidence of completed sentences or sentences for a known length is admitted, the jury here would be left to speculate how long Plaintiff might remain incarcerated and what the resulting impact on his claimed damages might be. This would, in turn, create a significant risk that the jury will feel compelled to assume the role of the future jury in Plaintiff's criminal case in circumstances where full access to the facts surrounding the charge will be unavailable to it.

4. This is ultimately an issue that requires the context of trial. Depending on the testimony, evidence, and argument offered to advance Plaintiff's claims for loss of capacity for the enjoyment of life, lost wages, and loss of earning capacity, the relevance of Plaintiff's incarceration may be either minimal or significant, and deferring the issue will allow the Court to better evaluate probative value and consider, in the context of specific lines of questioning or argument, whether limitations or limiting instructions will mitigate potential prejudice. Accordingly, Plaintiff may renew his objection during trial and, at that time, the Court will determine whether to allow the proposed evidence, argument, questioning, or testimony.

5. At the hearing on the Motion, Defendants suggested that documents from Plaintiff's arrest or criminal proceedings could be relevant to attack the credibility of Plaintiff's claimed income or assets or perhaps to address other issues. In contrast with the pleaded claims for loss of capacity for the enjoyment of life, lost wages, and loss of earning capacity, it is highly speculative that Plaintiff will raise particular issues in a manner that makes the pending charge, his incarceration, or information from the criminal file relevant and that disclosing the charge, the incarceration, or information from the criminal file will be the only way to meaningfully respond. Nevertheless, any such issues also require the context of trial to properly evaluate and address.

6. For the foregoing reasons, the Court **DEFERS RULING** on the Motion to the extent that it seeks to preclude any reference to Plaintiff's charge or incarceration.

7. **Given the potential for unfair prejudice surrounding this issue, counsel for Defendants shall address with the Court outside of the presence of the jury any intention to offer evidence, elicit testimony, or make argument related to Plaintiff's pending charge or incarceration before offering or eliciting any such evidence, testimony, or argument.**

---

[1]Plaintiff also claims future medical expenses, but the possibility that medical care will continue to be provided without cost at a correctional institute is not a proper basis to seek reduction of Plaintiff's claimed future medical expenses. *See Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1255 (Fla. 2015) [40 Fla. L. Weekly S553a] (holding that damages for future medical expenses could not be reduced because of the availability of Medicare, Medicaid, and similar social legislation benefits because "it is absolutely speculative to attempt to calculate damage awards based on benefits that a plaintiff has not yet received and may never receive, should either the plaintiff's eligibility or the benefits themselves become insufficient or cease to continue").

[2]*See, e.g., Clark v. W & M Kraft, Inc.*, 476 Fed. Appx. 612, 617 (6th Cir. 2012); *Jones v. City of Warren,* No. 11-15330, 2015 WL 3937608, at *4 (E.D. Mich. June 26, 2015); *Estate of Casillas v. City of Fresno,* No. 1:16-cv-1042 AWI-SAB, 2019 WL 586747, at *3 (E.D. Cal. Feb. 13, 2019)

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose felony criminal history

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff, v. JEFFREY JAMIL LONG and AF TITLE, CO., d/b/a AMERICAN FINANCIAL, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CA-001794-O. August 3, 2021. Denise K. Beamer, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Jeffrey Jamil Long, Pro se, Orlando, Defendant.

ORDER ON PLAINTIFF, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, JEFFREY JAMIL LONG

THIS CAUSE having come before this Court at the hearing on August 2, 2021, on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, JEFFREY JAMIL LONG, and the Court having considered the same, it is hereupon,

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

1. On May 18, 2021, this Court previously ruled that the First Request for Admissions and Second Request for Admissions served on the Defendant, Jeffrey Jamil Long, were deemed admitted. Specifically, it was deemed admitted that Jeffrey Jamil Long failed to disclose on the application for insurance that he had a felony criminal history within the past ten (10) years at the time of the application for insurance. In addition, it was deemed admitted that Jeffrey Jamil Long was not injured in the motor vehicle accident which occurred on September 29, 2020, nor did Jeffrey Jamil Long seek any medical treatment as a result of the motor vehicle accident which occurred on September 29, 2020.

2. This Court finds that the Plaintiff, Imperial Fire and Casualty Insurance Company's application for insurance unambiguously required Jeffrey Jamil Long to disclose his felony criminal history within the past ten (10) years at the time of the policy inception, that Plaintiff provided the required testimony to establish that Jeffrey Jamil Long's failure to disclose his felony criminal history was a material misrepresentation because Plaintiff would not have assumed the risk nor issued the policy, and thus, Plaintiff properly rescinded the subject insurance policy.

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

4. With respect to Defendant, Jeffrey Jamil Long, a Clerk's Default was entered against him on April 20, 2021.

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

5. Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment is hereby **GRANTED**.

6. This Court hereby enters final judgment for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendant, JEFFREY JAMIL LONG.

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

8. This Court finds that the facts alleged by the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the Motion for Final Summary Judgment, the certified copy of the felony records of JEFFREY JAMIL LONG, the Plaintiff's Underwriting Guidelines, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

a. The IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX4018, is rescinded and is void *ab initio*.

b. The subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute § 627.409 and the terms and conditions of the insurance policy issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY.

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

9. 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.

* * *

Colleges and universities—Discovery—Stay—Discovery in action against college board of trustees is stayed pending adjudication of dispositive motion regarding sovereign immunity defense

SHANTRELL FISHER, individually and on behalf of all others similarly situated, Plaintiff, v. POLK STATE COLLEGE DISTRICT BOARD OF TRUSTEES, Defendant. Circuit Court, 10th Judicial Circuit in and for Polk County. Case No. 2021 CA 000922000000. August 5, 2021. William D. Sites, Judge. Counsel: Adam M. Moskowitz, Howard M. Bushman, Adam A. Schwartzbaum, and Barbara C. Lewis, The Moskowitz Law Firm, PLLC; and John A. Yanchunis, Morgan and Morgan Complex Litigation Group, for Plaintiff. Robert J. Sniffen, Matthew J. Carson, and Jeffery D. Slanker, Sniffen & Spellman, P.A., for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND TO STAY DISCOVERY PENDING ADJUDICATION OF DISPOSITIVE MOTION

THIS CAUSE came before the Court on Defendant's Motion for Protective Order and to Stay Discovery Pending Final Adjudication of Dispositive Motion filed May 17, 2021 (hereinafter, the "Dispositive Motion"). The Court held a hearing on the motion, as noticed, on July 26, 2021, and counsel for the Parties were in attendance. After hearing argument from counsel, having reviewed and considered the motion, Plaintiff's response, case law submitted by counsel, and being otherwise fully informed in the premises, it is **ORDERED**:

1. The Florida Supreme Court has made it clear that "sovereign immunity is both an immunity from liability and an immunity from suit." *Florida Highway Patrol v. Jackson,* 288 So. 3d 1179, 1185 (Fla. 2020) [45 Fla. L. Weekly S32a]. "In Florida, sovereign immunity is the rule, rather than the exception," [*Pan-Am Tobacco Corp. v. Dep't of Corr.,* 471 So. 2d 4, 5 (Fla. 1984) (citing Art. X, section 13 of the Florida Constitution)], and it "protects the state from burdensome interference from the performance of its governmental functions and preserves its control over state funds, property and instrumentalities." *Brevard Cty. v. Morehead,* 181 So. 3d 1229, 1232 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2803a] (quotations omitted). Moreover, sovereign immunity is a defense directed to the subject matter jurisdiction of the Court. *See, Wallace v. Dean,* 3 So. 3d 1035, 1045 n.14 (Fla. 2009) [34 Fla. L. Weekly S52b].

2. This Court has broad discretion and wide latitude to control the timing of discovery. *McClure v. Publix Super Markets, Inc.,* 124 So. 3d 998, 999 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2302a]; Fla. R. Civ. P. 1.280(e). Pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, a trial court possesses broad discretion in limiting discovery and protecting parties that come before it, which such discretion includes protecting a party from undue burden or expense upon a showing of good cause. Fla. R. Civ. P. 1.280(c); *see also, Rojas v. Ryder Truck Rental, Inc.,* 641 So. 2d 855, 857 (Fla. 1994).

3. To require Polk State College to respond to the discovery served by Plaintiff and to sit for a corporate representative deposition before this Court adjudicates the Dispositive Motion is, as the Third District recently found, "irreparable harm in and of itself." *Bank of Am., N.A. v. De Morales,* 314 So. 3d 528, 530 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2752a] (quotations omitted).

4. Accordingly, Defendant's Motion for Protective Order and to Stay Discovery Pending Final Adjudication of Dispositive Motion is **GRANTED**. All discovery in this matter is stayed until Defendant's Dispositive Motion is heard by this Court.

5. Defendant shall have no more than thirty (30) days to set the hearing on the Dispositive Motion, which must occur within ninety (90) days of the July 26, 2021 hearing.

6. The deposition of the corporate representative currently scheduled on July 30, 2021, is cancelled and Defendant shall not be required to respond to written discovery propounded by the Plaintiff.

* * *

Criminal law—Battery on elderly person—Tampering with victim—Criminal mischef—Immunity—Stand Your Ground law—Defendant's motion seeking immunity from prosecution under section 776.032 is denied—Motion is unsworn, defendant did not attach or rely on any record evidence, and at evidentiary hearing defendant failed to present any testimony or point to any evidence from which elements supporting SYG claim could be inferred—Because defendant failed to raise prima facie claim of immunity, burden did not shift to state to overcome claim

THE STATE OF FLORIDA, Plaintiff, v. GUILLERMO PENALVER, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F21-7542, Section 19. August 31, 2021. Zachary N. James, Judge. Counsel: Amit Mathur, Assistant State Attorney, for Plaintiff. Ramie Altawil, Assistant Public Defender, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PURSUANT TO FLA. STAT. 776.032 (FLORIDA'S STAND YOUR GROUND LAW)

THIS CAUSE came before the Court on Defendant, Guillermo Penalver's ("***Defendant***"), Motion to Dismiss Pursuant to Fla. Stat. 776.032 ("***Motion***"). In his Motion, the Defendant seeks immunity from prosecution under Fla. Stat. § 776.032, Florida's "Stand Your Ground" law ("***Stand Your Ground***" or "***SYG***").

Florida's Stand Your Ground law provides that a defendant

seeking self-defense immunity carries the initial burden of establishing a prima facie claim. Fla. Stat. § 776.032(4). Only after a defendant raises a prima facie claim of self-defense immunity does the burden of proof shift to the State of Florida ("***State***") to overcome the defendant's claim. *Id.* Here, the Defendant's Motion is unsworn and does not attach or rely on any record evidence. And at the August 27, 2021 evidentiary hearing scheduled for the Motion, the Defendant failed to present any testimony or point to any evidence whatsoever from which the elements to support an SYG claim could be inferred. As the Defendant failed to raise a prima facie claim of immunity, his Motion must be, and is, **DENIED.**

I. RELEVANT BACKGROUND

The Defendant was arrested on May 2, 2021, following an altercation between the Defendant and the alleged victim at a Home Depot store in Miami, Florida. He was subsequently charged by Information with three separate criminal offenses: Battery on an Elderly Person, a third-degree felony; Tampering With a Victim, also a third-degree felony; and Criminal Mischief $200-$1,000, a first-degree misdemeanor,

On July 20, 2021, the Defendant filed his Motion, seeking immunity and dismissal of all charges pursuant to Florida's Stand Your Ground law. On August 22, 2021, the State filed its Motion to Strike and Response to Defendant's Motion to Dismiss; and on August 26, 2021, the Defendant filed his Response to the State's Motion to Strike.

At the scheduled evidentiary hearing on August 27, 2021, the Defendant did not point to or present any evidence, and he did not offer any testimony. Instead, the Defendant relied solely on his unsworn Motion, asserting that an unsworn pleading is sufficient to establish a prima facie claim of self-defense immunity under the SYG statutes.

II. APPLICABLE LAW

Florida's Stand Your Ground law is codified in Chapter 776 of the Florida Statutes. Section 776.012(1) provides:

> 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.

§ 776.012, Fla. Stat. (2021).

Section 776.032, in turn, provides, in relevant part:

> (1) A person who uses or threatens to use force as permitted in s. 776.012 . . . 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 . . .
>
> (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 . . .

§ 776.032, Fla. Stat. (2021) (emphasis added).

Thus, to prevail on an SYG claim, a defendant must first raise a prima facie claim of self-defense immunity. Assuming a defendant raises a prima facie claim, the burden then shifts to the State to overcome the immunity claim by clear and convincing evidence.

Case law instructs that "[i]n evaluating the evidence at a hearing on immunity, an objective standard applies. . . . The trial court must determine whether, based on the circumstances as they appeared to the defendant, a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew would have used the same force as did the defendant. The appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force." *Huckelby, Jr. v. State,* 313 So.3d 861, 866 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D321c] (internal quotations and citation omitted).

III. ANALYSIS

The Court must determine whether an unsworn SYG motion by itself satisfies the Defendant's initial burden under section 776.032, which requires him to raise a prima facie claim of self-defense immunity before the burden shifts to the State. The Defendant asserts that his unsworn Motion suffices, while the State contends that the Motion does not raise a prima facie claim because it is not sworn to by the Defendant or anyone else with personal knowledge of the subject incident.

"[S]tatutory enactments are to be interpreted so as to accomplish rather than defeat their purpose." *Dennis v. State,* 51 So.3d 456, 461 (Fla. 2010) [35 Fla. L. Weekly S731b] (quoting *Reeves v. State,* 957 So.2d 625, 629 (Fla. 2007) [32 Fla. L. Weekly S239a]). " 'The starting point for [the] interpretation of a statute is always its language,' so that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.' " *Vargas v. Enterprise Leasing Co.,* 993 So.2d 614, 618 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2574a] (quoting in part *Garcia v. Vanguard Car Rental USA, Inc.,* 510 F.Supp.2d 821, 829-30 (M.D. Fla. 2007), *aff'd,* 540 F.3d 1242, 1246 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1001a]), *approved,* 60 So.3d 1037 (Fla. 2011) [36 Fla. L. Weekly S187a]. The language of a statute or rule is construed in accord with its plain and ordinary meanings. *See Baden v. Baden,* 260 So.3d 1108, 1112 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2550a]. "[W]hen the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning." *Brown v. State,* 715 So.2d 241, 243 (Fla. 1998) [23 Fla. L. Weekly S266a]. And when statutory language is clear or unambiguous, the court "need not look behind the statute's plain language or employ principles of statutory construction to determine legislative intent." *English v. State,* 191 So.3d 448, 450 (Fla. 2016) [41 Fla. L. Weekly S219b]; *see also Daniels v. Fla. Dep't of Health,* 898 So.2d 61, 65 (Fla. 2005) [30 Fla. L. Weekly S143a] ("When the statutory language is clear, 'courts have no occasion to resort to rules of construction—they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.' ") (quoting *Nicoll v. Baker,* 668 So. 2d 989, 990-91 (Fla. 1996) [21 Fla. L. Weekly S96a]).

Florida's Stand Your Ground law provides that a defendant must raise a prima facie claim of self-defense before the burden shifts to the State. Fla. Stat. § 776.032(4). The parties do not dispute that the Defendant must first make a prima facie claim, but they disagree on what is required by the Defendant to meet this initial showing. Turning to the plain and ordinary meaning of "prima facie claim," Black's Law Dictionary defines "prima facie" as: "Sufficient to establish a fact or raise a presumption unless disproved or rebutted." *Black's Law Dictionary* (8th ed. 2004). And Merriam-Webster defines "prima facie claim" as: "Legally sufficient to establish a fact or a case unless disproved." *Merriam-Webster.com Dictionary,* Merriam-Webster, https://www.merriam-webster.com/dictionary/prima%20facie, accessed 27 Aug. 2021.

Thus, to raise a prima facie claim of self-defense immunity under section 776.032, a defendant must establish some facts to show that the elements for justifiable use of force have been met. It is not a high burden, but it is not nothing. And the filing of an unsworn motion unsupported by record evidence does not establish anything. *State v.*

Brugman, 588 So.2d 279, 279 (Fla. 2d DCA 1991) ("An attorney's unsworn statement does not establish a fact in absence of a stipulation.") (citing *Leon Shaffer Golnick Advertising, Inc. v. Cedar,* 423 So.2d 1015 (Fla. 4th DCA 1982)); *Olson v. Olson,* 260 So.3d 367, 369 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2527a] ("The practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. . . . [T]heir unsworn statements do not establish facts. . .") (quoting *Smith v. Smith,* 64 So.3d 169, 171 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1379a]).

Here, the Defendant' Motion does not establish any facts; it is merely a recitation of the Defendant's attorney's version of facts. *See State v. Holder,* 400 So.2d 162, 163 (Fla. 3d DCA 1981) ("Clearly, the facts set forth in the motion could not have been within the personal knowledge of the defendant's attorney unless he happened to have been on the scene of the alleged crime."). The Defendant's attorney does not claim to have any personal knowledge of the facts of this case, so the Defendant cannot establish a prima facie claim of SYG immunity unless and until his Motion is either: (i) sworn to by a person with personal knowledge of the facts alleged therein; or (ii) supported by evidence or testimony at the SYG hearing.

The Defendant asserts that his unsworn Motion, by itself, raises a prima facie claim, citing to *Jefferson v. State,* 264 So.3d 1019 (Fla. 2d DCA 2018) [44 Fla. L. Weekly D135a]. Indeed, the court in *Jefferson* held the trial court erred in summarily denying the petitioner's SYG motion, but the court was not grappling with whether an unsworn motion suffices to establish a prima facie claim of SYG immunity. That is because the SYG motion in *Jefferson*—unlike the Defendant's Motion—was sworn. As noted by the appellate court in *Jefferson,* the trial court entered an order finding: "A written motion ***that is sworn to by the [petitioner],*** without live testimony in court subject to cross examination, is legally insufficient to raise a prima facie claim for immunity." *Id.* At 1023. The trial court there agreed with the State's assertion that a defendant seeking SYG immunity must testify under oath and be subject to cross-examination by the State, even after filing a sworn motion. *Id.* The Second District Court of Appeal held that the trial court erred by requiring the defendant to testify notwithstanding his filing of a sworn motion detailing his claims. The *Jefferson* case thus stands for the uncontroversial proposition that when faced with a *sworn* SYG motion, the trial court should merely review the facial sufficiency of the claims set forth, and so long as the sworn claims are sufficient, the defendant has raised a prima facie claim of SYG immunity. *Id.* at 1026. But it does not resolve the question of whether an *unsworn* motion carries the day.

Unlike the petitioner in *Jefferson,* the Defendant here did not file a sworn motion, and therefore he has not established any facts in support of his claim. This Court agrees with the Fourth District Court of Appeal's explanation of what is required to satisfy the initial prima facie burden in SYG claims, as set forth in *Langel v. State,* 255 So.3d 359 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2058a]:

> To raise a "prima facie claim of self-defense immunity from criminal prosecution" under section 776.032(4), a defendant must show that the elements for the justifiable use of force are met. Ordinarily, this will require the defendant to testify or to otherwise present or point to evidence from which the elements for justifiable use of force can be inferred. Only then would the burden shift to the state to "overcome the immunity" by clear and convincing evidence. § 776.032(4), Fla. Stat.

Langel, 255 So.3d at 362-63.

To require anything less—in other words, to find that a defendant raises a prima facie claim by doing no more than filing an unsworn motion, not subject to perjury—would eviscerate the clearly stated intent of the Florida legislature that a defendant making an SYG claim be required to make the first showing of eligibility for SYG immunity. Under the Defendant's theory, could he raise an entirely different defense at trial if he were to not prevail at the SYG hearing, and then not even be subject to impeachment, let alone perjury? Could he later deny that he was even involved in the altercation and claim mistaken identity? Could he deny that any altercation took place at all? It was likely to avoid issues like these, among others, that the legislature included the requirement that a defendant seeking self-defense immunity make the initial showing by establishing a prima facie claim.

The legislature included the requirement that the Defendant make a prima facie claim of self-defense immunity before the burden shifts to the State, and irrespective of its reasoning for doing so, it is this Court's solemn responsibility to faithfully apply the law. A "prima facie claim" must be given its plain and ordinary meaning, and a prima facie claim is one that is legally sufficient to establish a fact. Because an unsworn motion does not establish a fact, a defendant who raises an SYG claim through an unsworn motion unsupported by record evidence does not make a prima facie claim of SYG immunity unless the defendant also presents some testimony or evidence at an evidentiary hearing. Since the Defendant here filed an unsworn Motion that did not point to any record evidence, and since he did not present any testimony or offer any evidence at the evidentiary hearing on his Motion, he failed to raise a prima facie claim of self-defense immunity under section 776.032.

IV. CONCLUSION

To make a prima facie claim of self-defense immunity from criminal prosecution, as required under Florida Statutes, Section 776.032(4), a defendant must either: (i) file a facially sufficient motion, sworn to by a person with personal knowledge of the facts set forth; ***or*** (ii) present testimony or point to evidence from which the elements of justifiable use of force can be inferred. A defendant is not required to do both options, but he cannot do neither before the burden shifts to the State. The Defendant did not present any testimony or offer any evidence at the evidentiary hearing on his Motion. Based upon the foregoing, it is hereby **ORDERED and ADJUDGED** that the Defendant's Motion is hereby **DENIED**.

* * *

Torts—Breach of fiduciary duty—Conversion—Punitive damages—Motion for leave to amend complaint to seek punitive damages is denied—Claims for breach of fiduciary duty arising from alleged oral general partnership and for conversion based on failure to pay acquisition fees and distributions are legally invalid and cannot support claim for punitive damages—Moreover, evidence proffered falls short of establishing type of reprehensible conduct required by section 768.72(1) and rule 1.190(f) to support punitive damages claim

CONSTANTINE SCURTIS, et al., Plaintiffs, v. 6TH AVENUE BUILDINGS, LTD., et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Complex Business Litigation. Case No. 2014-31805 CA 01. August 5, 2021. Michael A. Hanzman, Judge. Counsel: Katherine Eskovitz, Nathan Holcomb, and Colleen Smeryage, Santa Monica, CA, for Plaintiffs. John Lukacs, Coral Gables; and Benjamin Brodsky and Alaina Fotiu-Wojtowicz, Miami, for Defendants.

ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR LEAVE TO AMEND VERIFIED REVISED FOURTH AMENDED COMPLAINT TO SEEK PUNITIVE DAMAGES

I. RELEVANT BACKGROUND

In 2003 Alexander Rodriguez ("Rodriguez") and his then brother-in-law, Constantine Scurtis ("Plaintiff" or "Scurtis"), decided to invest in real estate together.[1] Rodriguez would provide capital (or access to capital), and Scurtis would contribute real estate "know how" and

"sweat equity."

Scurtis identified acquisition targets and the parties—using Rodriguez' capital—began to acquire income producing real estate. Like many real estate investors, they formed a single purpose entity (typically a limited partnership) to acquire each parcel. Each entity was governed by a written limited partnership agreement that identified all general/limited partners, and the percentage of the entity each partner owned. Generally speaking, Rodriguez was the 95% owner, Scurtis owned approximately 5%, and an entity controlled by Scurtis (initially ACREI, LLC) was designated the general partner of each limited partnership as well as a .01% owner.[2] Each written limited partnership agreement carefully defined the respective rights and obligations of the general and limited partners.[3]

At or about 2005, Scurtis and Rodriguez decided to expand what Scurtis described as their "mom and pop" shop and pursue larger projects. They then hired Fred Levenson, Esquire ("Levenson"), an attorney at White and Case, to counsel them on matters of corporate structuring and acquisition financing.[4] Levenson recommended that a new "guarantor" entity be formed so that Rodriguez and Scurtis would not have to personally guarantee debt or be subject to so-called "bad-boy" carve outs on otherwise non-recourse financing. Rodriguez and Scurtis agreed to implement this recommendation, and Levenson formed Newport Property Apartment Ventures, Ltd. ("NPV") as the new "guarantor" entity.

To capitalize NPV, thereby enabling it to serve as the guarantor for acquisition loans, Scurtis and Rodriguez assigned to this new entity their respective interests in twelve (12) limited partnerships that had already acquired real estate. At that time the general partner of each of these twelve (12) limited partnerships was an entity controlled by Scurtis (ACREI, LLC, ACREI II, LLC or ACREI III, LLC). Following this March 2005 transaction, and the assignments executed in connection therewith, all interests in these limited partnerships previously owned by Rodriguez and Scurtis, including Scurtis' interest in the ACREI entities, were transferred to—and now owned by—NPV.[5] NPV was owned 94.5% by Rodriguez and 5% by Scurtis, with a minor interest (.5%) held by an entity general partnership, Newport Property Apartment Ventures, Inc. ("NPV, Inc.").[6] NPV, Inc. was, in turn, wholly owned by Rodriguez.[7] This 2005 transaction therefore divested Scurtis of legal operating control over the twelve (12) limited partnerships that were now held by NPV—transferring that control to Rodriguez. Scurtis, however, continued to manage to the day-to-day affairs of the restructured business.

Between 2005 and 2007 Rodriguez and Scurtis jointly acquired additional properties, continuing to use single purpose limited partnerships (or other closely held entities). Like before, Scurtis generally owned 5%, with Rodriguez owning approximately 95%, of each entity. A general partner entity, now controlled by Rodriguez, would own a small (usually .01%) interest. Both Scurtis and Rodriguez executed written limited partnership (or operating) agreements governing each of these entities.

In 2008 the marriage between Rodriguez and Cynthia began to unravel, and the relationship between Rodriguez and Scurtis quickly followed suit. On August 14, 2008, Scurtis was: (a) removed as a member of the Board of Directors (or similar governing body) of each partnership entity; (b) "terminated and removed as an [sic] manager of each General Partnership and/or Newport Entity"; and (c) divested of "any authority" or "apparent authority" to act "on behalf of any general partner, any Management Entity or any of their respective affiliates, subsidiaries, ..." *See* August 14, 2008 "Written Consent of Equity Holders." This written consent also directed "each General Partner and each Newport Entity" to take all action necessary to: (a) terminate Scurtis for "cause" from all board/officer positions; and (b) prevent Scurtis from (i) accessing any tangible or intangible property, including financial books and records; and (ii) communicating with any third parties on behalf of the entities. *Id.*[8]

On September 18, 2008, Scurtis advised "everyone that effective immediately I will no longer be working at Newport," and that he had "decided to pursue other opportunities." He further advised that "Stuart Zook will become the Chief Operating Office at Newport," and asked "everyone to embrace the change and continue to work with the same passion and desire to grow Newport to heights we have dreamed about." From that point forward Scurtis had no involvement in day-to-day business affairs.

II. THE LITIGATION

On December 17, 2014, Scurtis filed this action. In Count I of his initial complaint he alleged that Defendant 6th Avenue Buildings, Ltd. (one of the parties' jointly owned entities) breached a contract by "selling properties without authority, without notifying Scurtis, and without compensating Scurtis." Complaint p. 4. Four properties that were allegedly sold in violation of this contract were identified: 2395 NE 6th Avenue, Miami, Florida—2341 NE 6th Avenue, Miami, Florida—2347 NE 6th Avenue, Miami, Florida—and 700 NE 24th Street, Miami, Florida. Similar breach of contract claims also were advanced against three (3) other entities that had been formed by Rodriguez and Scurtis to acquire real estate: 455 Building, Ltd. (count II), 750 Bayfront, Ltd. (count III), 500 NE 24th Street, Ltd. (count IV) and 2328 NE 6th Ave, Ltd. (count V).

The initial complaint also brought a breach of contract claim against Rodriguez, alleging that he also sold "properties without authority, without notifying Scurtis, and without compensating Scurtis." Complaint ¶ 40 (count IV). The complaint also pled a claim for "Improper Conveyance" (whatever that may be) against all Defendants (count VII). Plaintiff sought damages equaling "5% of net profits from the sale of the subject properties; the loss of the right to sell the property in the future; and the loss of right to develop the property in the future." Complaint ¶ 48.

On August 26, 2015, Scurtis filed his "Amended Complaint and Demand for Jury Trial," adding meat to the bones. This pleading was brought by Scurtis as well as ACREI, LLC. The amended complaint added a number of additional Defendants, including Stuart Zook ("Zook") and other Rodriguez-Scurtis partnership entities that had not been previously sued. This amended pleading also contained additional background allegations, including beefed up allegations relating to the formation and structure of the parties' venture.

The amended complaint alleged that: (a) Rodriguez and Scurtis orally agreed to enter into a general partnership for the purpose of acquiring, rehabilitating, developing and managing income producing real estate; (b) that pursuant to this oral agreement Scurtis (through his entity SITRUCS) was to receive a three percent (3%) acquisition fee on all real estate acquired; (c) that NPV was formed to act as the Rodriguez-Scurtis general partnership and to administer several limited partnerships under the umbrella of the Rodriguez-Scurtis general partnership; and (d) that the NPV partnership agreement granted each partner a "right of first refusal" to buy another's limited partnership interest.[9] The amended complaint also alleged that Rodriguez—with the assistance of others—transferred assets belonging to the Rodriguez-Scurtis general partnerships to newly created entities [MCM and MRES], and that Scurtis was entitled to a five percent (5%) ownership interest in these entities, as well as a three percent (3%) acquisition fee for each piece of real property they acquired. Amended Complaint ¶ 93.

On June 13, 2016, Scurtis, ACREI, LLC and ACREI II, LLC filed a "Verified Second Amended Complaint" which, for present purposes, did not materially alter the landscape. Nor was the landscape materially altered by the "Third Amended Complaint" filed by Scurtis, ACREI, LLC and ACREI II, LLC on April 25, 2019. Scurtis

then changed counsel, retaining the firm of Roche Cyrulnik Freedman LLP. Shortly thereafter, on January 8, 2021, he, together with all three ACREI entities, filed a "Verified Fourth Amended Complaint."[10]

This pleading dramatically changed the tone of this case and upped the ante. It began—literally in the first sentence—by describing Rodriguez as "a serial cheater and liar" who, "[a]fter cheating on his wife..., and lying about his affairs..., then "lied to and cheated his brother-in-law," and went on to allege—in its introductory paragraph—that Rodriguez engaged in an "illegal and fraudulent pattern of criminal activity—including embezzlement, obtaining property by fraud, insurance fraud, forgery, mail fraud, and wire fraud." Verified Fourth Amended Complaint ¶ 1. Plaintiffs also added additional claims, including causes of action for civil theft (count 7) and racketeering (count 9). The 123 page Verified Fourth Amended Complaint contains 59 counts, spanning 722 paragraphs.[11]

On January 8, 2021, Scurtis also filed thirteen (13) derivative actions, advancing claims belonging to certain of the entities in which he owns a five percent (5%) interest.[12] Through these thirteen (13) actions Scurtis, in a derivative capacity, brings breach of fiduciary duty claims "belonging to the [partnership entities], *Kaplus v. First Cont'l Corp.,* 711 So. 2d 108, 110 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1021b], with Scurtis himself "being only a nominal Plaintiff." *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]; *Regalado v. Cabezas,* 959 So. 2d 282, 287 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D939a] (in a derivative action the entity "is the real party interest and the shareholders are merely redressing rights of action that belong to the corporation"); *Liddy v. Urbanek,* 707 F.2d 1222, 1224 (11th Cir. 1983) ("[t]he corporation is the real party in interest even though the corporate management has failed to pursue the action").[13]

III. THE PENDING MOTION

A. Governing Law

Presently before the Court is Plaintiffs' "Renewed Motion for Leave to Amend Verified Revised Fourth Amended Complaint to Seek Punitive Damages" (DE 938).[14] The motion was fully briefed, and on July 22 and 27, 2021 the Court conducted a hearing for purposes of accepting Plaintiffs' evidentiary "proffer" pursuant to Florida Statute § 768.72 (1) , and Rule 1.190 (f) of the Florida Rules of Civil Procedure ("a motion for leave to amend for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages").

In adjudicating this motion the Court must "examin[e] the evidence in [the] light most favorable to the plaintiff[s], and indulg[e] every reasonable inference therefrom in the plaintiff's favor." *Am. Cyanamid Co. v. Roy,* 498 So. 2d 859, 861 (Fla. 1986); *Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.,* 16 So. 3d 1006, 1009 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1791d] ("[i]n evaluating the sufficiency of the evidence proffered in support of a punitive damages claim, the evidence is viewed in a light favorable to the moving party"). But as this Court pointed out in *Luque v. R. J. Reynolds Tobacco Company,* 2016 WL 11474634 (11th Cir. July 26, 2016) [24 Fla. L. Weekly Supp. 226a], § 768.72 (1), "as plainly written, . . . require[s]" that the moving party present "evidence supporting each element of the substantive cause of action," and evidence of "reprehensible conduct on the part of the defendant." *Id.* No "reasonable basis for the recovery of punitive damages can be shown absent some evidence in the record (or proffered) tending to support each element of the underlying substantive claim, as well as evidence that would permit a finding that the defendant acted with the requisite scienter." *Id., see also Bistline v. Rogers,* 215 So. 3d 607, 609 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D706a] ("[t]o merit punitive damages, the conduct . . . must be egregious and sufficiently reprehensible to rise to the level of truly culpable behavior deserving of punishment").

The reason § 786.172 (1) imposes the obligation to clear these hurdles is simple. The Legislature recognized that "[b]eing able to pursue punitive damages without first having to demonstrate a reasonable basis for that relief provides a plaintiff with a significant tactical advantage," as "[i]t goes without saying that a potential punitive damages award significantly increases a defendant's exposure for liability, which, in turn, increases the plaintiff's leverage in settlement negotiations." *In re Johnson,* 453 B.R. 433, 438 (Bankr. M.D. Fla. 2011) [23 Fla. L. Weekly Fed. B115a]. Section 768.72 "eliminates that tactical advantage," *id.,* by requiring the "trial court to act as a gatekeeper," thereby ensuring that "punitive damages are reserved for truly culpable behavior," and that a defendant is exposed to such damages only when a case involves the type of conduct that should be met with "society's collective outrage," *KIS Group, LLC v. Moquin,* 263 So. 3d 63, 65-66 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D166c]; that being "conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others." *Owens-Corning Fiberglas Corp. v. Ballard,* 749 So. 2d 483, 486 (Fla. 1999) [24 Fla. L. Weekly S401a].[15]

B. Analysis

Upon careful consideration of the legal issues presented and the evidence proffered, the Court concludes that Plaintiff has no basis upon which to seek punitive damages. As for the legal issues presented, Plaintiff advances two common law claims which supposedly support this relief: (1) a breach of fiduciary duty claim; and (2) a claim for conversion. As for the breach of fiduciary duty claim, the "duty" Plaintiff says he was owed arises out of an alleged oral general partnership that, in his view, was an "umbrella" entity that hovered above, and controlled, the entities he and Rodriguez formed to acquire and operate their real-estate holdings. For reasons the Court will later explain, this claim is legally bankrupt.

Turning to the conversion claim, Plaintiff alleges that the Defendants stole his interest in the ACREI entities, and failed to pay him acquisition fees and distributions. Plaintiff admittedly executed written assignments of his interest in each ACREI entity, and accepted the benefit of those written assignments. The law will not permit him to now avoid those written contracts by claiming he was unaware of what he was signing, or ignorant of the legal consequences. *See, e.g., Moreno v. First Int'l. Title, Inc.,* 176 So. 3d 301 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1834b] (party may not avoid a contract by claiming he did not read it or appreciate its effect); *Murphy v. Courtesy Ford, L.L.C.,* 944 So. 2d 1131, 1134 (Fla. 3d DCA 2006) [32 Fla. L. Weekly D565a] (". . . a party to a contract is not 'permitted to avoid the consequences of a contract freely entered into simply because he or she elected not to read and understand its terms before executing it or because in retrospect, the bargain turns out to be disadvantageous' ").

As for his claim for acquisition fees and distributions, a failure to pay money cannot, as a matter of law, support a cause of action for conversion. *See, e.g., Gasparini v. Pordomingo,* 972 So. 2d 1053 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D295a]; *Futch v. Head,* 511 So. 2d 314 (Fla. 1st DCA 1987). The only exception to this rule is when there exists an obligation to segregate specific funds; an example being ". . . where a specific sum of money is to be held in constructive trust until the occurrence of a specified event." *Belford Trucking Co. v. Zagar,* 243 So. 2d 646, 648 (Fla. 4th DCA 1970). That exception has no application here.

In sum, Plaintiff's claims based upon an oral general partnership

and for conversion are legally infirm and, *a fortiori,* cannot support a claim for punitive damages. *See, e.g., Soffer v. R.J. Reynolds Tobacco Co.,* 187 So. 3d 1219, 1229 (Fla. 2016) [41 Fla. L. Weekly S101a] ("a claim for punitive damages is not a separate, free-standing cause of action . . . but is rather a remedy that can be sought based on any properly pled cause of action"). But even if Plaintiff could overcome these legal obstacles, the evidence proffered falls short of establishing the type of reprehensible conduct required by § 768.72(1), and Rule 1.190(f).

As an initial matter, the vast majority of wrongdoing Scurtis complains of caused harm not to himself, but rather the entities he brings derivative claims on behalf of or, in some cases, third parties. Plaintiff alleges for example: (a) the misuse of limited partnership assets resulting his "legitimate real estate business [becoming] contractually-bound to clean up Rodriguez' personal misconduct. . ." (Motion p. 4); (b) the "improper sales and transfer of limited partnership assets for below market prices," (Motion p. 13); (c) the use of NPV to commit or conspire to commit mortgage and insurance fraud (Motion p. 13); (d) "using NPV for illicit self-dealing and as part of criminal acts" (Motion p. 13); and (e) the transfer of NPV "properties" to other entities controlled by Defendants Rodriguez and Zook without adequate consideration. (Motion p 2).

This wrongful conduct, it if occurred at all, resulted in harm to complete strangers to this case (i.e., insurers and banks which were the target of mortgage and insurance fraud) or the limited partnerships. Any injury to Scurtis resulted only from a pro-rata reduction in the value of his 5% interest(s). *See, e.g., Angelino v. Santa Barbara Enterprises, LLC,* 2 So. 3d 1100 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D397a] (recognizing that shareholders have no standing to bring direct actions for injuries allegedly suffered by the corporation, when shareholder's only claim was that the value of their interest was diminished); *Alario v. Miller,* 354 So. 2d 925, 926 (Fla. 2d DCA 1978) ("[i]f the damages are only indirectly sustained by the stockholder as a result of injury to the corporation, the stockholder does not have a cause of action as an individual"); *Schuster v. Gardner,* 25 Cal. Rptr. 3d 468, 473 (Ct. App. 2005) ("a shareholder cannot bring a direct action for damages against management on the theory their alleged wrongdoing decreased the value of his or her stock (*e.g.,* by reducing corporate assets and net worth)"). And as this Court has ruled before, punitive damages are not available in derivative actions as a matter of law. *See Easton Hunt Capital Partners, L.P. v. Meyer Ice Cream, LLC,* Case Number 2018-25989 CA 01, February 5, 2021 "Order on Plaintiff's Motion for Leave to File Second Amended Complaint and to Add Punitive Damages," citing *McGuire, Woods, Battle & Boothe, L.L.P. v. Hollfelder*, 771 So. 2d 585, 586 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2637a]; *Lanman Lithotech, Inc. v. Gurwitz,* 478 So. 2d 425 (Fla. 5th DCA 1985); and *Chemplex Fla. v. Norelli,* 790 So. 2d 547, 549 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1744b].

In a futile attempt to avoid this well settled precedent, Plaintiff again insists that his claims are based upon an oral general partnership, and argues that there is no "derivative direct distinction in a general partnership case." *See* Plaintiff's Post Hearing Memorandum, p. 1. In support of this argument, Plaintiff points out that the Florida Revised Uniform Partnership Act ("RUPA") allows "a partner [to] bring a direct suit against the partnership or another partner for almost any cause of action arising out of the conduct of the partnership business." *Id.* p. 2, citing *Koros v. Doctors' Special Surgery Ctr. of Jacksonville, Ltd.,* 717 So. 2d 137, 139 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2123b]; *see also,* Fla. Stat. § 620.8404, (a "partner may maintain an action against . . . another partner for legal and equitable relief, with or without an accounting as to partnership business to . . . [e]nforce a partner's rights under this act, . . ."). Plaintiff therefore insists that he, as a general partner, may directly sue his other general partner (Rodriguez), and seek damages (and presumably punitive damages) on behalf of the general partnership entity.

There is no doubt that under RUPA a partner in a general partnership owes a fiduciary "duty of loyalty and the duty of care" to both "the partnership and the other partners," *see* Fla. Stat. § 620.8404, and that one general partner may sue another general partner "to . . . enforce a partner's rights . . ." under the "partnership agreement" and the "Act" (i.e., RUPA). Fla. Stat. § 620.8405 (2)(a)-(b), (emphasis added). It does not, however, necessarily follow that a general partner may sue another partner directly (as opposed to derivatively) to enforce the rights of, and recover damages caused *solely* to, the partnership. In other words, nothing in RUPA suggests that long-settled precedent regarding "derivative vs. direct" claims is out the window in a general partnership dispute or, as Plaintiff puts it, that "derivative actions do not have any place under Florida's general partnership law." Post-Hearing Memorandum p. 4.

To the contrary, when the Legislature enacted RUPA in 1995, it expressly adopted the "entity theory" of partnership, recognizing that a general partnership is a distinct entity separate and apart from its individual partners. *See* Fla. Stat. § 620.8201(1) ("[a] partnership is an entity distinct from its partners"); *Larmoyeux v. Montgomery,* 963 So. 2d 813 (Fla. 4th DCA 2007) [25 Fla. L. Weekly D2194a]. While it is true that RUPA, unlike Florida's Revised Uniform Limited Partnership Act ("FRULPA"), does not contain a provision providing for derivative claims, the statute instead has a specific "standing" provision which, as plainly written, authorizes the *partnership* (not a partner) to "maintain an action against a partner" for "causing harm to the partnership." Fla. Stat. § 620.8405(1), The statute then goes on to provide that a *partner* "may maintain an action" to enforce his rights under "the partnership agreement" or this Act." Fla. Stat. § 620.8405(2)(a)(b).

The statute, as plainly written, does not expressly authorize a partner to sue directly in order to redress harm realized by the partnership itself. Only the partnership is afforded standing to bring such a claim. *See* Fla. Stat. § 620.8405 (1), *see, e.g., Atwater v. Kortum,* 95 So. 3d 85, 90 (Fla. 2012) [37 Fla. L. Weekly S439a] (a "statute must be given its plain and obvious meaning"). Moreover, § 620.8104(1) provides that "[u]nless displaced by particular provisions of this act, the principles of law and equity supplement this act." *Id.* Equitable derivative claims existed long before they became creatures of statute. It therefore appears to this Court that a general partner seeking to recover damages suffered by the partnership entity (as opposed to the partner himself) must do so via a derivative action.[16]

Thankfully the Court does not, for purposes of deciding this motion, have to take a deeper dive into this stimulating academic issue because, as pointed out earlier, Rodriguez and Scurtis decided to conduct all of their business through limited partnerships (and similar juridical entities) that were formed by written agreements. Those agreements specified the interests held by both men, and documented their respective rights and obligations towards the entity and each other. Consistent with these written agreements, all real estate acquired by Rodriguez-Scurtis was owned and operated by one of these entities. No business was ever transacted by any oral general partnership. It never owned/leased a single piece of property; it never employed a single person; it never had a single bank account; it never received upstream (or paid downstream) any distributions; it never acquired or possessed a single asset (tangible or intangible); and it never had any indicia of existence. This of course is not surprising given that Rodriguez-Scurtis elected to do all of their real estate business through limited partnership entities/closely held corporations, and documented their relationship via written agreements.

Permitting a party to agree, in writing, to conduct business using a particular legal structure (i.e., a corporation, LLC, LP) and then, when

litigation arises, say they were "really" operating through an entirely different structure (an oral general partnership) would: (a) enable parties to avoid their written undertakings; and (b) cause utter chaos in matters of corporate governance and litigation. People who agree to do business using statutorily authorized vehicles (i.e., LPs, LLCs and corporations) are obligated to conduct themselves consistent with the statutory and common law governing the type of entity they elect to employ, and must accept the law that will govern any internal dispute. Allowing parties to avoid that law by claiming, in later litigation, that they used an undocumented oral structure, as opposed to the vehicle they agreed upon in writing, would wreak havoc and deprive an opposing party of the bargain struck when they agreed to do business. *See, e.g., Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So. 2d 1114,1120-21 (Fla. 1984) ("[t]hose who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law . . ." that will govern that entity).

Here, Rodriguez and Scurtis contractually agreed in writing (approximately 50 times) to do business using specific statutory entities (LPs, LLCs, and closely held corporations), and this Court will not permit Scurtis to evade his agreements by now insisting that he and Rodriguez "really" operated through an oral general partnership. *See. e.g., Sabin,* 404 So. 2d at 773 ("[a] party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions").

Furthermore, even assuming the Court indulged the fiction that Rodriguez-Scurtis "really" did business pursuant to some oral general partnership, (despite having executed approximately fifty (50) written agreements to the contrary), it would make no difference here because all wrongdoing Plaintiff complains of was directed at either the limited partnership entities, third parties, or in some instances himself. None of the alleged wrongdoing was aimed at, or had any impact upon, this supposed general partnership. So even if the Court accepted the bizarre claim that this "umbrella" general partnership entity hovered above all the entities formed by Rodriguez-Scurtis, and owned (or controlled) them as some sort of "parent" or "holding company," it makes no difference here because all of the damages Scurtis seeks were inflicted upon one of the "subsidiary" entities (i.e., the limited partnerships). Those damages may only be recovered through a derivative action. *See, e.g., Fritz v. Fritz,* 219 So. 3d 234 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1125a] (affirming dismissal of limited partner's direct action for damages suffered by limited partnerships).

Again, Scurtis alleges that; (a) property owned *solely* by the limited partnership entities was sold at below market value or transferred to affiliated entities without adequate consideration; (b) funds belonging to certain of the limited partnership entities were unlawfully used to cover up Rodriguez' personal wrongdoings; and (c) these entities were damaged as a result of being used to perpetrate mortgage and insurance fraud.[17] Only the limited partnerships whose property was undersold, or whose funds were used to clean up Rodriguez' mess, or fend off claims of mortgage/insurance fraud, would be injured by these actions; not this imaginary oral general partnership which, according to Plaintiff, served as an omnibus "umbrella" entity. The alleged general partnership entity suffered no harm at all—something that again comes as no surprise, as it never owned anything or conducted any business.

The bottom line is that while Plaintiff may not like Florida's jurisprudence on limited partnerships, including: (a) the requirement that claims seeking to recover damages suffered by a limited partnership entity be brought derivatively; and (b) precedent foreclosing punitive damages in derivative cases, he may not side-step this jurisprudence (not to mention the 50 plus agreements he executed) by claiming that he and Rodriguez "really" did business through an oral general partnership. Scurtis and Rodriguez, for reasons that benefited both of them, decided to transact all their business through the use of single purpose entities (LPs, LLCs, or closely held corporations), and executed contracts specifying their respective rights and obligations. Plaintiff may not now disavow that decision because he finds controlling law inconvenient. *See, e.g., Rocky Creek Ret. Prop., Inc. v. Estate of Fox ex rel. Bank of Am., N.A.,* 19 So. 3d 1105, 1109 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2067b] ('[a] party has a duty to learn and know the contents of an agreement before signing it," and "[a]ny inquiries . . . concerning the ramifications of [the contract] should have been made before signing") (internal citations omitted). And even if he could advance this theory, all the damages he sues for were caused at the limited partnership level or to himself directly. For these reasons, the Court need not answer the academic question of whether a general partner may bring direct claims against another general partner seeking to recover damages inflicted on the general partnership entity.[18]

This brings the Court to an examination of the conduct Scurtis alleges harmed him directly. He first claims that Rodriguez improperly "removed him from the day-to-day operations of the partnerships" and "deprived him of access to books and records . . . ." Motion p. 2. Maybe so, but the question of whether Scurtis—as a 5% owner—had an ongoing right to manage the day-to-day business of these entities is debatable, with Defendants having the stronger side of the argument given that: (a) Scurtis assigned his interests in the entities that served as general partners (i.e., the ACREI entities); and (b) he never complained at the time he was legally divested of operating control (i.e., March 2005), *or* at the time he was factually divested of operating control (September 2008). More importantly for present purposes, removing an operator, and denying him access to books and records, is hardly a basis for a punitive damage award. These types of disputes over operating control and access to records are garden variety business scuffles occurring daily in corporate America. *See, e.g., Weinstein Design Group, Inc. v. Fielder,* 884 So. 2d 990, 1001 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2185a] (" . . . punitive damages are reserved for particular types of behavior which go beyond mere intentional acts").

Scurtis next says that Defendants "made fraudulent tax filings with the IRS, claiming that Scurtis was receiving hundreds of thousands of dollars of partnership distributions" when, in reality, "there were not paying Scurtis any distributions . . ." Motion p. 2. Plaintiff strategically mischaracterizes this issue as one of "false reporting" to the IRS, when it involves nothing more than a legitimate dispute over whether Scurtis owed money to certain of the limited partnership entities. In particular, some of the limited partnership entities carried significant debt on their books, classified as loans advanced to Scurtis. Scurtis was aware of the fact that these loans were on the books, and he admits he received the money. He nevertheless insists these loans were "fake," and were supposed to be forgiven, because the funds represented earned compensation booked as loans at the request of the partnerships' accountants.[19]

When distributions later became due to Scurtis, Defendants used the money he would have otherwise received to re-pay these loans and, as required by law, reported the amounts credited Scurtis as income, thereby resulting in him having a tax liability despite receiving no cash. This caused Scurtis a problem with the IRS, as he apparently lacked liquidity and could not timely pay his taxes. But the issue this claim presents is not one of "false reporting." Scurtis received this income and Defendants were obligated to report it to the IRS regardless of whether Scurtis received any cash. The issue is whether the loans—admittedly on the partnerships' books—were "real" or "fake." The evidence on this point is conflicting, but even if the loans should have been forgiven—as Scurtis insists—Defendants'

decision to satisfy debt that was admittedly on the books is hardly reprehensible conduct deserving of punishment. *See, e.g., Winn & Lovett Grocery Co. v. Archer,* 171 So. 214, 222-23 (Fla. 1936) ("[p]unitive or exemplary damages are allowable, however, solely as punishment or 'smart money' to be inflicted for the malicious or wanton state of mind with which the defendant violated plaintiff's legal right. . ."); *see also* Restatement (Second) of Tort § 908 (2) (1979) ("[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others").

Next, Scurtis says he "faced . . . liability" as a result of Rodriguez' misuse "of NPV and its corporate funds" to "commit and cover up criminal activity" (i.e., mortgage and insurance fraud), and that Rodriguez used NPV funds/assets to "avoid defaulting on personal loans," and to settle claims made by his personal baseball assistant, Yuri Sucart. Motion pp. 3-4. Rodriguez himself would have received 95¢ of every $1.00 used for these purposes, but more importantly, Scurtis does not point to any harm he actually suffered as a result of these illegal/improper activities, and any liability he may have faced never came to pass. And as the Court pointed out earlier, any harm that may have been inflicted as a consequence of this conduct was suffered either by the lender and insurer Defendants attempted to defraud, or by the entity itself. For these reasons, these "bad acts" cannot support a punitive damage award in favor of Plaintiff. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 22-24 (1991) (before punitive damages may be awarded there must be "some understandable relationship" between defendant's conduct and plaintiff's alleged injury); *Hardin v. R.J. Reynolds Tobacco Co.,* 314 So. 3d 302, 308 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1845a] (punitive damages may not be awarded absent "a direct link between the intentional wrongdoing by the defendant and the injuries to the plaintiff").

Lastly, Plaintiff highlights the family drama this case has spawned, directing the Court to e-mail exchanges between Rodriguez and Cynthia, where Rodriguez threatens to withhold child support and not see "our girls for the next two years until the lawsuit is over." Motion pp. 5-6. According to Scurtis, these threats forced Cynthia to "change her tune," and eventually issue statements complementing Rodriguez as being an "exemplary father," and belittling her brother's "new allegations" as "act(s) of a desperate man." Motion p. 7. Rodriguez' threats, in Scurtis' view, amount to tampering with a witness in an effort to influence testimony and shut down this lawsuit. Motion p. 25.[20]

The insurmountable problem with Plaintiff's claim of "witness tampering" is that Cynthia had absolutely no involvement in any of the events underlying the claims/defenses in this case and, for that reason, never had any relevant testimony to offer in the first place. She is no more than a family member caught in the middle of this distasteful dispute between her brother and ex-husband. It is unfortunate that she and her daughters have been dragged into this litigation. But no testimony Cynthia has to offer will move the needle. For that reason, Rodriguez' attempts to secure her support for his litigation cause cannot support a punitive damage award.

IV. CONCLUSION

Scurtis, who was unceremoniously removed as an officer/director/operator of a business he helped launch, is convinced that Rodriguez, and his new partner Zook, embarked on a scheme calculated to damage him and the entities he partly owns. He believes that after his departure those entities were mismanaged, used as Rodriguez' personal "piggy bank," and employed to defraud third parties. Scurtis is also convinced that Rodriguez intentionally "dumped" property for less than it was worth just to deny him the economic value of his 5% ownership, and that Rodriguez unlawfully transferred other properties to newly formed entities in which he and Zook had an interest.[21] Scurtis also may (or may not) be owed a significant amount of money.

Scurtis will have the opportunity to present all of these claims to a trier of fact, and he may (or may not) secure a substantial compensatory damage award in his favor, and in favor of the entities on whose behalf he brings derivative claims. But for the reasons discussed herein, his "Renewed Motion for Leave to Amend Verified Revised Fourth Amended Complaint to Seek Punitive Damages" is **DENIED**.

---

[1]Rodriguez was then a major league baseball player who was married to Scurtis' sister, Cynthia Rodriguez ("Cynthia").

[2]ACREI, LLC was formed in March 2003. Scurtis was its sole member and its manager. *See* Limited Liability Operating Agreement, ACREI, LLC. Scurtis later formed, and was the sole manager and member of, ACREI II, LLC and ACREI III, LLC, two other limited liability companies that also served as a general partner of certain Rodriguez-Scurtis limited partnerships. ACREI is an acronym for "Alex Constantine Real Estate Investments."

[3]*See, e.g.*, March 28, 2003 "Limited Partnership Agreement" for 2328 NE 6 Ave. Ltd.

[4]Levenson apparently represented all interested parties and neither Rodriguez nor Scurtis were advised of any potential conflict, or of a need to retain (or consider retaining) separate counsel.

[5]Scurtis does not deny executing an "Assignment and Assumption of Membership Interest" transferring, as "Assignor," his interest in ACREI, LLC, ACREI II, LLC and ACREI III, LLC to NPV, as "Assignee." But he alleges that he "never knowingly signed" these documents—whatever that may mean. Revised Fourth Amended Complaint, ¶ 164. He is nevertheless bound by these contracts. *Sabin v. Lowe's of Florida, Inc.,* 404 So. 2d 772, 773 (Fla. 5th DCA 1981) ("[a] party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions").

[6]*See* April 5, 2005 Limited Partnership Agreement for NPV.

[7]In a written consent executed by both Rodriguez and Scurtis, each acknowledged that Rodriguez was issued 1000 shares of, and named President of, NPV. Scurtis was not issued any shares.

[8]This resolution also authorized each entity to negotiate a redemption (i.e., purchase) of any and all interests owned by Scurtis. This never occurred and Scurtis continues to own his 5% interest in these entities.

[9]Based upon this "right of first refusal," Scurtis has alleged that he had the right to acquire real estate assets sold by any of the limited partnerships and has sought, as damages, profit he says he would have made had he been afforded that opportunity. The Court has rejected this claim because the limited partnership agreements, as plainly written, only provide for a "right of first refusal" when a limited partner seeks to transfer "his interest in the Partnership . . . ." *See, e.g.,* March 28 2003 "Limited Partnership Agreement" for 2328 N.E. 6 Ave., Ltd., Article VI. No limited partner was granted a "right of first refusal" to purchase any asset belonging to the entity itself. The Court will enforce the contracts as plainly written. *See, e.g., Gulliver Sch., Inc. v. Snay,* 137 So. 3d 1045 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a].

[10]Given the fact that Scurtis assigned his interest in all three ACREI entities to NPV, the Court has no idea how he, or his counsel, had the authority to bring this case on their behalf.

[11]On February 4, 2021, the Court struck all allegations of Rodriguez' marital infidelities as "scandalous and wholly irrelevant," and directed Plaintiffs "to re-file their pleading absent these allegations." *See* February 4, 2021 Order. On February 9, 2021, Plaintiffs filed their "Revised Verified Fourth Amended Complaint," which is identical to the prior version *sans* the stricken allegations.

[12]Under settled Florida law direct and derivative claims may not be brought in a single lawsuit, as "one cannot in the same action sue in more than one distinct right or capacity." *Gen. Dynamics Corp. v. Hewitt,* 225 So. 2d 561, 563 (Fla. 3d DCA 1969); *Lobree v. ArdenX LLC,* 199 So. 3d 1094 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2095a].

[13]Derivative actions, which in most jurisdictions are now statutory, are in the public interest as shareholders lack standing to bring an action for injuries suffered by the entity itself, and corporate insiders (who are often the targets of such claims) tend to, for obvious reasons, lack motivation to direct the filing of a lawsuit against themselves. *Lewis on Behalf of Citizens Sav. Bank & Tr. Co. v. Boyd,* 838 S.W.2d 215, 221 (Tenn. Ct. App. 1992) (derivative actions are "an extraordinary remedy. . . available to shareholders when a corporate cause of action is, for some reason, not pursued by the corporation itself").

[14]This Court's predecessor granted leave to amend to assert a claim for punitive damages, finding that "Plaintiffs have made a reasonable showing by evidence on the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages," as required by section 768.72." *See* May 20, 2020 "Order Granting Plaintiff's Motion for Leave to Amend Operative Complaint to Add Claim for Punitive Damages." The Third District vacated that order on procedural grounds, without commenting on the merits.

[15]The fact that a plaintiff can proffer evidence supporting each element of a tort does

not, *ipso facto,* entitle her to reach a jury on the question of punitive damages. *See, e.g., KIS, Group,* 263 So. 3d at 65-66 (a trial court's denial of a motion for summary judgment on a fraud claim is [not] the functional equivalent of a determination by the court that there is a reasonable evidentiary basis for punitive damages"). As this Court ruled in *Luque,* she must also provide sufficient evidence of reprehensibility.

[16]Plaintiff directs the Court to out of state decisions which, in *limited* circumstances, blur the "direct-derivative" line, and permit direct actions by shareholders in closely held corporations and limited partners. *See, e.g., Barth v. Barth,* 659 N.E.2d 559 (Ind. 1995) (discussing A.L.I. Principles of Corporate Governance § 7.01(d) which permits shareholders in closely held corporation to bring direct claims under specific circumstances); *Trieweiler v. Sears,* 268 Neb. 952, 689 N.W.2d 807 (2004) (finding persuasive A.L.I. § 7.01 (d), and permitting a direct action if doing so will not: (a) expose the corporation to multiples actions; (b) materially prejudice the interests of creditors, or (c) interfere with the fair distribution of any recovery); *BBMS, Inc. v. Brown,* 251 Ga. 409, 306 S.E.2d 288 (1983) (permitting direct action by a plaintiff who was "the only injured shareholder"); *Crosby v. Beam,* 47 Ohio St. 3d 105, 548 N.E.2d 217 (1989) (addressing claims that were not "wholly derivative in nature"). No Florida appellate court, however, has ever chipped away at the long-settled precedent which requires that claims seeking to recover damages suffered solely by an entity be brought derivatively, and this Court obviously lacks authority to "tweak" the "direct v. derivative" test that our appellate courts have laid down, even if it believed it to be "a good idea or the 'fair' thing to do." *Guardian Ad Litem Program v. O.R.*, 45 So. 3d 974 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2275a]. And it does not. Plaintiff also points out that another out of state court has suggested (or possibly held) that under Florida law a general partner may sue another general partner for damages suffered by the partnership. *Lefkovitz v. Wagner,* 395 F.3d 773 (7th Cir. 2005). This Court tends to disagree but, as explained later, it need not decide the issue for today's purposes.

[17]As for the claim of mortgage fraud, Zook instructed NPV employees who lived in Miami to write checks for "rent" to Tampa properties in order to protect Rodriguez from personal guarantees being called in. NPV would then pay back the employees, deeming the payments "consulting fees." For example, on November 11, 2008, Jose ("Pepi") Gomez paid Newport Square $1,333.87 dollars and noted on the check that it was for "rent." On the same day, Gomez was provided a check for $1,333.87 from NPV for "corp. consulting." The purpose of these falsified transactions was to increase the rent roll for various debt service coverage covenants and, in turn, avoid payment on their Wachovia loans. As for the insurance fraud, Zook directed Alejandra Gutierrez, an NPV employee, to create two sets of accounting records. The first set of records would reflect the actual damage caused by Hurricane Ike, and the second set of records would reflect inflated damages that the Partnership would report to its insurance broker, Marsh & McLennan. An affiliated company—Seacoast Restoration, Inc.—would then do repairs—create inflated invoices—and kick money back to NPV. Jeannie Crook, NPV's former CFO, blew the whistle on these activities and was then terminated, resulting in a lawsuit for wrongful discharge. NPV eventually settled that case for $130,000.00. NPV also hired outside counsel, at considerable cost, to conduct an investigation of these matters. Rodriguez claims to have been completely unaware of these events. Yet when they were brought to his (and the Board's) attention, no disciplinary action was taken against any of the parties involved. Fortunately for NPV, no claims were ever brought by the bank, the insurance carrier, or any authorities.

[18]Nor need the Court decide whether Plaintiff's oral general partnership claim is barred by the statute of frauds. *See, e.g., Khawly v. Reboul,* 488 So. 2d 856 (Fla. 3d DCA 1986); *Weinsier v. Soffer,* 358 So. 2d 61 (Fla. 3d DCA 1978); *LynkUs Communications, Inc. v. WebMD Corp.,* 965 So. 2d 1161 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1964a]; *Browning v. Poirier,* 165 So. 3d 663 (Fla. 2015) [40 Fla. L. Weekly S304a]; *Wilcox v. Lang Equities, Inc.,* 588 So. 2d 318 (Fla. 3d DCA 1991).

[19]According to Scurtis, the accountants wanted to book this compensation as loans because showing losses would assist Rodriguez' personal tax planning. If Scurtis is to be believed, these loans represented income that was required to be reported at the time—something that would have resulted in a tax obligation.

[20]Plaintiff also suggests that Rodriguez "tampered" with Tony Argiz ("Argiz"), an accountant for the partnerships, by satisfying Argiz' outstanding invoice and re-hiring him after an apparent falling out. After Rodriguez "made nice" with Argiz in 2015 (after Scurtis filed suit), he commented to one of his associates that "[t]hat circle is closed," suggesting that he had appeased Argiz and secured his cooperation in this litigation. The Court finds that this conduct does not amount to witness tampering, and is confident that Argiz would not perjure himself for Rodriguez or any other client.

[21]The claim that Rodriguez would intentionally sell properties for substantially less than he could achieve on the open market appears implausible, as 95% of any money left on the table would have gone to Rodriguez himself. To be sure, the evidence suggests that Rodriguez and Zook wanted to rid themselves of properties owned with Scurtis ("Taki deals"), as they claim those assets were underperforming. But the contention that Rodriguez would forfeit millions of dollars in potential sale proceeds (95% of which would go to him) just to harm Scurtis strains credulity.

* * *

Estates and trusts—Digital assets of decedent—Motion for sanctions against personal representative who obtained access to decedent's email account and emails, alleging violation of decedent's privacy rights is denied—Personal representative's cross-motion for sanctions also denied—Standing—Movants, a company and an acquaintance of decedent, have no standing to seek relief for alleged violation of decedent's privacy rights—Further, any common-law privacy claim that decedent might have had was extinguished upon her death—Pursuant to provisions of Florida Fiduciary Access to Digital Assets Act, personal representative is entitled to custody of contents of decedent's email accounts—Fact that movants did not receive notice of personal representative's application for court order directing account custodian to disclose account contents is immaterial where movants had no standing to object to application

IN RE: ESTATE OF MARIA CECILIA QUADRI, Deceased. MARIA ISABEL QUADRI DE KINGSTON, as personal representative of the ESTATE OF MARIA CECILIA QUADRI, Petitioner, v. RAUL PARISI, OSCAR PICCOLO, and OXEN GROUP LLC, a Delaware limited liability company, THOMAS J. HESS, individually, and THOMAS J. HESS, P.A., a Florida corporation, Respondents. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-180-CP-02. Adv. Case No. 2018-445-CP-02. August 9, 2021. Milton Hirsch, Judge.

ORDER ON CROSS-MOTIONS FOR SANCTIONS

Maria Isabel Quadri de Kingston, in her capacity as personal representative of the estate of her late sister Maria Cecilia Quadri[1], has obtained access to Cecilia's "Yahoo!" email account, including the emails themselves. Respondents Piccolo and Oxen, in their *Motion for Sanctions Against Petitioner and Her Counsel,* DE 534 ("Mtn"), aver that the emails were obtained by skullduggery on the part of Isabel and her attorneys, who should be subjected to every imaginable flagitious punishment.[2] Isabel's lawyers have filed a *Response,* DE 537, arguing, in effect, that they, on Isabel's behalf, are perfectly entitled to the emails and related material, so it doesn't really matter how they got them; and of course demanding attorneys' fees against Mr. Piccolo and Oxen.

As I attempt to demonstrate in part I of this order, the movants lack standing to seek relief for what they assert was a violation of Cecilia's privacy rights. Their motion can be denied on that basis alone. Both sides, however, place great reliance in their pleadings on the Fiduciary Access to Digital Assets Act, Fla. Stat. Ch. 740 ("the Act")—a relatively new statutory scheme that has yet to be construed by Florida courts, but which is certain to engender a great deal of litigation in the years ahead. Accordingly, I attempt to demonstrate in part II of this order that, pursuant to the law as it existed prior to the enactment of the Act, rights to privacy did not survive death; and in part III of this order, that the Act does not alter that general principle.

I. Piccolo and Oxen are without standing to bring the motion at bar

Both Mr. Piccolo and Oxen assert that the conduct engaged in by Isabel and her lawyers "violated Ms. [Cecilia] Quadri's privacy rights." *Mtn* at p. 18. Neither Mr. Piccolo nor Oxen asserts the violation of any right secured by law to them. They could scarcely do so. The demised email account is not their account. If by obtaining the content of Cecilia's email account Isabel infracted any legal right, it must be Cecilia's legal right.

The law does not provide a roving commission to each of us to litigate the rights of some of us or all of us. *Powers v. Ohio,* 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interest, and cannot rest a claim to relief on the legal rights or interests of third parties"); *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (Supreme "Court has held that [a litigant] generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").[3] "[E]ven where a constitutional right . . . is implicated, that right is a personal one, inuring solely to individuals." *Alterra Healthcare Corp. v. Estate of Shelley,* 827 So. 2d 936, 941 (Fla. 2002) [27 Fla. L. Weekly S735a]. *See, e.g., Higdon v. Metropolitan Dade County,* 446 So. 2d 203 (Fla.

3d DCA 1984).

I may be in some measure at fault for fostering the misimpression that Mr. Piccolo and Oxen had standing to bring their motion. When Isabel, in her capacity as personal representative, sought a court order directing "Yahoo!" to provide the content of Cecilia's email account, I did what I customarily do: I entered an order inviting any interested person having an objection to the requested relief to file his or her objection in writing within a reasonable period of time, cautioning that if no timely and sufficient objection were received, the application might be granted. I do this as a matter of course, not to suggest that I have made a finding that any particular person or entity is an interested person, or has standing for some or all purposes, but simply to cast the net of due process, which at a minimum must afford notice and hearing, as broadly as possible. I do this also to educate myself. As a consequence of this very open invitation to would-be objectors, I often learn of cases or issues that might not otherwise have come to my attention.

Undoubtedly Mr. Piccolo and Oxen, as respondents herein, are interested persons in this litigation. I suppose that when I entered my standard order inviting responses to Isabel's motion requesting an order directed to "Yahoo!" I simply assumed that counsel for Piccolo and Oxen would receive copies of that standard order. Counsel for Piccolo and Oxen insist that they received no such copies, *Mtn* at pp. 4 *et. seq.,* ¶¶9 *et. seq.,* and of course I accept their representation in that regard. But it matters not at all. My reflexive entry of a standard order inviting responsive pleading does not vest standing in one who has no standing.

Mr. Piccolo and Oxen clearly have no standing here. To the extent that, in her lifetime, Cecilia had a reasonable expectation of privacy in her email account, she and she alone could seek relief for invasion of that expectation of privacy. And the third-party rights that Piccolo and Oxen could not have asserted in Cecilia's lifetime they certainly cannot assert after her death. Claims of violation of the right to privacy are personal, to be asserted solely by the person whose privacy was infracted. "It is well settled that the right to privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded." *Hendrickson v. California Newspapers, Inc.,* 48 Ca. App. 3d 59, 62 (Cal. App. 1975) (emphasis in original). The law could scarcely be otherwise. "[G]eneral decisional law . . . holds this tort"—*i.e.,* a claim for invasion of privacy—"to be purely personal. . . [I]f actions for violating the right of privacy were allowed by other than the person directly involved, fixing their boundaries and parameters would become an almost impossible task. For example, within what degree of relationship, if any, must a prospective plaintiff be?" *Nelson v. Times,* 373 A. 2d 1221, 1225 (Me. 1977). The facts at bar illustrate the "almost impossible" problem that the *Nelson* court identifies. At recent hearings held in this matter, we repeatedly heard testimony that Cecilia had "no relation" to the Oxen company, and that she and Piccolo were no better than casual friends. (Isabel argues that they were the very opposite of friends; that Piccolo cruelly took advantage of Cecilia as she lay dying, swindling or attempting to swindle her out of her Brickell Key condominium unit.) If Mr. Piccolo and Oxen have standing to bring their present claim, they have standing to bring a similar claim on behalf of almost any decedent, no matter how exiguous their relationship to that decedent.

Compare *James v. Screen Gems,* 174 Cal.App. 2d 650 (Cal. App. 1959). The plaintiff was the widow of Jesse James, Jr., who in turn was the son and namesake of the infamous outlaw of the old West.[4] Screen Gems produced a movie, "Bitter Heritage," which, in Mrs. James's view, invaded the privacy of her late husband, and for which she sought damages. But "[t]he authorities appear to be uniform that the right of privacy cannot be asserted by anyone other than him whose privacy is invaded." *James,* 174 Cal.App.2d at 653 (quoting *Kelly v. Johnson Publishing Co.,* 325 P. 2d 659, 662 (Cal. App. 1958)). "[T]here have been no instances wherein courts have allowed recovery on this theory, where defendant's alleged wrongful act was directed toward a third person." *James,* 174 Cal.App.2d at 653 (quoting *Coverstone v. Davies,* 239 P. 2d 876, 881 (Cal. App. 1952)). Mrs. James had been her late husband's wife for over half a century; yet even this connection was insufficient to vest her with standing to assert the violation of her husband's right of privacy. *See also Gruschus v. Curtis Publishing Co.,* 342 F.2d 775 (10th Cir. 1965); *Bradley v. Cowles Magazines, Inc.,* 168 N.E. 2d 64, 66 (Ill. App. 1960). Oxen is a corporation in which Cecilia had no interest. Mr. Piccolo was at best an acquaintance, perhaps secretly a nemesis. Neither has standing to demand relief, as both seek to do, on the grounds that the conduct engaged in by Isabel and her lawyers "violated Ms. [Cecilia] Quadri's privacy rights." *Mtn* at p. 18.

II. Any common-law privacy claim that Cecilia might have had died with her

Because the common-law right to privacy is entirely personal, it is extinguished by death. The law has long distinguished between property rights, which may exist even after death, and personal rights, which do not. *See, e.g., Shafer v. Grimes,* 23 Iowa 550, 553 (Iowa 1867) (discussing the common-law maxim *actio personalis moritur cum persona, i.e.,* that a personal action dies with the person but property rights survive). A decedent's estate could, at common law, and can, even today, enforce property rights on the decedent's behalf. Not so with personal rights, the right to privacy being a prime example. *See Justice v. Belo Broad. Corp.,* 472 F. Supp. 145, 147 (N.D. Tex. 1979) (collecting cases); *Flynn v. Higham,* 197 Cal. Rptr. 145, 149 (Cal. App. 1983) ("the right [to privacy] does not survive, but dies with the person"). Whether this is a good or a bad distinction, a good or a bad rule, is not for me to decide. The rationale for the rule, good or bad, is plain: The dead do not experience privacy, or its deprivation, at least in the same sense that the living do. More elegantly put, "The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter, unendowed with will." *Letter from Thomas Jefferson to Major John Cartwright,* (June 5, 1824) *in* Thomas Jefferson, *Writings* 1490, 1493 (Merrill D. Peterson ed. 1984).[5]

In ways both wondrous and maddening the advent of the Internet, and of so-called "social media," have altered our daily lives. Apropos the case at bar, Cecilia's estate includes her "Yahoo!" account and the content of the many emails included therein. The disposition, even the existence, of assets of this kind was of course not foreseen by the common law of estates and probate. To supply that deficiency, Florida has enacted Fla. Stat. Ch. 740, the "Fiduciary Access to Digital Assets Act." Alleging, in effect, that the statutory scheme preserves alive a cause of action for invasion of privacy that would otherwise have followed Cecilia to the grave, Respondents devote the lion's share of their Motion to consideration of the Act.

III. Isabel, as personal representative, is entitled to Cecilia's digital assets

The Act was enacted not in a void, but in the context of existing common and statutory law. Even before—long before—computers were invented, men and women died possessed of diaries, intimate correspondence, and other private writings. Such items of personal property, like all a decedent's belongings, became part of the estate, to be considered and disposed of by the personal representative subject to the court's oversight. The matter is not so very different under the Act.

Section 740.003 provides someone situated as Cecilia was with means to forbid disclosure of the contents of her emails after her

death.[6] So far as appears, she availed herself of none of those means. That being the case, "If a . . . court directs the disclosure of the content of electronic communications of" an email account-holder such as Cecilia, "the custodian" of that account—in this instance, "Yahoo!"—"*shall* disclose to the personal representative of the estate of the [account-holder; in this instance, Cecilia] the content of" the email account. Fla. Stat. § 740.006. (Emphasis added.) As a condition of compliance, "Yahoo!" is entitled to demand the sorts of things it would be expected to demand to insulate itself from future liability in connection with the statutorily-mandated disclosure, *e.g.,* a certified copy of the account-holder's death certificate, Fla. Stat. § 740.006(2); a certified copy of the letters of administration issued to the personal representative who makes demand for the contents of the email account, Fla. Stat. § 740.006(3); even a finding by the court that disclosure "is reasonably necessary for the administration of the estate," Fla. Stat. § 740.006(5) (c)4. "Yahoo!" and like-kind entities are entitled to insist that all applicable i's be dotted and t's crossed; but once that is done, the email account and its contents must be delivered to the personal representative, just as more traditional holders of a decedent's assets—banks, for example—must, upon a proper showing, deliver those assets to the personal representative. *See also* Fla. Stat. § 740.06 ("Custodian compliance and immunity").

It seems pedestrian to say that so-called digital assets—email accounts and the emails themselves, for example—are in many ways like, but in a few ways unlike, more traditional estate assets. As a general rule digital assets are not amenable to being sold, like a decedent's car or boat, with the proceeds forming part of the estate. Cecilia's email correspondence has no market value. The parties do battle over it because they believe that it has power to convey or withhold a litigation advantage. Nor does email correspondence necessarily raise greater concerns about privacy, about intimacy, than traditional correspondence that might become part of an estate. As noted *supra,* long before the invention of computers men and women wrote in diaries and kept private papers. Presumably Lord Admiral Nelson and Lady Emma Hamilton had to be profoundly discreet in exchanging, and then hiding or destroying, the love letters that documented the illicit affair they were conducting.[7] The missives that they entrusted to the hands of only the most closed-mouth of messengers can today be reduced to pixels and sent rocketing through cyberspace. Is the need for privacy and discretion any different? Are the consequences of indiscretion any greater?[8]

Whatever the answers to those musings, I conclude that, pursuant to the provisions of Florida's Fiduciary Access to Digital Assets Act, Isabel is entitled to custody of the contents of Cecilia's email accounts. Isabel's credentials as personal representative were in order at the time the demand for disclosure was made to "Yahoo!" and that demand was accompanied by the requisite court order. Respondents' chief complaint is that they were not given notice of Isabel's application for that court order, and that, had they been given notice, they would have objected. The failure of notice is unfortunate, but unintentional and inconsequential. Apparently the Office of the Clerk of Court, whose workload is overwhelming, neglected to make a timely correction to the service list in this case, which correction would have reflected the appearance of Respondents' present counsel. The Clerk's Office is not to be blamed for this, and counsel for Isabel is certainly not to be blamed for it. It was an accident.

And it made no difference. Had Mr. Piccolo and Oxen objected, I would have told them then what I tell them now: They are utterly without standing to make their objection. As discussed *supra,* the common law empowers no third party to assert the privacy rights of a decedent, and neither does the Act.

A failure of notice due to a recent change in counsel is always unfortunate and usually remediable. Here, its only consequence is a very heartfelt suspicion on the part of counsel for Respondents that counsel for Petitioner deliberately manipulated the litigation to deprive them of notice; and an equally heartfelt indignation on the part of counsel for Petitioners that counsel for Respondents would entertain such a suspicion. As a chancellor in equity I am clothed with ample and more than ample power to deny the cross-motions presently before me, and I do so; but even I lack a balm for feelings so severely wounded as those of all counsel here. "Therein the patient/Must minister to himself." Wm. Shakespeare, *MacBeth* Act V, sc. 3.

IV. Conclusion

Respondents' *Motion for Sanctions Against Petitioner and Her Counsel* (DE 534) is denied. Petitioner's *Response and Motion for Attorneys' Fees* (DE 537) is denied.

---

[1]In the interest of clarity, the personal representative is referred to herein as "Isabel," and the decedent as "Cecilia." No disrespect is intended by the use of given names.

[2]*See Mtn* at p. 8 (attorneys' fees and costs, additional monetary sanctions, abating the probate administration, requiring that Isabel and her lawyers "purge and delete all copies of the" emails and related matter, barring Isabel and her lawyers from making any litigation use of the emails and related matter); *id.* at p. 22 ("making detailed findings of . . . bad faith," attorneys' fees and costs, purging the email-related matter, revoking the letters of administration issued to Isabel).

[3]There are narrow exceptions to this rule, *see, e.g., Singleton v. Wullf,* 428 U.S. 106 (1976), but there can be no serious suggestion that those exceptions are applicable here, and Mr. Piccolo and Oxen make no such suggestion.

[4]*See* https://en.wikipedia.org/wiki/Jesse_James

[5]I recognize that the Florida Constitution, at Art. I § 23, captioned "Right of privacy," provides that, "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." But this constitutional provision has no applicability here, and Respondents, to their credit, do not suggest that it does. First, any invasion of privacy worked here was worked by one private party upon another. There is no allegation of "governmental intrusion." Second, no judge has yet held that a decedent is a "natural person" for this purpose, *cf. Infante v. Dignan,* 782 F.Supp. 2d. 32, 38 (W.D.N.Y. 2011) (it is "well settled that a deceased person has no constitutional rights"), and I decline to become the first. *See gen'ly Weaver v. Myers,* 170 So. 3d 873 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1676f].

[6]There are no reported opinions under this relatively new statutory scheme, so we write on a blank slate. Section 740.003 could be read to provide that an email account-holder, by means of an "online tool" or otherwise, could forbid in perpetuity the disclosure of the contents of his or her email account. But probate proceedings are proceedings in equity, and a court of equity exercises a capacious power to invigilate the disposition of an estate. Franz Kafka famously instructed his friend and executor Max Brod to destroy all of Kafka's papers after his death. Fortunately for modern literature, Brod ignored his instructions and published Kafka's oeuvre. Had Fla. Stat. § 740.003 been available to Kafka, would it have trumped the power of a chancellor in equity to grant a motion brought by Brod to publish, rather than burn, Kafka's writings? Such analogies as we can draw upon suggest the contrary, *viz.,* suggest that if an estate asset represents a contribution to the world of arts and letters the court has power to countermand the wishes of the decedent and order that the demised writings, paintings, compositions, *etc.,* be made public, for the betterment of both the estate and society at large. *See gen'ly Eyerman v. Mercantile Trust Co.,* 524 S.W. 2d 210 (Mo. App. 1975) (court prohibited the destruction of testatrix's house as ordered in her will because of the exceptional architectural significance of the house).

But shame on me for opinion-padding. There is no suggestion whatever that anything in Cecilia's emails has enduring literary, artistic, cultural, or other like-kind value. The present donnybrook over the content, and the possession, of her emails is about litigation advantage, nothing more.

[7]*See, e.g.,* http://www.bbc.co.uk/history/british/empire_seapower/nelson_emma_01.shtml.

[8]That the legal principles that governed a personal representative's access to, and power to dispose of, estate assets prior to the invention of digital assets are, for the most part, the same principles that the Fiduciary Access to Digital Assets Act applies to a personal representative's access to, and power to dispose of, digital assets—that the legislature has, in effect, put new wine into old bottles—does not mean that there was no reason for the enactment of the statutory scheme. The Yahoos of the world—the large corporations that host email accounts, social media, and the like—no doubt felt that, unless they were given specific statutory conditions precedent to the disclosure to a personal representative of a decedent's digital assets, they would be exposed to civil liability and endless litigation every time they were called upon to disclose (or to refuse to disclose) such assets. The statutory scheme provides those specific conditions precedent, and provides a safe harbor for the corporation that complies with them. *See*

Fla. Stat. § 740.06 ("Custodian compliance and immunity").

* * *

Criminal law—Sexual battery on child under age 12 by person 18 or older—Evidence—Recorded forensic interview of victim—State's motion for protective order requiring defense to return recorded victim interview to state at conclusion of criminal case is granted—Although risk of disclosure of recording by public defender's office is low, potential harm to victim in event of disclosure is very high, and burden on defense of returning recording is very low

THE STATE OF FLORIDA, v. LUIS ENRIQUE JUARBE, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F21-7195, Section F014. October 12, 2021. Robert T. Watson, Judge. Counsel: Natalie Snyder and Laura Adams, State Attorney's Office, for State. Micki Bloom, Public Defender's Office, for Defendant.

AMENDED ORDER
ON STATE'S MOTION FOR PROTECTIVE ORDER[1]

Defendant Luis Enrique Juarbe was charged by Information on or about May 20, 2021 with being a person 18 years of age or older who committed sexual battery on a person less than 12 years of age, in violation of section 794.011(2)(a) of the Florida Statutes. An audio- and video-recorded forensic interview of the alleged victim was conducted prior to charges being filed. The State intends to provide a copy of the recording to the defense as discovery, but asks the Court to require the defense to return it to the State at the conclusion of this case.[2] The Court has reviewed the entire recording in chambers and has heard argument of the parties on two occasions.

The Parties' Positions

The defense opposes the request as unnecessary. It argues that the recording should be handled as any other item of discovery and maintained in the defense case file at the end of the case.

At the first hearing on July 7, 2021, the State initially provided no authority in support of its request other than, essentially, "this is the way we always do it." When pressed by the Court, the prosecutor cited sections 92.55 and 92.56 of the Florida Statutes. The plain language of those sections, however, does not appear to govern the State's request, and the State has provided no authority showing that those sections are applicable.

At the second hearing a week later, the State presented a witness to explain the history of the protection provided for the recordings and argued that the risk of inadvertent disclosure, even if small, justifies the relief sought. Because the damage to a minor victim from disclosure would be great, the State finds the protective measure is warranted.

Protective Order: Relevant Legal Authority

Turning now to the substantive legal issue at hand, the provisions that appear to govern are Rule 3.220(e) and (i).

Rule 3.220(e) provides:

"Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party."

Based on witness testimony and representations of counsel for both parties, the Court finds that there is not such a substantial risk from the disclosure and non-return of the forensic interview recording. There is no evidence of past inadvertent disclosure of such a recording by the Public Defender's Office or other basis to find a substantial risk of harm of any sort to the alleged child victim in this case if the Court were not to order the defense to return to the State at the conclusion of this case the copy of the recording.

Rule 3.220(1) provides in relevant part:

"Protective Orders. (1) Motion to Restrict Disclosure of Matters. On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery . . . or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy . . . ."

A good cause is a "legally sufficient reason," *Black's Law Dictionary* (9th ed. 2009), or "a substantial reason . . . or a cause moving the court to its conclusion, not arbitrary or contrary to all the evidence . . . ." *State v. Boyd,* 846 So. 2d 458, 460 (Fla. 2003) [28 Fla. L. Weekly S320b]. "The determination of good cause is based on the peculiar facts and circumstances of each case. Obviously the trial court is in the best position to weigh the equities involved . . . ." *Id.* And generally, "[m]atters relating to granting or limiting discovery rest within the sound discretion of the trial judge." *Woodson v. State,* 739 So. 2d 1210, 1211 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D1810a], *rev. denied,* 749 So. 2d 505 (Fla. 1999).

Legal Analysis[3]

In determining whether good cause exists in this case for the relief sought, the Court finds guidance in a modified version of the Posner Rule. Named for retired judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, the rule "is intended . . . to assist analysis by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors." *American Hosp. Supply Corp. v. Hospital Products Ltd,* 780 F.2d 589, 593 (7th Cir. 1986). As applicable to this request for a protective order, the Court considers: (1) the risk of disclosure of the recording if the protective order requiring its return to the State at the end of the case is not entered; (2) the harm to the alleged minor victim if a disclosure were to occur; and (3) the burden or harm to the defense if the protective order is entered. *See id.* at 594 (setting forth similar considerations in the preliminary injunction context). "The court undertakes these inquiries to help it figure out whether granting the [protective order] would be the error-minimizing course of action, which depends on the probability [of disclosure] and on the costs to the [victim], the defendant [defense], or others of granting or denying the [protective order]." *Id.*

Based on the record before it, the Court finds as to these factors:

(1) The risk of disclosure of the recording is low. Again, there is no evidence of past inadvertent disclosure of such a recording by the Public Defender's Office or other basis to find but a low risk of disclosure if the Court were not to order the defense to return to the State at the conclusion of this case the copy of the recording.

(2) The potential harm to the alleged minor victim in the event of a disclosure is very high. The Court has reviewed the entire forensic interview recording in chambers. The child interviewed discusses in graphic detail the sexual battery and other abuse/attempted abuse allegedly perpetrated by the defendant. The Court finds, based on its experience as well as common sense, that public availability of such a recording at any time would reasonably be expected not only to embarrass the alleged child victim, but re-traumatize and revictimize him/her.

Rule 3.220(b)(1) recognizes and addresses this potential harm with disclosure of material which "portrays sexual performance by a child or constitutes child pornography" by completely exempting it from production to the defense. Though the potential harm from disclosure of such material is arguably greater (as is the protection the rule affords) than that of the recording at issue here, the rule supports the conclusion that substantial harm would likely result from disclosure of the interview (with its graphic verbal description of alleged sexual abuse) in this case.

Indeed, even disclosure of just an alleged victim's identity can be harmful. *See, e.g., Clerk of Ct. & Comptroller of Collier Cnty. v. Doe,* 292 So. 3d 1254, 1260 (Fla. 2d DCA 2020) [45 Fla. L. Weekly

D737b] (mentioning, in a case about the alleged negligent disclosure of merely the victim's identity, the "seriousness of the harm asserted by Jane Doe," and the "great importance of protecting victims of crimes"). *See also* § 92.56 (2), Fla. Stat. ("defendant [charged with child abuse, aggravated child abuse, or sexual performance by a child] may not disclose the victim's identity to any person other than the defendant's attorney or any other person directly involved in the preparation of the defense").

(3) The burden to the defense of returning to the State the recording at the end of the case is small. The State has assured the Court and the defense that it will securely maintain the recording of the interview and will make it available to the defense if the need arises after the conclusion of this case, such as in the event of a post-conviction motion. The only burden the defense has claimed, other than simply not being allowed to treat this item of discovery the same way it treats all other items of discovery, is the risk that the Assistant Public Defender(s) handling this case may forget or otherwise inadvertently fail to comply with the protective order, not return the recording to the State at the end of the case, and risk being found in contempt of court. This argument merits almost no weight, as the Court is highly confident that the lead defense attorney, who has demonstrated thorough preparation, diligence, and professionalism in her work before the Court, will have little difficulty complying with a protective order (as will any co-counsel as an officer of the court).

Balancing these factors—a low risk of disclosure without a protective order, but great potential damage if such disclosure occurs, and a very low burden to the defense of such a protective order—the Court finds the balance favors granting the relief sought and finds good cause to restrict the disclosure of the recording of the child forensic interview by requiring the defense to return to the State at the conclusion of this case the copy of the recording.[4]

Conclusion

Therefore, it is ORDERED and ADJUDGED that the State's Motion for Protective Order is GRANTED. The defense SHALL RETURN to the State the forensic interview recording produced in this case no later than 15 days after conclusion of this case, which shall mean the later of: (1) the entry of a Judgment of Acquittal, (2) the entry of a Judgment and Sentence, (3) if Defendant appeals, the entry of a Mandate by the Court of Appeal affirming the conviction and sentence, (4) if Defendant seeks review by the Florida Supreme Court or the United States Supreme Court, whenever review is denied or, if granted, a mandate issued by such higher court affirming the conviction and sentence, or (5) if a higher court vacates the conviction and/or sentence, whenever any of items (1)-(4) above subsequently occurs.

[1]The Cautionary Advisement to the State & Order on State's Motion for Protective Order entered on August 19, 2021 is hereby withdrawn, with this Amended Order entered in its place. There is no change to the content of this Order regarding the protective order, set forth beginning halfway into page two.

[2]The parties agree, and the Court hereby orders, that: (1) the recording must remain in the actual or constructive possession, custody, and control of defense counsel at all times; (2) no reproduction of the recording of any type may be made by defense counsel, any member of the defense team, or anyone else; (3) the recording may not be viewed/heard by anyone other than the Defendant, defense counsel (including co-counsel), and any expert retained by the defense; and (4) no transcript of the recording, or portion thereof, may be prepared (other than typed or handwritten notes, verbatim or otherwise, prepared by defense counsel).

[3]The Court sets forth its analysis in this written order instead of ruling from the bench in the often-rapid hustle and bustle of daily morning proceedings because it believes thoughtful, considered, reasoned, and transparent decisions on important issues such as the one raised here are critical to a healthy, respectable, and respected system of justice and best serve the parties, victims, lawyers, and the public.

[4]The Court notes that the State of Washington recently enacted a law that flips the burden, mandating, absent a finding of good cause for not doing so, a protective order for audio and video recordings of child forensic interviews, including a requirement that "upon termination of representation or upon disposition of the matter at the trial court level, attorneys and other custodians of recordings promptly return all copies of the recording." Wash. Rev. Code Ann. § 26.44.186 (West 2018) (eff. Mar. 22, 2018). The law imposes a civil penalty of up to ten thousand dollars for violation of such a protective order, in addition to any other appropriate sanction by the court. *Id*. While obviously not binding on this Florida court, this recent Washington legislative (and executive) determination provides additional support for this court's finding on potential harm from disclosure, as well as the ultimate outcome after balancing harm and the other relevant factors.

* * *

Corporations—Shareholder derivative actions—Settlement—Pursuant to binding precedent of *Batur v. Signature Properties of Nw. Fla., Inc.*, proposed settlement of shareholder derivative suit by corporation is examined under both section 617.07401(3) and section 617.07401(4)—Criteria of section 617.07401(3) are satisfied where special litigation committee was independent, acted in good faith, and conducted reasonable investigation of claims before recommending settlement—Settlement meets fairness criterion of section 617.07401(4)—Motion to approve settlement is granted, and derivative claims are dismissed with prejudice

THOMAS E. LAURIA, et al., Plaintiffs, v. FISHER ISLAND COMMUNITY ASSOCIATION, INC., et. al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Complex Business Litigation. Case No. 2020-20499 CA 01. August 4, 2021. Michael A. Hanzman, Judge. Counsel: Alan J. Kluger and Steve Silverman, Kluger Kaplan Silverman Katzen & Levine, P.L., Miami, for Plaintiffs, Jeff Horowitz, Thomas A. Lauria and George D. Perlman. Carl Goldfarb and Sashi C. Bach, Boies Schiller Flexner, LLP, Ft. Lauderdale for Defendant Fisher Island Community Association, Inc. Joshua T. Fordin, John O'Sullivan, and Jason Sternberg, Quinn Emanuel Urquhart & Sullivan LLP, Miami, for Defendants Fisher Island Holdings, Inc., and Par 7, LLC. H. Eugene Lindsey, III, Katz Barron, Coral Gables, for Defendant, Fisher Island Club, Inc.

FINAL JUDGMENT GRANTING NOMINAL DEFENDANT FISHER ISLAND COMMUNITY ASSOCIATION, INC'S MOTION TO ADOPT THE SETTLEMENT AND DISMISSING ACTION WITH PREJUDICE[1]

Before the Court is Nominal Defendant Fisher Island Community Association's ("FICA") motion to approve a proposed settlement and dismiss this derivative action (the "Motion"). Defendants Fisher Island Holdings, LLC, and Par 7, LLC (collectively, the "Developer") filed a Notice of Joinder in and Adoption of the Motion on June 28, 2021. This Court, having considered the arguments of the parties and the record evidence introduced during a three-day evidentiary hearing, hereby enters this Order granting the Motion, entering final approval of the settlement (the "Settlement") between FICA and the Developer, and dismissing this action with prejudice.

BACKGROUND

Plaintiff, Thomas Lauria, Jeff Horowitz and George D. Perlman, ("Plaintiffs") bring this action in a derivative capacity advancing claims that belong solely to FICA. *See Rappaport v. Scherr,* 46 Fla. L. Weekly D1231b (Fla. 3d DCA May 26, 2021) ("As a general rule, an action to enforce corporate rights or to redress injuries to the corporation cannot be maintained by a stockholder in his own name or in the name of the corporation, but must be brought by, and in the name of the corporation itself.") (quoting *James Talcott, Inc. v. McDowell,* 148 So. 2d 36, 37 (Fla. 3d DCA 1962)). Given that plaintiffs in a derivative case are advancing claims belonging **solely** to the corporation, the corporate directors and the corporation itself are authorized statutorily to end those claims in one of two ways. § 617.07401, Fla. Stat.

First, the corporation has the right, among others, to appoint independent directors or a committee of two or more independent directors to investigate the case and petition the Court to discontinue the proceedings if the corporation believes that "the maintenance of the derivative suit is not in the best interest of the corporation." § 617.07401(3). Second, corporate directors possess inherent authority to compromise (i.e., settle) derivative claims in a manner they believe is in the best interest of the entity and its members. § 617.07401(4);

Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49, 52 (5th Cir. 1980) ("[C]orporate directors possess inherent authority to compromise such suits."); *Salovaara v. Jackson Nat. Life Ins. Co.,* 246 F.3d 289, 296 (3d Cir. 2001) ("A corporation may enter into a settlement despite the existence of a derivative action when doing so is in the corporation's best interests."); *Star v. TI Oldfield Dev., LLC,* 962 F.3d 117 (4th Cir. 2020) (applying the *Salovaara* framework and holding that the Board's settlement was in the best interests of the company); *see also Rappaport,* 2021 WL 2125129, at *3 (holding that the corporation has the right "to take over the litigation" in the pre-suit demand context) (quoting *Kamen v. Kemper Fin. Services, Inc.,* 500 U.S. 90, 101 (1991)).

That means that while members of a corporation, shareholders, *et cetera* have the right to advance derivative claims when they feel the corporation has claims that are not being attended to, they do so with the knowledge that the entity on which behalf's the claims are brought has the right to end that litigation, as long as it does so consistent with Florida Statutes § 617.01401.

The parties dispute whether this motion is governed by subsection (3) or subsection (4) of Florida Statute Section 617.07401. The statute is by no means a legislative model of clarity, but in reading of the statute, cohesively as a whole, and *in pari materia,* the Court finds that subsection 617.07401(3) applies only when a corporation seeks **discontinuance** of a derivative case because it has determined that the litigation is not in its best interest. This subsection makes no mention of "settlement" at all, or a court's need to determine whether any such settlement is fair and reasonable. That is so because, in this Court's view, this subsection only addresses circumstances where the entity seeks to **discontinue** a derivative case as not being in its best interests. And because this subsection addresses circumstances where the entity seeks to **discontinue** litigation, it imposes the requirement that those recommending this course of action be independent, and that they conduct a reasonable investigation in good faith. It makes sense that the entity seeking to **discontinue** a case clear these hurdles, as it is recommending the abandonment of claims.

Subsection 617.07401(4), on the other hand, specifically addresses a situation like this where the corporation decides to **settle** the case. Subsection 617.07401(4) requires no more than court approval and notice to members of the corporation when appropriate. *Id.* The sole focus of this subsection, which expressly addresses settlements, is on the fairness of the settlement itself, not the process leading up to it. The Court is simply called upon to determine whether the actual bargain struck is fair, reasonable and in the best interest of the entity.

Plaintiffs nonetheless cite *Batur v. Signature Properties of Nw. Fla., Inc.,* 903 So. 2d 985 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D1285b], a decision that either holds (or at least suggests in *dicta)* that subsection 617.07401(3) controls this inquiry. In *Batur,* the corporation contended that subsection (4) rather than subsection (3) applied, but the court there rejected the argument as untimely because the corporation "made no mention whatsoever of subsection 607.07401(4) in the proceedings below." *Id.* at 994. The court also stated that subsection 617.07401(3) governed, but this statement appears to be *dicta* because it was not necessary to the court's holding.

While the Court disagrees with *Batur,* absent contrary precedent from another district court of appeal, it is bound by that decision. *See, e.g., Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992) (absent "interdistrict conflict, district court decisions bind all Florida trial courts"). The Court will therefore follow *Batur* and decide this case under subsection 617.07401(3). Pursuant to 617.07401(4), it will also address whether the settlement is fair, reasonable and in the best interest of FICA, thereby covering all bases.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Under Subsection 617.07401(3), the Court Finds the Committee was Independent, Acted in Good Faith, and Conducted a Reasonable Investigation**

If subsection (3) applies, it imposes upon the entity seeking approval of a settlement, in this case FICA, the burden of proving independence, the good faith of the group making the determination, and the reasonableness of the investigation. § 617.07401(3). Absent any legislative indication to the contrary, the Court finds that burden is one of the preponderance of the evidence. *See Klein ex rel. Klein v. FPL Grp., Inc.,* No. 02-cv-20170, 2004 WL 302292, at *4 (S.D. Fla. Feb. 5, 2004) [17 Fla. L. Weekly Fed. D330a] (applying Florida law and the preponderance of the evidence standard).

Two overarching principles have guided the Court's consideration. First, the law encourages settlement in all contexts and looks upon settlement of litigation with favor. *See State Farm Mut. Auto. Ins. Co. v. InterAmerican Car Rental, Inc.,* 781 So. 2d 500, 501-02 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D905b] (per curiam); *see also Hanson v. Maxfield,* 23 So. 3d 736, 739 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2246a] ("Settlements are 'highly favored and will be enforced whenever possible.' ") (quoting *Robbie v. City of Miami,* 469 So. 2d 1384, 1385 (Fla. 1985)); *Casablanca Condo. Ass'n of Miami Beach v. Crescent Heights XLII, Inc.,* 819 So. 2d 921 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1406b] (reversing trial court's order setting aside a valid and enforceable settlement agreement). Second, parties are free, and in fact have a constitutional right to, enter into contracts so long as they are not contrary to law or public policy. *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.,* 145 So. 3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]. A settlement agreement is a contract, plain and simple, and FICA had the constitutional right to enter into a contract to settle this derivative action. *Lazzaro v. Miller & Solomon Gen. Contractors, Inc.,* 48 So. 3d 974, 975 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2635d]. In fact, the **only** reason that this settlement is before the Court for approval is because before the parties entered into a settlement agreement, the Plaintiffs initiated a derivative action. Therefore, FICA's constitutional right to settle this case is subject to review under § 617.07401.

a. The Special Litigation Committee Was Independent

The Court applies what Judge Gold described in the *Klein* case, which the Derivative Plaintiffs rely upon, as a "totality of the circumstances" test to determine whether the members of this Special Litigation Committee (the "SLC") were in a position to base their decision on the merits rather than being governed by extraneous considerations and influences. *Klein ex rel. Klein v. FPL Grp., Inc.,* 2004 WL 302292, at *18 (S.D. Fla. Feb. 5, 2004) [17 Fla. L. Weekly Fed. D330a] (turning to Delaware case law to interpret Florida's "independence" standard).[2] That test requires the Court look at (1) whether the member is a defendant who has potential liability, (2) their participation or approval in the wrongdoing, (3) past or present dealings with the corporation, (4) past or present business or social dealings with the individual defendants, (5) the number of the committee, and (6) whether the committee has any structural bias. *Klein,* 2004 WL 302292 at *18.

The Court finds as a matter of fact that the members of the SLC, who volunteered their time and spent countless hours reviewing the settlement, speaking to potential witnesses, evaluating the merits of the claims, and doing what they felt was best for the Fisher Island community, acted completely independently and in good faith. And Plaintiffs claim to contrary is all sizzle and very little steak.

As for Mr. Ferraro, the fact that he may have received a case of wine from the Developer, or offered the Developer Tour de France tickets, are completely insignificant in the scope of this case. Mr.

Ferraro, a highly respected member of the bar, lives in this community, and this Court finds that he at all times acted in its best interest, without conflict or any dual allegiance. *See Kaplan v. Wyatt,* 499 A.2d 1184, 1189 (Del. 1985) (affirming the independence of an SLC when its members based their "decision on the merits of the issue rather than being governed by extraneous considerations or influences").

With respect to Mr. Drury, the fact that he attempted to acquire property by offering to pay the Developer, in part, through the marketing and promotional activities of his wife, who is a high-end and well-paid model, is simply irrelevant. He had every right to offer her marketing and promotional services as consideration (or partial payment) for a condominium unit. The Court certainly does not think that the fact that he may have done that in the past bears on his independence or suggests that he was somehow biased or under the influence of the Developer in serving his role on the SLC. The Court finds that Mr. Drury selflessly donated his time and energy to assess this settlement, carefully weighing its pros and cons, and he did what he believed was best for the members of the community that he was charged with representing.

With regard to Mr. Smith, there has been virtually no discussion about his alleged lack of independence because there were no facts that could bear on such a discussion. He was completely independent, completely competent, and like Mr. Ferraro and Mr. Drury, devoted his time and energies to evaluating the Settlement and making a determination as to whether it is in the best interest of the community.

The Court finds the testimony of all three members of the SLC to be credible. *See, e.g.,* July 23, 2021 Hr'g Tr. 249:25-250:6 (Ferraro stating he was "[t]otally objective and independent" in evaluating and negotiating the settlement); July 26, 2021 Hr'g Tr. 101:7-14, 166:10-22 (Drury confirming that the Developer is not the source of his business and stating he would "absolutely" be able to litigate when it was in the best interest of the Island); *Id.* at 206:20-207:11 (Smith stating he does not have any business or social relationship with the Developer).

Again, the Court finds that the members of this SLC were completely independent. None of them were under any influence of the Developer in any way, shape, or form. Whatever past business dealings they have had in buying their respective condominiums, or, in Mr. Drury's case, acting as a broker for sale of new units on the Island, do not impugn their independence, integrity, or commitment one iota. The Court also notes in a context of an entity like FICA, a not-for-profit corporation representing a residential community, it is virtually inevitable that the members of any SLC drawn from the members of that community, will necessarily have views on issues that affect the community, such as the issues raised in this litigation. The reality does not undermine their independence. *See Sarnacki v. Golden,* 778 F.3d 217, 223 (1st Cir. 2015) (applying Delaware law) (finding the SLC members were independent despite their previous public statements and noting the fact that they had "preliminary views . . . not surprising and d[id] not by itself constitute prejudgment of the issue"); *In re Life Partners Holdings, Inc.,* No. DR-11-CV-43-AM, 2015 WL 8523103, at *21 (W.D. Tex. Nov. 9, 2015) (holding that "skepticism is not bad faith" and finding that the directors were independent even though the "Directors were initially skeptical toward the allegations because they believed they lacked adequate supporting evidence and were too speculative"); *Borchardt v. King,* No. *1*:10CV261, 2015 WL 410408, at *8 (M.D.N.C. Jan. 29, 2015) (holding that notwithstanding an SLC's prior vote to reject the demand letter, the SLC directors' "behavior [was] consistent with a duty to carefully and open-mindedly investigate the alleged wrongdoing"); *Clifford v. Ghadrdan,* No. 1:12-CV-3683-SCJ, 2014 WL 11829337, at *7 (N.D. Ga. Mar. 5, 2014) (holding that "there [was] nothing to indicate that [a director's] initial opinion regarding Plaintiffs' claims was entrenched or that it prevented him from conducting an objective investigation of Plaintiffs' claims").[3]

b. The Special Litigation Committee Conducted a Reasonable Investigation in Good Faith

The Court finds that the SLC in good faith conducted a reasonable investigation. Nothing about this SLC was untoward or in the least bit questionable. The Court does not believe their integrity or *bona fides* can be subjected to serious question. A reasonable investigation does not mean that the SLC had to try the underlying cases that are in dispute or weigh every fact and dig into the weeds on every potential claim and defense. *See In re Sunbeam Securities Litigation,* 176 F.Supp.2d 1323, 1329 (S.D. Fla. 2001) (stating that in the class action context the court "should not try the case on the merits nor make a proponent of a proposed settlement justify each term of a settlement against the hypothetical or speculative measure of what concessions might have been gained" (internal quotation marks omitted)). Rather, a reasonable investigation required the committee members to weigh the benefits and detriments of the settlement agreement as a whole and determine whether or not the proposed settlement was a reasonable resolution of the pending and potential claims. To do so, the SLC had to investigate claims that are being released and weigh them against the benefits FICA is receiving under the settlement.

The Court finds that the SLC did exactly that and did a more thorough job than would be required by law. They met with capable counsel that was retained to represent their interests, consulted with those lawyers, familiarized themselves with the facts and circumstances of the underlying claims that were being compromised (including this claim), weighed the potential upside of the claims that were being compromised against the benefits of the settlement, and conducted a thorough and more than reasonable investigation before they made a decision to recommend this Settlement. The settlement also was negotiated with the assistance of an experienced mediator and without a hint of collusion. The Court finds that the SLC has acted in good faith, independently, and conducted a more than reasonable investigation before recommending this settlement.

Assuming subsection 617.07401(3) applies (and this court again believes it does not), the Court finds that FICA and the members of the SLC have carried the burden of proof imposed by this statute.

2. **The Settlement Passes a Subsection 617.07401(4) Fairness Analysis**

Turning to the settlement itself, if the Court were conducting a fairness analysis under subsection 617.07401(4), it finds this settlement agreement passes that test with flying colors. *See Hardwicke Companies, Inc. v. Freed,* 299 So. 2d 116, 118 (Fla. 2d DCA 1974) (holding that proposed settlements must meet the "statutory requirement of fairness and reasonableness"); *Esformes v. Holtz,* 1997 WL 34861313 (Fla. 11th Cir. Ct. Oct. 24, 1997) (same). Florida courts weigh the fairness and reasonableness of the proposed settlement by considering "the validity of the minority shareholders' claims, possible defenses to such claims, the probability of success if the action were pursued to final judgment, the complexity, expense and likely duration of the litigation, and the benefit to the corporation." *Id.*

There are three claims being compromised.

a. Seawall Claim

The first is what the Court is going to refer to as the "seawall claim," *Ashkin et al. v. Ryan, et al.,* No. 2019-0281242-CA-01. There are a number of problems with that claim, most notably a key statute governing not-for-profit corporations such as FICA is very limited in what constitutes a conflict of interest for a member of a Board of Directors. *See* § 617.0832, Fla. Stat. The Court notes that there is a dispute in the seawall case whether the conflict question is governed by Chapter 617, or by Chapter 720, which was enacted after FICA was

incorporated and does not generally apply retroactively. That issue has not been decided.

The plaintiffs in the seawall matter also face a standing impediment. While the Derivative Plaintiffs argue that one director should be entitled to sue others for declaratory relief in the context of a purported conflict, they rely on a single Delaware case for that point. No Florida precedent has authorized that cause of action, and it is an issue of first impression in Florida whether such a cause of action exists. Assuming the standing hurdle is overcome, the substantive question that is still unresolved is whether there was a conflict at all that would disqualify the Developer-appointed directors of FICA's Board from voting.

In the not-for-profit corporation context here, even if the Derivative Plaintiffs overcome that hurdle, and a court were to rule that these Developer-appointed directors had a statutory obligation to abstain, the seawall replacement is almost complete. So assuming the plaintiffs prevail in their current declaratory judgment action, the issue of damages would still have to be resolved in an arbitration through a derivative action on behalf of FICA. Whether FICA is entitled to damages in the form of a $2 million delta between the batter pile system that was put in and the estimate for the cost of putting in a tieback seawall, which was lower also is debatable.

Of course, in that "next" case the Developer would argue that the Board acted reasonably pursuant to advice of counsel, FICA Ex. 8, that FICA and the community also received a benefit from the more expensive method of installation, which permits construction of an underground garage and allows the building to be set back further form the road. It is doubtful that an arbitrator would award the whole $2 million delta to FICA; it would probably be more of a Solomon-like decision giving part of it. The Court thinks the value of that claim at a million dollars is generous, assuming plaintiffs in that action cleared all the hurdles in their path.

b. Transportation Invoicing Claim

Secondly, there is the transportation invoicing claim. The Court has reviewed Judge Shepard's 2017 Final Arbitration Award and Order on FICA's Motion for Clarification. One thing is clear: FICA's unjust enrichment claim was denied because FICA had never invoiced the Developer for its prior use of the barges for construction projects. *See* Pls.' Ex. 1, Oct. 16, 2017 Final Arbitration Award 36-38 and Nov. 14, 2017 Arbitration Order 2. Judge Shepard did not say that merely sending an invoice would result in a $3 million award; he stated that the issue was not properly before him because no invoice had been sent. *Id.* at Nov. 14, 2017 Arbitration Order 2.

Judge Shepard also pointed out, and the Court agrees, that the governing documents give FICA the discretion to use a number of methods to bill for that transportation per person, per route, whatever it may be. *Id.* (stating that "[t]he owner of the Transportation System has the discretion to levy a charge, which it may or may not exercise"). But Judge Shepard did not suggest, nor in this Court's opinion could he reasonably have suggested, that the governing documents would give FICA the ability to discriminate in the charges it imposes for use of the Fisher Island transportation system. The Developer owns units on Fisher Island, whether he lives there or not; he is an owner, and he pays FICA dues like every other owner. If he is going to be charged for transporting construction materials on the ferries serving the island, the Court thinks there is a very credible argument that could be made in response to any arbitration, should it be brought, that others who use the ferries to transport construction materials, whether individual unit owners who are remodeling or building out their units, or condominium associations that are making repairs or changes to their building, or the Club, should be charged similarly. In this Court's view, FICA does not have the authority to selectively charge individuals and entities who are using the ferries for commercial purposes, depending upon who it is that is using the system for those purposes.

This claim is, to say the least, extremely defensible, and losing it would put FICA on the hook for attorney's fees under the prevailing party fee provision in the 2007 global settlement agreement. So the SLC's decision to compromise this hypothetical transportation claim is not problematic. The Court finds Mr. Smith's testimony credible that at best it is a $500,000 to $750,000 claim. But even if the Court were to credit the Derivative Plaintiffs' version and value the claim in the $2 to $3 million range, it still would not affect the Court's opinion that this settlement is fair, reasonable and in the best interest of FICA.

c. Alleged Unauthorized Modification of 2007 Settlement Agreement

The third claim brought up is the claim that the Developer lacked authority, through the 2020 Agreement with the Fisher Island Club, Inc. (the "Club"), to modify the 2007 covenant not to build above 75 feet. That claim has so many problems that the Court does not know where to begin. The first problem is that if the Developer retracted from that obligation, he did so pursuant to an agreement with the Club where he provided consideration. Parties can agree to one thing and subsequently agree to something totally different provided there is consideration on both sides and mutuality in that later agreement. *St. Joe Corp. v. McIver,* 875 So. 2d 375, 381 (Fla. 2004) [29 Fla. L. Weekly S53a] ("It is well established that the parties to a contract can discharge or modify the contract, however made or evidenced, through a subsequent agreement.")

In the 2020 Agreement between the Developer and the Club, each party provided consideration to the other, there was mutuality, and the parties accordingly were free to modify the Developer's undertakings in the Amended and Restated Guaranty Agreement, which was an exhibit to the 2007 Global Settlement Agreement. Furthermore, the Court could not deny the Developer the benefit of its bargain under the 2020 Agreement, while at the same time allow the club to retain the **extensive** benefits it received from the Developer under the same contract. Thus, this claim, which attempts to prevent the Developer from building over 75 feet, places the entire 2020 Agreement in jeopardy, something that no party—not even the Derivative Plaintiffs—want to see happen.

d. Future Removal of Parcel 7 Ramp

That brings the Court to the real issue here and the concern of the Derivative Plaintiffs: whether or not this Settlement results in a safety hazard to the members of the Island. The Court found all three Derivative Plaintiffs to be credible and that each is sincerely looking out for the best interest of the Fisher Island community. But the only competent, substantial expert testimony in the record regarding safety is from an expert proffered by FICA, who testified convincingly that eliminating the auxiliary or emergency ramp will not present any danger or inconvenience to the residents of Fisher Island once the renovations on the ferry landings on parcels 6 and 8 are done and those ramps, with new state-of-the-art hydraulic ramp systems, are open for continuous and permanent use. His analysis included both a comparison of the ferry system on Fisher Island to the ferry systems servicing Martha's Vineyard, Nantucket, Block Island, Catalina Island, and also a quantitative study of how long it would take the residents of Fisher Island to evacuate under different scenarios. He also analyzed whether in case of an emergency, residents of Fisher Island could board ferries without their vehicles from locations other than the landings on Parcels 6 and 8, and determined they could.

The expert, Cameron Clark, is EVP and Chief Strategy & Business Development Officer of Hornblower Groups, a diverse maritime company with global operations including more than 200 vessels making more than 35 million passenger trips per year. In his testimony, Mr. Clark concluded: "It is my expert opinion that the upgraded ferry landings on Parcel 6 and 8, with larger multi-use vessels,

will allow for the elimination of the auxiliary landing site at Parcel 7, without detrimental impact on the residents and in fact will exceed the level of historical services and provide residents with a convenient and safe service." Ex. FICA 7, Cameron Clark Expert Witness Dep. 72:10-20. The Court therefore finds that the safety concerns of the derivative Plaintiffs, *while sincere,* do not justify a rejection of this settlement.

CONCLUSION

People who live in a condominium or residential community with some form of joint ownership necessarily relinquish certain rights that would be theirs if they owned a single-family home. Such a community is a "little democratic sub society," *Woodside Vill. Condo. Ass'n, Inc. v. Jahren,* 806 So. 2d 452 (Fla. 2002) [27 Fla. L. Weekly S34a], and many times people have to abide by the vote and decisions made by their electoral officers and directors even though they do not agree with those decisions. *See, e.g., White Egret Condo., Inc. v. Franklin,* 379 So. 2d 346 (Fla. 1979) ("inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property"). Here, the SLC had the authority to enter into this settlement. For any FICA members who are unhappy with it, their remedy lies at the ballot box, not in the courtroom.

Fisher Island has been embroiled in seemingly endless litigation. As Mr. Ferraro forcefully and credibly testified, this pervasive litigation does nothing but damage the community. It damages property values, and it damages the perception of the community and people who live in it. It is time for all this litigation to meet its end, for as Justice Joseph Story once put it, "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." *Ocean Ins. Co. v. Fields,* 18 F. Cas. 532, 539 (C.C.D. Mass. 1841). FICA, through a statutorily authorized SLC, has wisely decided to finally put an end to Fischer Island's litigation. This Court finds that it had the authority to do so, and that it satisfied both sections 617.07401(3) and (4) in the process.

The Court grants FICA's Motion to approve the settlement and dismisses these derivative claims with prejudice. The Court retains jurisdiction to entertain any authorized and timely filed post judgment motions.

---

[1]This Final Judgment amends and supersedes the Court's August 1, 2021 Order Granting Defendant Fisher Island Community Association, Inc's Motion to Adopt the Settlement.

[2]Although no Florida appellate court has articulated the precise test used to weigh someone's independence or lack thereof, the Court agrees with Judge Gold's analysis, applying Delaware law, a jurisdiction this Court follows in corporate matters because Florida's corporation statutes are patterned after Delaware. *See Connolly v. Agostino's Ristorante, Inc.*, 775 So. 2d 387, 388 n.1 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2752e] ("The Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines." (Internal quotation marks omitted)). Like Judge Gold, this Court finds that the "totality of circumstances" test is appropriate in determining independence or lack thereof on the part of the SLC and its members. *See Klein,* 2004 WL 302292, at *18.

[3]Indeed, courts expect SLC members to be experienced and well versed on the issues at hand. *Peller v. The S. Co.,* 707 F. Supp. 525, 528 (N.D. Ga. 1988), aff'd sub nom. *Peller v. S. Co.*, 911 F.2d 1532 (11th Cir. 1990) ("If [S]LCs are to be utilized, the court must accept the likelihood that members of an [S]LC will have experience akin to that of the defendant directors. Indeed, the appointment of persons with no background in public utilities or corporate management to the [S]LC would probably be irresponsible.").

* * *

Criminal law—Search and seizure—Vehicle—Consent—Court cannot conclude that defendant voluntarily consented to search of his vehicle, which was parked next door to a residence that was site of arrest of another person, where consent was preceded by prior unlawful police action and there was no clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of that prior illegal action—Defendant, who opened the door of arrestee's residence when police arrived to execute search warrant, was unlawfully detained in handcuffs outside arrestee's home while police took arrestee into custody, conducted an unlawful protective sweep of arrestee's home, applied for and obtained search warrant for residence, and executed the search warrant—Protective search of arrestee's home, during which narcotics were found in plain view, was unlawful in absence of specific and articulable facts supporting a reasonable belief that there were persons in home who might pose some danger to officers—Mere unspecified noise from back of house was not, standing alone, sufficient to justify protective sweep—Moreover evidence presented by state to support protective sweep was conflicting and unreliable—Motion to suppress evidence discovered in defendant's vehicle is granted

STATE OF FLORIDA, v. MARSHALL KING, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F19-12866, Criminal Division. June 22, 2021. Ramiro C. Areces, Judge. Counsel: Simar Khera, State Attorney's Office, for State. Kirk Shields, County Public Defender's Office, for Defendant.

ORDER GRANTING DEFENDANT'S SECOND MOTION TO SUPPRESS

[Original Opinion at 28 Fla. L. Weekly Supp. 314a]

THIS MATTER having come before the Court on Defendant's Second Motion to Suppress (the "Motion"), and this Court, having examined the case file, heard the testimony of witnesses on June 5, 2020 and again on May 18, 2021, heard argument from counsel and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUGED:

Defendants Motion is GRANTED.

For the reasons stated below, this Court finds the protective sweep and subsequent detention of Defendant was unlawful. The unlawful seizure tainted any consent Defendant may have given for the search of his vehicle, and the State failed to demonstrate, by clear and convincing evidence, that there was an unequivocal break between the unlawful activity and Defendant's consent to search.

Defendant's Motion, despite its title, is, in essence, a motion for reconsideration of this Court's June 10, 2020 Order denying Defendant's first motion to suppress. At issue on June 10, 2020 was whether Defendant voluntarily consented to the warrantless search of his vehicle. The evidence, at that time, established that Miami-Dade Police executed an arrest warrant on a Mr. Hall at his residence. Defendant was at Mr. Hall's home at the time the arrest warrant was executed, and Defendant was made to wait outside, in handcuffs, while police took Mr. Hall into custody, saw narcotics in plain view, applied for a search warrant, and searched Mr. Hall's home. Following the search of Mr. Hall's home, Defendant's handcuffs were removed and Defendant was immediately asked if he would consent to a search of his vehicle. Defendant's vehicle was parked next door.

Following a hearing on Defendant's first motion to suppress, this Court ruled the State had proven by a preponderance of the evidence that Defendant voluntarily consented to the search of his vehicle. Critical to this Court's determination was its finding that "Defendant's consent to search the vehicle 'was free of the taint of prior illegal police action.' " Order at 4 (quoting *Gonzalez v. State,* 59 So. 2d 182, 187 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D500a]). In reaching this conclusion, the Court relied on well-settled law that "officers executing a search warrant for contraband have the authority to detain the occupants of the premises while a proper search is conducted." *Muehler v. Mena,* 544 U.S. 93, 98 (2005) [18 Fla. L. Weekly Fed. S183a].

In his instant Motion, Defendant contends his consent was tainted

by prior unlawful police action—namely, an illegal protective sweep that led to his unlawful detention. Defendant also argues that irrespective of the presence of any unlawful police activity, this Court should reevaluate the strength of the State's evidence in light of its apparent inconsistencies and contradictions.

"[O]ur analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant,* 656 U.S. 332, 338 (2009) [21 Fla. L. Weekly Fed. S781a].

One such exception is a search incident to arrest. The United States Supreme Court has held that "there is ample justification. . . for a search of the arrestee's person and the area within his immediate control—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence." *Chimel v. California,* 395 U.S. 762, 763 (1969).[1]

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs. . . ." *Id.* While the "Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest," the searching officer must have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie,* 494 U.S. 325, 337 (1990). Florida courts have similarly required specific and articulable facts to support an officer's reasonable belief that the area to be swept harbors persons who pose a danger to the officers. For example, in *Diaz v. State,* Florida's Fourth District Court of Appeal found that a "quick and cursory check" of the residence was not justified where "no evidence was adduced at the hearing to establish the required 'reasonable, articulable suspicions' that [individuals thought to be in the home] posed a danger and might jeopardize the officers' safety or destroy evidence." 34 So. 3d 797, 802 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1119a]. Specifically, the *Diaz* court found that officers' testimony concerning "general safety concerns with narcotics investigations," in addition to a reasonable belief that other persons were inside the home were insufficient to establish "any articulable facts which would warrant a reasonable belief that the occupants posed a threat to officer safety." *Id.* at 802.

In this case, the State presented testimony from three officers who were present for the execution of the arrest warrant on Mr. Hall. The officers testified that Defendant opened the door to Mr. Hall's home and was immediately pulled outside, that the officers got in tactical formation and called for Mr. Hall to come out, and that he was apprehended in the hallway and taken into custody. The officers on scene then engaged in a protective sweep.

The State, however, failed to present any competent evidence that would allow this Court to find there was a reasonable, articulable suspicion for the protective sweep of the home. While the State offered the testimony of a detective who testified he heard noises coming from the back of the home, the State failed to link these noises to any specific, articulable facts which would serve as a reasonable basis to believe there were persons in the home who may also pose some danger to the officers. *See e.g. Diaz,* 34 So. 3d at 802 (a reasonable belief that third persons were inside the home was insufficient to "establish a reasonable, articulable suspicion that these individuals posed a danger and might jeopardize the officers' safety or destroy evidence.") (quotation marks omitted). The State also failed to explain why these noises warranted a protective sweep of the entire home—including the unoccupied room wherein the officers observed narcotics in plain view. *See Chimel v. California,* 395 U.S. 752, 763 (1969) ("There is no comparable justification, however, for routinely searching any room other that in which an arrest occurs. . . ."); *see also Diaz,* 34 So. 3d at 801 (a protective sweep "may only extend to those places where a person may be hiding"). At best, the State's evidence demonstrated only generalized concerns associated with narcotics investigations. *See e.g.* Transcript of June 5, 2020 Court Proceedings at 9:20 ("With narcotics, there is some expectation of a possible threat. Firearms, sometimes narcotics dealers protect themselves with them."); *Id.* at 46:1-2 ("99 percent of the time, there are firearms"); *Id.* at 100:14-25 (officers did not know if there were other occupants, if said occupants could be dangerous, and knew nothing about the residence). The State, turning the evidentiary burden on its head, argued it was the *absence* of any known occupants or firearms that justified law enforcement's actions in this case. *See e.g. Id.* at 156:9-14 ("Search warrants and arrest warrants are inherently dangerous and pose a very large danger to those officers. They are going into places where they don't know—they don't know what's inside that home, so that's a huge danger.").[2]

These generalized concerns, however valid from an officer's perspective, form an insufficient basis upon which to allow a warrantless search of a home. *See Diaz,* 34 So. 3d at 802; *see also Faulkner v. State,* 834 So. 2d 400, 403 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D241a] (officer testimony "that he was concerned because the area was 'a high crime area and a high narcotics area' " was insufficient "to establish a reasonable concern for the safety of persons or property") (Silberman, J., concurring); *Mestral v. State,* 16 So. 3d 1015, 1018 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1817c] ("The *Buie* 'standard would require the officers to have articulable facts, not a mere hunch, that would warrant a reasonable belief that the rooms they intended to search harbored a dangerous individual posing a threat to those on the arrest scene.' "); *Cf. U.S. v. Denson,* 775 F.3d 1214 (10th Cir. 2014) (then-Circuit Court Judge Gorsuch found specific articulable facts where officers were aware subject was a fugitive with a history of violent crime, was a known gang member with violent associates and resided with someone who was wanted on an outstanding warrant).

This, of course, does not mean the officers could not, once at the scene, have formed a reasonable suspicion based on specific articulable facts that there were persons in the premises who may pose some danger. However, the evidence relied upon by the State in this case—a mere unspecified noise from the back of the house—is, standing alone, insufficient to establish a reasonable suspicion that there are persons who pose a danger to officer safety somewhere within the home.

Additionally, this Court does not find the State's testimonial evidence in this case to be particularly reliable. Whereas this Court heard testimony concerning the manner in which the arrest warrant for Mr. Hall, and the subsequent protective sweep, were executed, many of the facts are contradicted by the State's single evidentiary exhibit. For example, the in-court testimony was that the officers knocked on Mr. Hall's door, that the Defendant opened the door and was immediately pulled outside, that the officers took a tactical position, that the officers called for Mr. Hall to step out into the hallway, that Mr. Hall stepped out into the hallway and was taken into custody. The in-court testimony further sought to establish that at least one officer heard a noise, which led the officers to an unoccupied room with suspect crack cocaine in plain view. That same officer then heard "additional" noises coming from a separate room, which was occupied by Mr. Maycock, a non-party.[3]

In contrast to the in-court testimony, the affidavit attached to the application for a search warrant of the premises, which was executed and sworn to on the date of incident, and which the State moved into evidence, reads, in pertinent part, "On July 2nd, 2019. . .After a short period of time, 'The Subject'[4] walked to the door and opened it for

your Affiant. . .The Subject was taken into custody without incident." *See* State's Exhibit 1 (hereinafter, the "Affidavit"). The Affidavit then states the officers "proceeded to conduct a security sweep for other persons within 'The Premises' and made contact with Mr. King and Mr. Maycock who were in separate rooms." *Id.*

There are irreconcilable differences between these two versions of events. The State, nevertheless, advances two arguments in support of its contention that the obvious contradictions between its witnesses' testimony and the Affidavit should not affect this Court's confidence in the State's evidence. First, the State elicited testimony from the detective who executed the Affidavit that he had merely inadvertently swapped "The Subject" for "Mr. King." This explanation is unpersuasive and only serves to make this Court less sure of what happened on the morning of July 2, 2019.

If, for example, Defendant, for whom there was no arrest warrant, opened the door, then why was he immediately taken into custody? Why would the officers, after apprehending a person for whom they had no arrest warrant, proceed to engage in a protective sweep "for *other* persons?" Why would they have merely "made contact" with Mr. Hall upon finding him inside one of the rooms? And, finally, how does the in-court testimony concerning the tactical formation, the calling out for Mr. Hall, and the arrest in the hallway factor into the narrative set forth in the Affidavit? Only one of the State's two narratives can be true. Simply swapping "the Subject" for "Mr. King" does not reconcile the obvious contradictions in the State's evidence.[5],[6]

The State's second argument is that the allegations within the Affidavit were merely intended to secure the search warrant and have little to do with the arrest of Mr. Hall and the subsequent protective sweep of the home. This argument is untenable. Judges on emergency warrant duty rely on the sworn allegations set forth by officers seeking a search warrant to determine whether there is probable cause for a particular search. The State, which reviews an officer's application for a search warrant before it is sent to a Judge, should be more than a little concerned when the sworn statements contained within the Affidavit are materially different from the in-court testimony. The State cannot use the existence of the search warrant to justify Defendant's prolonged detention, while simultaneously brushing aside the very facts upon which the warrant was issued when necessary to prove the legality of the protective sweep.[7]

In short, the State's evidence is unreliable. This Court, therefore, is constrained to find the protective sweep, and subsequent detention[8] of Defendant, unlawful.[9]

This, of course, does not end our inquiry. The evidence the State seeks to use against Defendant was not found in the residence during the unlawful protective sweep. The evidence the State seeks to use against Defendant was discovered in his vehicle after Defendant is alleged to have consented to the search. The Florida Supreme Court has stated that "consent will be [held] voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." *Norman v. State,* 379 So. 2d 643, 646-47 (Fla. 1980).

In this case, there was no proof of an unequivocal break in the chain of illegality. Instead, Defendant was detained,[10] made to wear restraints and held for several hours, while police watched over him and applied for and executed a search warrant. After police searched the premises, Mr. Hall was taken away, Defendant's handcuffs were removed and he was immediately asked, in the presence of at least two officers, whether he would consent to the search of his vehicle, which was parked next door.

The State argues that the removal of Defendant's handcuffs constitutes an unequivocal break in the illegality. This argument is unpersuasive—particularly under the specific facts of this case. The mere removal of restraints does not, standing alone, constitute an unequivocal break in the illegal police activity. This is especially true here, where one State witness described Defendant's consent as having come "prior to [police] wrapping up the investigation." Transcript of June 5, 2020 Court Proceedings at 16:22-17:1.

Whereas some cases have, in finding a clear unequivocal break, relied on the passage of time between the illegal conduct and the defendant's consent, or the reading of Miranda warnings, or the execution of a written consent form, or a discussion concerning Defendant's right to refuse, this case contains no such facts. There is, simply put, no reliable evidence of a clear unequivocal break between the unlawful detention and Defendant's purported consent.

This Court is aware that it previously found Defendant's consent was voluntary. Two things, however, have changed. First, the burden and test to be applied has changed. Rather than find that Defendant consented to the search by a preponderance of the evidence, this Court must now find by clear and convincing evidence that Defendant's consent was not involuntary. Second, and more importantly, the State's evidence, as a whole, has proven to be unreliable and this Court has reassessed the weight it should give the State's *prior* testimonial evidence. To that end, this Court is mindful of certain conflicts in the evidence made manifest at the first hearing, which standing alone were insufficient to cast doubt on what this Court otherwise found to be credible testimony, but which taken together with the now-impeached testimony, render a finding of voluntary consent near impossible. This Court, therefore, finds the State has failed to prove Defendant's consent was voluntary.

Finally, this Court notes that even if the applicable standard remained a preponderance of the evidence, this Court would still vacate its prior Order, grant Defendant's Motion and exclude the evidence. There are, for the aforementioned reasons, too many questions concerning how the arrest warrant, protective sweep and alleged consent to search occurred. This Court has, quite simply, reconsidered the State's evidence and found it insufficient to establish that Defendant's consent to search his vehicle was voluntary.

This Court further finds that, notwithstanding the societal cost of potentially setting free a person alleged to have committed a felony, there are unconstitutional practices that must necessarily be curtailed. This Court appreciates the tremendous risks law enforcement officers face when executing a warrant. The State, however, is charged with demonstrating to this Court that the officers executing the warrant were possessed with something more than a mere hunch that there were persons in the home who posed a threat to officer safety. The State failed to show this Court any such proof. Instead, the State, knowingly or not, has asked this Court to extend the government's ability to conduct a protective sweep of an entire home when it doesn't possess any articulable facts. The United States and Florida Constitutions, as interpreted by both federal and state courts, prohibit such an extension of this well-delineated exception to the Fourth Amendment's warrant requirement.

Accordingly, this Court grants Defendant's Motion, vacates its prior Order dated June 10, 2020 and will exclude the evidence alleged to have been discovered in Defendant's vehicle at trial. *Nealy v. State,* 652 So. 2d 1175, 1176-77 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D623a] ("Evidence seized as a result of involuntary consent must be suppressed.").

---

[1]Reversed, in part, on other grounds.

[2]The above quote is from the hearing on June 5, 2020. The State made a similar argument on May 18, 2021.

[3]There was no evidence concerning what these noises sounded like, which room they may have been coining from, why they sounded like someone concealing himself, nor why those same noises could also have sounded like someone concealing some unspecified "items."

[4]"The Subject" refers to Mr. Hall.

[5]The State, moreover, did not present any evidence that would allow this Court to make a ruling as to which specific room the noise was thought to have come from. This Court was also left with a vague picture of what the home looked like, where the Defendant was apprehended relative to the rest of the home, where the officers spotted the narcotics in plain view and where the officers found a third person who was in the home—namely, Mr. Maycock.

[6]The matter of who opened the door is, moreover, not immaterial. The State has conceded that if Mr. Hall was the first person out the door, there would be no reason to conduct a protective sweep.

[7]This is not, moreover, the only portion of the State's testimonial evidence that was effectively impeached by Defendant. One of the State's witnesses testified the narcotics, alleged to have been in plain view, were seen in the northwest bedroom. That same witness, however, had to concede on cross that the property receipt indicated the narcotics were discovered in the southwest bedroom.

[8]Defendant was detained for several hours. *See* Transcript of June 5, 2020 Court Proceedings at 118:6-9. Although no specific amount of time was clearly established, the evidence appeared to suggest Defendant was detained in handcuffs for approximately three to five hours before he was asked for his consent to search his vehicle.

[9]The State contends that even without the illegal protective sweep and the view of the narcotics in plain view, the officers would still have been able to obtain a search warrant, because Mr. Hall indicated to one detective that there were firearms in the home. As a result, the State argues the officers would have been permitted to detain Defendant just the same. This argument is unpersuasive because it can only be of any conceivable merit, *if* the State had, through the admission of reliable evidence, established some sort of timeline that would allow this Court to find that Defendant's detention was never unlawful. However, the State's own evidence purported to establish that officers learned of the firearms only *after* Mr. Hall asked to speak with a detective who was not on scene, and after said detective arrived on scene to speak with Mr. Hall. By that time, Defendant had been unlawfully seized for a considerable period of time, and the only purported basis for his detention at that time would have been the narcotics seen in plain view during the unlawful protective sweep and the preparation of an application for a search warrant on those grounds. Mr. Hall's subsequent statements concerning the firearms may have strengthened the probable cause for the search warrant, but did not cure the unlawful protective sweep and detention.

[10]Either when he opened the door consistent with the in-court testimony, or after he was found in a separate room as stated in the Affidavit.

* * *

Estates—Will contest—Revocation of revocable trust—Motion for summary judgment to remove individual from his position as trustee of revocable trust and position as personal representative of estate of testatrix granted—It is undisputed that right to revoke trust was expressly reserved to settlor by trust provisions, that she exercised that right and was competent to do so, and that trustee received notice of revocation—Even if trust had not been revoked, removal would be appropriate based on trustee's unfitness to practice law, as evidenced by his suspension from the Florida Bar and denial of reinstatement, and based on request for removal made by all qualified trust beneficiaries—Removal as personal representative is required where undisputed facts show that individual was not qualified to act as personal representative at time of appointment and continues to be unqualified

In Re: ESTATE OF MARGARET ANN TREVARTHEN, JOSE IVAN JIMENEZ and CAROL ANN DYBDAL, Petitioners, v. KEVAN BOYLES, as Personal Representative, Respondent. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Probate Central Division (Div. IC). Case No. 50-2017-CP-004460. Consolidated with Case No. 50-2018-CA-000667. March 23, 2020. Renatha S. Francis, Judge. Counsel: Peter Ticktin, Jamie Alan Sasson, and Michael J. McCormick, Jr., for Petitioner. Rosemary Cooney, for Respondent.

[AFFIRMED: 46 Fla. L. Weekly D1991b (Kevan Boyles and Rosemary Cooney v. Jose Ivan Jimenez and Carol Ann Dybdal, Case Nos. 4D20-1042, 4D20-1201 (Fla. 4DCA, September 8, 2021.) Full DCA opinion published below.]

FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on the Petitioners' Motion for Summary Judgment to both remove KEVAN BOYLES, from his position as Trustee of the Margaret Ann Trevarthen Revocable Trust; and to remove him from his position as Personal Representative of the Estate of Margaret Ann Trevarthen, and this Court having heard argument of counsel, having reviewed the Motion for Summary Judgment, the Response to the Motion for Summary Judgment, the affidavits submitted, the other documents in the Court file, and being otherwise advised in the Premises, the Court finds as follows:

Findings of Fact

Presently, KEVAN BOYLES claims to be the Successor Trustee of the Margaret Ann Trevarthen Revocable Trust by virtue of an instrument, "The Restatement of the Margaret Ann Trevarthen Revocable Trust Agreement" which was signed on October 9, 2015 (hereinafter referred to as the "First Trust.") Moreover, Mr. BOYLES has been appointed as the Personal Representative of the Estate of Margaret Ann Trevarthen by virtue of a Will which was also signed by Margaret Ann Trevarthen on October 9, 2015 (hereinafter referred to as the "First Will").

Mr. BOYLES, in his capacity of a Florida attorney, had prepared the First Will and First Trust Agreement for Margaret Ann Trevarthen, in which he was appointed the Personal Representative and Successor Trustee, respectively, on October 9, 2015.

In Article Four of the First Trust, titled "Administration of My Trust During My Lifetime," Section 1(d) "Amend or Revoke the Trust" states:

> I shall have the absolute right to amend or revoke my trust, in whole or in part, at any time. Any amendment or revocation must be delivered to my Trustee in writing.

Two days later, on October 11, 2015, Miss Trevarthen prepared a revocation of all of the trust agreements which she signed on October 9, 2015.

Miss Trevarthen wrote, apparently by her own hand:

> Dear Mr. Boyles,
>
> I am revoking all the Trust Documents signed Oct. 9, 2015, including your Living Trust and Affidavit of Trust.
>
> Sincerely,
>
> Margaret Ann Trevarthen

The revocation of the First Trust was witnessed and notarized by Arpine Paronyan.

No one has claimed that the revocation of the trust agreements was due to undue influence. Moreover, on January 7, 2020, Mr. BOYLES filed Exhibits in opposition to the Motion for Final Summary Judgment. Although most of those documents had no bearing on the Motion for Summary Judgment, Exhibit "J" is an affidavit from Arpine Paronyan, the notary who was present at the time that the revocation was signed by Miss Trevarthen.

Ms. Paronyan stated under oath in Paragraph 6 of her affidavit:

> Once I looked at the documents in front of Ms. Trevarthen, I asked Ms. Trevarthen if she knew what she was about to sign and she indicated that she did. She told me that her financial affairs had been assigned to an attorney who had not been returning her calls. I asked Ms. Trevalthen if she was signing this at her own free will, she said yes and indicated that she wanted to get lawyers that won't ignore her calls and that she didn't want this lawyer to handle her affairs.

Although there is no proof that the revocation of the trust which Mr. BOYLES had prepared was sent to Mr. BOYLES at that time, there is no question that he received the Revocation by April 13, 2016, as Mr. BOYLES acknowledged that he received it on that date in his letter to Miss Trevarthen of that date. (Mr. BOYLE's letter was dated April 13, 2015, and it appears that the date was incorrect, as the letter itself referred to receipt of other documents, including a Replacement of Trustee, which was dated April 2, 2016.)

Moreover, pursuant the Article 12, Section 2, "The Removal of a Trustee" of the First Trust, even if it had not been revoked, Miss Trevarthen or after her death, the majority of the beneficiaries have the power to remove Mr. BOYLES. Article 12(b) and (c) state:

> **Section 2. The Removal of a Trustee**
>
> Any Trustee may be removed as follows:

* * *

b. Removal by My Other Beneficiaries

After my death or disability, a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income under this Agreement may remove any Trustee.

c. Notice of Removal

Neither **I**, nor any of my beneficiaries, need give any Trustee being removed any reason, cause or ground for such removal. Notice of removal shall be effective when made in writing by either:

Personally delivering notice to the Trustee and securing a written receipt, or

Mailing notice in the United States mail to the last known address of the Trustee by certified mail, return receipt requested.

Even if the First Trust had not been revoked, there is no question that Mr. BOYLES had been removed by Mrs. Trevarthen as she had specifically written to Mr. BOYLES and his wife, Rosemary Cooney on April 2, 2016:

Dear Mr. Boyles and Ms. Cooney:

I here by (sic) replace both of you as my trustees of my trust. I further appoint Ivan Jimenez my trustee.

Sincerely,

Margaret Ann Trevarthen

On March 14, 2017, Miss Trevarthen executed a subsequent Will (hereinafter the "Second Will") and subsequent Trust (hereinafter the "Second Trust"), which named JOSE IVAN JIMENEZ, as her Personal Representative and as her Trustee, respectively. While this fact is not in dispute, Mr. BOYLES contends that the Second Will and Second Trust were procured by undue influence over Miss Trevarthen, and the issue of undue influence is not resolved.

On March 24, 2016, Mr. BOYLES was suspended from the practice of law by the Supreme Court of Florida, which was effective on April 23, 2016 (the date of Mr. BOYLES' Letter to Miss Trevarthen), except that Mr. BOYLES was not permitted to accept any "new business" from the date of the Order, March 24, 2016.

Notwithstanding his suspension, Mr. BOYLES wrote in his April 13, 2016 letter which was on stationery identifying himself as an attorney, from the Law Offices of Kevin Boyles, P.A.

Notwithstanding that he had already been ordered by the Florida Supreme Court to not accept any new business, Mr. BOYLES wrote of additional matters which were raised, and advised that if he did not hear from Miss Trevarthen by April 22, 2016, the last date he was allowed to act on old matters, that he would act accordingly, apparently in his capacity as an attorney, as the letter identified him as an attorney. The Court makes no findings at this time as to whether the incorrect date on Mr. BOYLES' letter of April 13, 2016 was intentionally stated as 2015 to avoid his suspension issue.

Other than a letter from Mr. BOYLES dated April 18, 2016, in which Mr. BOYLES advised of his suspension, and which this court notes a glaring lack of contrition, no further communications were heard from Mr. BOYLES until Miss Trevarthen died almost a year and a half later.

On August 27, 2017, Margaret Ann Trevarthen died.

On September 28, 2017, with no attempt by Mr. BOYLES to contact the beneficiaries, including Miss Trevarthen's niece, the Petitioner, CAROL ANN DYBDAL, or the Co-Petitioner, Mr. BOYLES' wife and attorney, Rosemary Cooney, on her own behalf, outside of the law firm in which she was employed, filed a Petition for Administration, followed by a Corrected Petition for Administration, in which Mr. BOYLES later admitted that he was aware of the subsequent will.

Within 4 days, on October 2, 2017, CAROLE ANN DYBDAL and JOSE IVAN JIMENEZ filed their Answer and Objection to Petition for Administration and Order Appointing Kevan Boyles as Personal Representative and Counter Petition for Revocation of Will/Estate. The Petitioners also filed a Petition for the Removal of Mr. BOYLES, as the Trustee of the Margaret Ann Trevarthen Revocable Trust.

Meanwhile, Mr. BOYLES petitioned the Supreme Court of Florida for Reinstatement, and the Supreme Court denied his Petition for his continuing wrongful conduct, including BOYLES' conduct in the above styled case, which was specifically cited by The Florida Bar in its Initial Brief requesting that the Supreme Court to deny Mr. BOYLES' reinstatement.

The Supreme Court of Florida accepted the arguments presented by The Florida Bar which was that the case, *sub judice*, forms another episode of Mr. BOYLES' pattern of unethical conduct and therefore did not reinstate him to The Florida Bar. The fact of the matter is that Mr. BOYLES opened this Estate and was appointed as the Personal Representative without the consent of any of the survivors or beneficiaries, and without ever given them advance notice that he would be opening the Estate.

Mr. BOYLES remains suspended and not a member of The Florida Bar.

After the Florida Supreme Court denied Mr. BOYLES' Petition for Reinstatement, the movants filed their Motion for Summary Judgment which addressed both actions, which are consolidated, the Removal of KEVAN BOYLES as the Personal Representative of the Estate, and the Removal of KEVAN BOYLES as the Trustee of the First Trust.

There are only two Primary Beneficiaries of the Trust pursuant to Article II of the Margaret Ann Trevarthen Revocable Trust, Miss Trevarthan's niece, CAROL ANN DYBDAL, and her nephew, Robert Trevarthen. Only one other beneficiary is named, Catherine Wortham in Article 7 who was left $25,000. Ms. Wortham did not respond to the Formal Notice sent to her in regard to the above styled litigation, and therefore has waived her claim or right to object. All of the qualified beneficiaries have agreed that they desire the removal of Mr. BOYLES as the Trustee of the Margaret Ann Trevarthen Revocable Trust and also as the Personal Representative of the Margaret Ann Trevarthen Estate.

Moreover, this Court finds that Mr. BOYLES was not a relative or even a friend to Margaret Ann Trevarthen. The sole reason that Mr. BOYLES was appointed as the Trustee of the Margaret Ann Trevarthen Revocable Trust and as the Personal Representative of the Margaret Ann Trevarthen Estate, was that he was an active attorney who was licensed to practice law in the State of Florida. The fact that Mr. BOYLES remains suspended and is no longer an active practicing attorney is a significant change of circumstances.

Conclusions of Law

Summary judgment is proper when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. See, *Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. The Court should grant summary judgment in favor of the moving party "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file 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." Fla. R. Civ. P. 1.510(c). Once the moving party has met its burden, the non-moving party then has the burden to show the existence of any dispute of material fact. *Hall v. Talcott,* 191 So. 2d 40, 42 (Fla. 1966).

As there are three different issues in the Motion for Summary Judgment, 1) the Revocation of the First Trust; 2) the Removal of KEVAN BOYLES as the Trustee of the First Trust; and 3) the Removal of Mr. BOYLES as the Personal Representative of the Margaret Ann Trevarthen Estate.

The issues of whether there was any undue influence regarding the formation of the Second Trust or of the formation of the Second Will are not before the Court, and are not being considered at this time. Although Mr. BOYLES provided evidence in that regard, it does not bear on the decisions as to the revocation of the First Trust, the removal of Mr. BOYLES as Trustee of the First Trust, or the removal of Mr. BOYLES as the Personal Representative of the Estate of Margaret Ann Trevarthen.

In fact, the only issues before this Court are 1) Whether the First Trust was revoked; 2) Whether KEVAN BOYLES should be removed as the Trustee due to his a) unfitness to serve as Trustee; b) a substantial change of circumstances; and/or c) because all of the qualified beneficiaries request his removal; and 3) whether KEVAN BOYLES should be removed as the Personal Representative of the Estate of Margaret Ann Trevarthen due to his unfitness to serve as a Personal Representative because a) he is unfit, and/or b) there was a substantial change of circumstances.

The consideration and determination of these issues follow.

Margaret Ann Trevarthen Revoked the First Trust

Although there are documents presented by Mr. BOYLES, which put into question the issue of possible undue influence in the formation of the Second Trust and the Second Will, the issue as to the Second Will are not before this Court at this time, and have no bearing on the issues presently before this Court.

There is no factual issue in dispute as to whether Miss Trevarthen continued to have the power to revoke the revocable trust. That right was expressly reserved for Miss Trevarthen in Article 4 of the First Trust.

There was no dispute as to whether there had been any undue influence as to the revocation of the First Trust, in that Mr. BOYLES' own evidence, Exhibit "J," which was provided from the impartial notary supported the fact that Miss Trevarthen did not want Mr. BOYLES to be her trustee. As to mental competence, surely, if Miss Trevarthen was of sound mind on October 9, 2015, when she signed the First Trust, there is no reason to suggest that 2 days later, on October 11, 2015, she had suddenly developed dementia or lost her capacity.

Moreover, there is no question as to whether Mr. BOYLES had received the notice of revocation of the trust.

As Miss Trevarthen had the right to revoke the First Trust, and as she did revoke it, this Court hereby deems the First Trust, The Restatement of the Margaret Ann Trevarthen Revocable Trust Agreement to have been revoked and nullified on October 11, 2015.

The Removal of KEVAN BOYLES as Trustee

Although the issue of the Removal of KEVAN BOYLES as Trustee is moot due to the revocation of the Restatement of the First Trust, for purposes of being complete, in the event that the First Trust were to remain in effect for any reason, this Court finds that Mr. BOYLES should be removed.

In determining whether Mr. BOYLES should be removed as the Trustee of the Margaret Ann Trevarthen Revocable Trust, the Court first looks at Florida Statute § 736.0706, Removal of Trustee, which states in pertinent part,

> (1) The settler, a co trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.
>
> (2) The court may remove a trustee if:
>
> (c) Due to the ***unfitness***. . . of the trustee. . the court determines that removal of the trustee best serves the interests of the beneficiaries: or
>
> (d) There has been a ***substantial change of circumstances or removal is requested by all of the qualified beneficiaries***. . . (Emphasis added.)

The Supreme Court of Florida has accepted the arguments in The Florida Bar's Initial Brief, which in whole add up to the determination that Mr. BOYLES remains unfit to practice law in the State of Florida. It is axiomatic that if he is not fit to act as an attorney due to his continuing unethical conduct, he is certainly not fit to act as the Trustee of the Margaret Ann Trevarthen Revocable Trust or of any trust or as a personal representative.

This Court is bound by the holding of the Supreme Court of Florida on the basis of the Doctrine of Collateral Estoppel, in determining that Mr. BOYLES is unfit to practice law.

The highest duties of an attorney arise when he or she takes the role of a Trustee or of a Personal Representative of an Estate. *Woolf v. Reed*, 389 So. 2d 1026 (Fla. 3d DCA 1980)

This is especially true, where the only reason that the attorney has been entrusted to perform as a trustee or personal representative, was because of his being a duly licensed and practicing attorney.

On this basis, alone, KEVAN BOYLES should be removed as the Trustee of the Margaret Ann Trevarthen Revocable Trust.

Moreover, the Court finds the arguments made by the Petitioner and The Florida Bar regarding Mr. BOYLES' reinstatement to The Florida Bar, persuasive. Therefore this Court agrees that if Mr. BOYLES is unfit to be barred in this state then he is unfit to serve as the trustee in this matter.

Furthermore, this Court finds that Mr. BOYLES' suspension and more importantly, the determination to be a substantial change of circumstances which mandate the removal of KEVAN BOYLES from acting as the Trustee of the Margaret Ann Trevarthen Revocable Trust. On this basis, alone, Mr. BOYLES should be removed.

Lastly, the removal of Mr. BOYLES has been requested by all of the qualified beneficiaries who have responded to the Notices served in the present litigation. The Respondents have argued that there is a third beneficiary, not only Miss Trevarthen's niece, Carol Ann Dybdal and Miss Travarthen's nephew, Robert Trevarthen, but also Catherine Wortham, who was left a special bequest of $25,000. As Ms. Wortham has not responded to the Formal Notice of this action, she does not have a say in this litigation. Nevertheless, technically, the statute requires the request be by all qualified beneficiaries, and the Respondent is correct that Ms. Wortham is a qualified beneficiary. However, the Trust document, itself, provides that it requires only a majority of beneficiaries, and Carol Ann Dybdal and Robert Trevarthen are the majority who have sought the removal of Mr. BOYLES. Hence, Mr. BOYLES should be removed on the basis of the majority demanding his removal. This alone is reason that Mr. BOYLES must be removed as the Trustee of the Margaret Ann Trevarthen Revocable Trust.

The Removal of KEVAN BOYLES as Personal Representative

In determining whether to remove Mr. BOYLES as the Personal Representative in this matter, there is only one provision of Florida Statute § 733.504, which is titled: "Removal of personal representative; causes for removal." The statute provides, *inter alia*:

> A personal representative *shall* be removed and the letters revoked if he or she was not qualified to act at the time of appointment" (emphasis added).

Also, subsection (12) of the statute provides that this Court *may* remove the personal representative if:

> The personal representative was qualified to act at the time of the appointment but is not now entitled to appointment.

In the present case, the undisputed facts show that Mr. BOYLES was not qualified to act as the Personal Representative at the time he was appointed. Although the appointment was made, apparently, there was no notification that Mr. BOYLES was suspended at the time of his appointment by the Court. Mr. BOYLES counsel argued that

the presiding judge knew that Mr. BOYLES was suspended, but no proof of any such knowledge has been provided. Nevertheless, even if the presiding judge at that time found that Mr. BOYLES was fit to be a personal representative, the recent decision by the Florida Supreme Court, which rejected a referee's decision to reinstate Mr. BOYLES, is binding on this Court as to the fact that Mr. BOYLES is not qualified at this time to be an attorney in the State of Florida.

The Supreme Court denied Mr. BOYLES' Petition for Reinstatement partially because Mr. BOYLES , obtained his appointment as a Personal Representative in this Estate continuing his pattern of inserting himself into probate matters without the knowledge or approval of the beneficiaries.

This leaves only the question of whether Mr. BOYLES is not "qualified" to act as a personal representative based on his character. In this regard, this Court finds that it is appropriate for this Court to use its discretion in order to determine whether a party is qualified to serve as personal representative for an estate, based on character.

The first time, in Florida, that the courts were confronted with whether a specific list of disqualifying reasons which did not include issues of character were exclusive was in *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d DCA 1976). There, the probate judge was faced with an intestate estate in which the decedent was a wife and mother of three daughters. The widower was not appointed due to evidence that he "was not *qualified* by character, ability, and experience to serve in the important capacity demanded. . ." notwithstanding that none of the specific reasons listed in the controlling statute which would have disqualified him were applicable. (Emphasis added.) The Second District Court of Appeal held that a party may be deemed to be not qualified to administer an estate based on character, even though character deficiencies were not listed as exclusionary grounds in the statute.

The Court held that

> The administrator of an estate occupies a fiduciary capacity. His responsibilities flow to many others, including the creditors, the interested taxing authorities and the remaining beneficiaries of the estate (Citation omitted). Where the record supports the conclusion that a person occupying the position of statutory preference does not have the qualities and characteristics necessary to properly perform the duties of an administrator, it would be an anomaly to hold that a probate court, which has historically applied equitable principles in making its judgments, does not have the discretion to refuse to appoint him simply because he did not fall within the enumerated list of statutory disqualifications.

Subsequently, in *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1253 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2582a] the probate court judge refused to appoint the individual who was named in the will. The Fourth District Court of Appeal remanded the case, relying on the dissent in *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 443 (Fla. 2d DCA 1988). The Court held:

> In his dissenting opinion, Judge Campbell indicated that "a trial judge may refuse to appoint a personal representative named in a will upon the basis of facts presented to the appointing judge at the time of appointment that, if presented after the appointment, would support removal of the personal representative." *Pontrello,* 528 So.2d at 445 (Campbell J., dissenting). Judge Campbell also added that "it would . . . be absurd to force the appointing court to wait until the estate or persons interested in the estate had actually suffered the detriment that was reasonably demonstrated would occur."

The *Schleider, id.* Court further held:

> The *Padgett* court held that "[a]lthough the probate statutes do not expressly impose a general requirement of 'good moral character' for persons seeking to qualify as a personal representative, the circuit court has the inherent authority to consider a person's character, ability and experience to serve as personal representative." *See Padgett,* 676 So.2d at 443 (citing *Estate of Snyder,* 333 So.2d 519). If the record supports the conclusion that the person lacks the necessary qualities and characteristics, the court has discretion to refuse to appoint even a person occupying a position of statutory preference who is not specifically disqualified by the statute. *See id.*

The logic in the appointment of a personal representative must also apply to the removal of a personal representative. Not only must the Court refuse to appoint an individual who lacks "good moral character," but a Court must not turn a blind eye and continue to keep a personal representative in place once it is proved that he or she has such a deficiency.

Moreover, the Court finds that Mr. BOYLES only connection to Miss Trevarthen was that as an attorney to a client. His only connection as her Personal Representative is based on the fact that he was a licensed practicing attorney in the State of Florida.

In *Schleider, Id.*, the Court held:

> *Pontrello* sets forth one example of such exceptional circumstances. According to the second district, the trial court may exercise its discretion "if after the personal representative is named in the will, unforeseen circumstances arise which clearly would have affected the testator's decision had he been aware of such circumstances, but the testator had no reasonable opportunity prior to his death to change the designation of the personal representative in his will." *Pontrello,* 528 So.2d at 443.

In the case *sub judice*, the suspension of Mr. BOYLES would have most certainly been an "unforeseen circumstance" as Mr. BOYLES had no connection to Miss Trevarthen as either a relative or a friend. His only connection was that he was her lawyer, and that reason for his appointment disappeared with his license to practice law. As there was a subsequent will, which Mr. BOYLES contends was induced by undue influence, there would have been no further reason for Miss Trevarthen to have taken further action to remove Mr. BOYLES as Miss Trevarthen already did remove him, or would have believed she did.

In fact, from the time that Mr. BOYLES wrote to Miss Trevarthen advising that he would stop acting as a Trustee, it appears that he purposefully was lying in wait, just waiting for Miss Trevarthen to die. For a year and a half he did nothing, and then, upon Miss Trevarthen's death, Mr. BOYLES commenced this Estate, was appointed as a personal representative, and held himself out to third parties as the Trustee of the First Trust.

Attorneys are often appointed as personal representatives because they are highly trusted, regulated, and there is a savings in not requiring duplication of efforts between a personal representative and an attorney for an estate. Additionally, it is presumptively understood that an attorney will know the duties of a personal representative, which also would save time and money.

Once Mr. BOYLES lost his ability to practice law, he also lost any reason for his appointment as a Personal Representative. The Petition, alone is good evidence that now, not only would Mr. BOYLES seek compensation for his time as a personal representative, but his wife, Mrs. Cooney, the one who filed the testamentary documents, also would seek compensation for her time. This is exactly what people who appoint their attorneys seek to avoid.

The Respondent argued that the reason for Mr. BOYLES' appointment is irrelevant and that technically, based on law at the time of his appointment, he is permitted to act and serve as the personal representative of this Estate. This Court disagrees with the Respondent's argument. By permitting Mr. BOYLES to act as the Personal Representative of the current Estate, this Court would be assisting Mr. BOYLES continued practice of law by necessarily being able to personally deal with his client, the Estate and its beneficiaries. In

effect, Mr. BOYLES would be doing indirectly what he is not permitted to do directly.

By denying Mr. BOYLES' application for reinstatement, the Florida Supreme Court denied his reinstatement on the basis of his lack of fitness based on character.

Rule 3-7.10 of the Rules Regulating The Florida Bar states that regarding reinstatement of a suspended attorney: ". . .The matter to decide is the fitness of the petitioner to resume the practice of law. . ." By its decision the Florida Supreme Court has held that Mr. BOYLES is not fit to resume the practice of law, due to his ethical deficiency.

In review of the court file regarding Mr. BOYLES' request for reinstatement, it seems that The Florida Supreme Court made its decision to deny him reinstatement, at least in part, on the fact that Mr. BOYLES, by continuing to insert himself in the case at bar, is not fit to practice law. It follows, then, that if Mr. BOYLES, as a matter of law, is not morally fit to practice law, he is likewise not fit to act in the most trusted positions a lawyer can occupy, being that of the personal representative of the Estate.

The Respondent argued that the court should not remove Mr. BOYLES as none of the factors laid out in Florida Statute § 733.504 are applicable. This Court disagrees with Mr. BOYLES position, in that the statute is clear that if Mr. BOYLES was not qualified to act upon his appointment, he shall be removed, and in the event that he became disqualified after his appointment, this Court may remove him.

This court finds that Mr. BOYLES, as a suspended attorney, who was suspended for similar action as he perpetrated when he filed to become the personal representative, was not qualified based on his character, at the time of his appointment, and this Court is therefore required to remove him as personal representative. Moreover, even if Mr. BOYLES was qualified at the time of his appointment, he is certainly not qualified at this time, and he will be removed.

This is especially true, here, where this Estate appears to be under siege by Mr. BOYLES who is protecting his own position, rather than actually acting in the best interests of the Estate.

Lastly, the Court finds that the introductory paragraph of Florida Statute § 733.504, and also, Florida Statute § 773.504(12) go hand-in-hand in the analysis of the case at bar, arguing that Mr. BOYLES is not qualified to act as the Personal Representative of this Estate.

It is **ORDERED AND ADJUDGED** that:

A. There is no material dispute of fact and therefore, Summary Final Judgment in this matter is GRANTED.

B. KEVAN BOYLES is removed as the personal representative of the Estate of Margaret Ann Trevarthen.

C. KEVAN BOYLES is removed as the Trustee of the Revocable Trust of Margaret Ann Trevarthen.

D. The Revocable Trust of Margaret Ann Trevarthen is deemed to have been revoked on October 11, 2015.

E. KEVAN BOYLES shall go hence without day.

F. The Court retains jurisdiction to enter orders to enforce this Judgment and any award of costs and attorneys' fees.

KEVAN BOYLES and ROSEMARY COONEY, Appellants, v. JOSE IVAN JIMENEZ and CAROL ANN DYBDAL, Appellees. 4th District. Case Nos. 4D20-1042, 4D20-1201. September 8, 2021. Order on Attorney's fees, September 8, 2021. Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Renatha Francis, Judge; L.T. Case Nos. 50-2017-CP-004460-XXXX-MB and 50-2018-CA-000067-XXXX-MB. Counsel: Rosemary Cooney of Probate, Guardianship, & Trust, P.A., West Palm Beach, for appellants. Peter Ticktin, Jamie Alan Sasson and Michael McCormick, Jr. of The Ticktin Law Group, Deerfield Beach, for appellees.

(FORST, J.) Appellant Kevan Boyles appeals the trial court's entry of final summary judgment against him, removing him as trustee of the testatrix's revocable trust and as putative personal representative of her estate under the terms of a 2015 will. Appellant Rosemary Cooney appeals from a related denial of her petition for administration of the estate and her motion to be substituted as successor party to Boyles in a challenge to the testatrix's 2017 will. Upon consideration of the parties' arguments and the record, we affirm on all issues raised on appeal.

Background

On October 9, 2015, Margaret Ann Trevarthen ("the testatrix") executed a will ("the 2015 will") and a revocable trust ("the 2015 trust"). Both documents were prepared by Boyles, in his capacity as the testatrix's attorney. The 2015 will and the 2015 trust named Boyles as personal representative and trustee, respectively, and his wife, Cooney (also an attorney), as successor personal representative and successor trustee. The terms of the 2015 trust gave the testatrix "the absolute right to amend or revoke my trust, in whole or in part, at any time." Moreover, in a section titled "The Removal of a Trustee," the 2015 trust provided that "[a]ny trustee may be removed [after the testatrix's death by] a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income under this Agreement . . . ."

Revocation of the 2015 Trust/Removal of the Trustees

Two days after signing and executing the trust documents, the testatrix signed documents revoking the 2015 trust. The revocation was witnessed by a notary, with the witness stating in an affidavit that the testatrix represented that she knew what she was signing and did so "at her own free will" because "her financial affairs had been assigned to [Boyles] who had not been returning her calls" and "she didn't want [him] to handle her affairs."

In early April 2016, pursuant to the terms of the 2015 trust providing that "[a]ny amendment or revocation must be delivered to my Trustee in writing," the testatrix sent Boyles the revocation documents, a signed, notarized letter stating "I am revoking all the trust documents signed October 9, 2015" (with the signatures of two witnesses), and a document entitled "Replacement of Trustee," informing Boyles and Cooney that they were being replaced as "trustees of my trust," with Appellee Ivan Jimenez appointed as trustee. By separate letter, the testatrix also informed Appellants that Jimenez was given power of attorney.

Boyles responded to this correspondence, acknowledging receipt and requesting that the testatrix "contact our office to clarify the status of our representation going forward." At about the same time that Boyles was referencing "our representation," he was shuttering his legal practice due to his suspension from the practice of law, effective April 23, 2016. At no time did Boyles inform the testatrix of his suspension or that he was not permitted to accept any new business as of March 26, 2016.

Revocation of the 2015 Will

In March 2017, the testatrix executed a new will ("the 2017 will") and a new trust ("the 2017 trust"). The 2017 will expressly revoked all former wills and codicils and named Ivan Jimenez as personal representative. Similarly, the 2017 trust expressly revoked all prior living trusts and named Ivan Jimenez as trustee. Appellants have challenged the validity of both 2017 documents, claiming that Jimenez applied undue influence over a mentally incompetent testatrix.

Under the 2015 will, there are two principal beneficiaries: Appellee Carol Dybdal, the testatrix's niece, who would receive nearly ninety-two percent of the estate, and her brother, who would receive nearly eight percent. A non-relative would receive $25,000. Under the 2017 will, five of the testatrix's caregivers would split $290,000, and Dybdal would receive ninety-eight percent of the remaining assets, with her brother's share reduced to two percent.

Both Dybdal and her brother support administration of the 2017 will, even though it distributes an additional $265,000 to non-relatives and diminishes the testatrix's nephew's share.

The Instant Action

The testatrix died in August 2017. The following month, Boyles filed a petition for administration requesting the trial court to admit the 2015 will and appoint him as personal representative. The trial court subsequently issued letters of administration and appointed Boyles as personal representative. Boyles never contacted the beneficiaries, and began mailing letters to financial institutions, representing himself as the trustee. At all times after April 23, 2016, Boyles has been suspended from the practice of law.

Appellees Jimenez and Dybdal immediately filed an objection to Boyles' appointment, and they filed a petition for administration of the 2017 will and sought appointment of Jimenez as personal representative. Additionally, Appellees filed a petition to remove Boyles as trustee, referencing the revocation of the 2015 trust.

Appellants challenged the validity of the 2017 will and 2017 trust, claiming that both instruments were procured by undue influence over the testatrix. During the ensuing will contest, Appellees moved for summary judgment, arguing for the removal of Boyles on the grounds that even if the 2015 will was operative, he was not qualified to serve as personal representative based on his lack of moral character. Ultimately, the trial court granted summary judgment on this ground, removed Boyles as personal representative, and further made a finding that the testatrix had revoked the 2015 trust.

Following Boyles' removal, Cooney filed a petition for administration of the 2015 will and motion to substitute herself as the successor party to challenge the validity of the 2017 will. At a hearing on these issues, Cooney argued that a ruling as to her petition for administration would be premature pending a resolution of the will contest. The trial court denied Cooney's petition, finding that she should not be appointed as the successor personal representative. The order also denied Cooney's motion to be substituted as the successor party in the challenge of the 2017 will and 2017 trust, determining that her involvement in the matter would prolong litigation and administration of the estate. In the same order, the trial court appointed an administrator ad litem to substitute as the successor party in the ongoing will contest and ordered the administrator ad-litem to investigate and report as to the viability of going forward with the will contest.

The trial court's orders and subsequent denials of motions for rehearing are the subject of appeals that have been consolidated for review and disposition.

Analysis

Removal of Boyles as Trustee

Appellants argue that the trial court erred in entering summary judgment and finding that the testatrix had revoked the 2015 trust because genuine issues of material fact remained.

The standard of review for an order granting summary judgment is de novo. *Fla. Atl. Univ. Bd. of Trs. v. Lindsey*, 50 So. 3d 1205, 1206 (Fla. 4th DCA 2010). Summary judgment is proper when there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).[1] When reviewing a ruling on summary judgment, the appellate court must examine the record in the light most favorable to the nonmoving party and determine whether the moving party has shown conclusively the complete absence of any genuine issue of material fact. *Gorham v. Zachry Indus., Inc.*, 105 So. 3d 629, 632 (Fla. 4th DCA 2013).

In their motion for summary judgment, Appellees declared "[i]t is undisputed that [the testatrix] executed documents revoking Mr. BOYLES as her Trustee and Power of Attorney." Indeed, Appellants do not dispute the 2015 trust's terms expressly and unambiguously provided the testatrix with the absolute right to revoke the trust at any time, so long as the revocation was delivered to the trustee in writing. Boyles, however, questioned whether the revocation letter was properly delivered, and he also maintained disputed issues of material fact existed as to the testatrix's capacity and intent and whether she was unduly influenced to revoke the 2015 trust a mere two days after executing it.

Notwithstanding Boyles' arguments, competent substantial evidence supports the trial court's summary judgment regarding the 2015 trust's revocation. Witnesses saw the testatrix signing the revocation letter and removal documents in October 2015 and April 2016, respectively. Without dispute, Boyles had notice and receipt of the written revocation, as reflected in his sending a response to the testatrix upon receiving notice of "Replacement of Trustee," stating "it would be greatly appreciated if you would contact our office to clarify the status of our representation going forward." Neither the 2015 trust nor the law required the testatrix to respond to Boyles' entreaty.

To the extent Boyles contends the 2015 trust's revocation was attributable to undue influence, his argument fails as undue influence has no application to a revocable trust. *Fla. Nat'l Bank of Palm Beach Cnty. v. Genova*, 460 So. 2d 895, 896-98 (Fla. 1984) (a mentally competent settlor may revoke a revocable trust, regardless of whether the decision was the product of undue influence); *MacIntyre v. Wedell*, 12 So. 3d 273, 275 (Fla. 4th DCA 2009) ("[E]ven after the settlor's death, the settlor's revocation of her revocable trust during her lifetime is not subject to challenge on the ground that the revocation was the product of undue influence."). Moreover, there is no evidence that, when signing the revocation letter a mere two days after naming Boyles as trustee, the testatrix was mentally incompetent. Although Boyles received the revocation and removal documents in April 2016, he made no effort to challenge the testatrix's competence before her August 2017 death.

Finally, Boyles fails to address the 2015 trust's permitting removal of a trustee by "a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income under this Agreement . . . ." Appellees established that two of the 2015 trust's three beneficiaries supported Boyles' removal (if the 2015 trust was deemed to have not been revoked).

Accordingly, no genuine issue of material fact existed, and the trial court properly found, on summary judgment, that the testatrix revoked the 2015 trust two days after creating it and/or removed Boyles and Cooney as trustee/successor trustee no later than April 2016; or, alternatively, that a majority of the trust's beneficiaries would remove Boyles as trustee if the 2015 trust was deemed to be the operative trust.

The Administrator Ad Litem's Substitution as Successor Party to Boyles and Cooney in Litigating the Ongoing Will Contest

Cooney's appeal primarily focuses on the trial court's denial of her motion to be substituted as the "proper party in the will/trust contest." Cooney asserts she "had standing, preference in appointment, and was qualified to serve to replace [Boyles] in the will/trust contest."

"We review orders of dismissal based on a lack of standing de novo." *Agee v. Brown*, 73 So. 3d 882, 885 (Fla. 4th DCA 2011); *Wheeler v. Powers*, 972 So. 2d 285, 288 (Fla. 5th DCA 2008). However, appellate review of a trial court's denial of appointment as personal representative is subject to abuse of discretion scrutiny. *See Schleider v. Est. of Schleider*, 770 So. 2d 1252, 1253 (Fla. 4th DCA 2000); *Hernandez v. Hernandez*, 946 So. 2d 124, 126 (Fla. 5th DCA 2007). Similarly, an appellate court will not reverse an order removing a personal representative absent a trial court's abuse of discretion.

Henderson v. Ewell, 149 So. 372, 372 (Fla. 1933); *In re Senz' Estate*, 417 So. 2d 325, 327 (Fla. 4th DCA 1982).

Cooney is correct that, per *Wheeler*, as the designated successor personal representative under the "prior [2015] will," she "fits the definition of an 'interested person' as [s]he may reasonably be expected to be affected by the outcome of the [will contest] and the non-probate of the [2015] will." *Wheeler*, 972 So. 2d at 288.

However, not "every personal representative from every prior will should be granted standing . . . . [T]he definition of 'interested person' is fluid and 'must be determined according to the particular purpose of, and matter involved in, any proceeding." *Id.* (quoting *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 507 (Fla. 2006). We look to the law regarding appointments and dismissals of personal representatives to determine if the trial court abused its discretion in excluding both Boyles and Cooney as parties to the underlying will contest.

"If the record supports the conclusion that a person lacks the necessary qualities and characteristics, the court has discretion to refuse to appoint even a person occupying a position of statutory preference who is not specifically disqualified by [section 733.504, Florida Statutes (titled "Removal of personal representative; causes for removal")]." *Schleider*, 770 So. 2d at 1254; *see Padgett v. Est. of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st DCA 1996) ("Although the probate statutes do not expressly impose a general requirement of 'good moral character' for persons seeking to qualify as a personal representative, the [trial] court has the inherent authority to consider a person's character, ability and experience to serve as personal representative[.]").

Moreover, the preferred personal representative "may be considered unsuitable to administer the estate, if there is an adverse interest of some kind [or] hostility to those immediately interested in the estate, or an interest adverse to the estate itself." *Schleider*, 770 So. 2d at 1254 (citing *In re Snyder's Est.*, 333 So. 2d 519, 520 (Fla. 2d DCA 1976)).

> A dispute between the beneficiaries of the estate standing alone is not sufficient grounds to refuse to appoint the person named as personal representative in the decedent's will, if she is otherwise qualified to serve. However, if a dispute which will result in unnecessary litigation and impede the administration of the estate is combined with other factors . . ., the totality of the circumstances may rise to a level that allows the trial court to exercise its discretion in refusing to appoint the personal representative named in the will.

Id. (internal citation omitted).

The record here demonstrates that Boyles was suspended from the practice of law in 2016 based on his conduct in filing numerous petitions for administration and wrongful death actions in matters where he had no contact with the beneficiaries, nor any permission from the beneficiaries to do so. Additionally, when Boyles filed the instant petition for administration, he similarly failed to notify the beneficiaries. The Florida Bar cited this as a factor in opposing Boyles' then-pending petition for reinstatement to practice law. That petition was summarily denied by the Florida Supreme Court. As noted above, there is no evidence or argument that the testatrix was ever informed of Boyles' 2016 suspension.

The underlying record provides support for the trial court's conclusion that Boyles' "character, ability [without a license to practice law] and experience" rendered him unfit to serve as personal representative. Thus, it was not an abuse of the trial court's discretion to not permit Boyles to be a party to the will contest.

With respect to Cooney, in deciding to appoint an administrator ad-litem "to succeed Mr. Boyles in the adversary action in this Estate" and "to quickly resolve the battle of the wills," the trial court focused on Cooney's fitness for appointment as personal representative of the estate, should the 2015 will be determined to be the operative will. It also took notice of the minimal differences between the 2015 and 2017 wills and the declaration of the two principal beneficiaries under both wills that they supported the 2017 will superseding the 2015 will even though the distribution of assets under the 2017 will was less beneficial to one if not both principal beneficiaries.

As noted above, the designated personal representative (or successor) "may be considered unsuitable to administer the estate, if there is an adverse interest of some kind [or] hostility to those immediately interested in the estate . . . ." *Schleider*, 770 So. 2d at 1254. The trial court found that, having "carefully reviewed all of the materials presented by Ms. Cooney, . . . it is apparent that if Ms. Cooney were to be appointed as a personal representative, this Estate would be locked in endless and unnecessary litigation" that would "impede the administration of this Estate." We find no abuse of discretion in the trial court's conclusion that "Ms. Cooney is not qualified to be the personal representative of this Estate," and its determination that "the matter of the will contest can move forward without her."

Contingent Refusal to Appoint/Removal of Boyles or Cooney as Personal Representative

Appellees sought to remove Boyles as personal representative of the estate and block Cooney's appointment as successor personal representative under the 2015 will's terms, while simultaneously contending that the 2017 will appointing Jimenez is the valid will. Although both appellants argued that removal was premature, the trial court's orders removed Boyles and denied Cooney's petition for appointment as successor personal representative.

On appeal, appellants have cited cases for the proposition that the trial court's blocking the potential appointment of either appellant was premature. Those cases, however, address situations where the trial court *appointed* a personal representative before the will contest was settled. *See Rocca v. Boyansky*, 80 So. 3d 377, 381 (Fla. 3d DCA 2012) (holding that "will contests and the rights of caveators must be determined prior to letters of administration being issued"); *In re Est. of Hartman*, 836 So. 2d 1038, 1039 (Fla. 2d DCA 2002) ("[T]he probate court was obliged to make a determination on th[e] challenge to the will prior to appointing a personal representative and admitting the will to probate."); *Grooms v. Royce*, 638 So. 2d 1019, 1021 (Fla. 5th DCA 1994) ("The trial court is required to rule on the challenge to the will *before* proceeding to probate or naming the personal representative designated by the contested will, regardless of her qualifications."). Here, the trial court revoked the letters of administration that were prematurely issued to Boyles and had not subsequently named a personal representative, instead appointing an administrator ad-litem.

Should the trial court determine that the 2017 will is the operative will, appellants' fitness to serve as personal representatives becomes a moot issue and supports the common-sense principle that adjudicating a will's validity should precede an examination of a potential personal representative's fitness to serve.

In the instant case, however, a predecessor trial court had issued letters of administration to Boyles before learning of the competing 2017 will. Thus, the trial court was faced with a situation where it needed to revoke the letters of administration that had prematurely been issued to Boyles and determine the parties to the will contest. There was a *Schleider* challenge lodged by the principal beneficiaries of both the 2015 and 2017 wills to the continued involvement in these matters by both Boyles and Cooney. *See Schleider*, 770 So. 2d at 1254 ("If the record supports the conclusion that the person lacks the necessary qualities and characteristics, the court has discretion to refuse to appoint even a person occupying a position of statutory

preference who is not specifically disqualified by [section 733.504].”). Thus, the trial court did not abuse its discretion by simultaneously addressing the appellants’ fitness to (1) be parties to the will contest and (2) be appointed as personal representative if the 2015 will, not the 2017 will, is determined to be the operative will.

Conclusion

Without dispute, the testatrix intended that Appellee Carol Dybdal and her brother be the sole beneficiaries of the trust set up by the testatrix and that they be the primary beneficiaries under her will. Both primary beneficiaries: (1) do not oppose administration of the 2017 will and the inclusion of the caregivers as beneficiaries, and (2) challenge the appointment of either Appellant Boyles or Appellant Cooney as either trustee or personal representative of their aunt’s trust and estate.

We affirm the summary judgment finding that the 2015 trust was revoked and replacing Boyles and Cooney as trustees. The 2017 trust’s validity is not before us, and the trial court did not abuse its discretion in excluding both appellants from challenging the 2017 trust.

As for the appellants’ appointments as personal representative and successor representative per the 2015 will, we find no abuse of discretion in the removal of appellants as party representatives and the appointment of an administrator ad litem “to quickly resolve the battle of the wills.” Nor do we find an abuse of discretion in the trial court’s foreclosing the appointment of either appellant as personal representative should the 2015 will be determined to be the operative will.

Affirmed. (WARNER and DAMOORGIAN, JJ., concur.)

---

[1]After the trial court issued its final summary judgment that is the subject of the instant appeal, the Florida Supreme Court amended Florida Rule of Civil Procedure 1.510(c) to adopt a new summary judgment standard. *See In re Amendments to Fla. R. of Civ. Proc. 1.510*, 309 So. 3d 192, 193-95 (Fla. 2020) (adopting the federal summary judgment standard). The amendment, which became effective on May 1, 2021, does not apply here as the final judgment predates the amendment. *See Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020) (stating that the amendment to rule 1.510(c) applies prospectively); *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 46 Fla. L. Weekly D1264, 2021 WL 2212092 at *1, n. 1 (Fla. 2d DCA June 2, 2021).

BY ORDER OF THE COURT:

ORDERED that the motion for attorney’s fees filed by Michael J. McCormick, Jr., counsel for appellees, pursuant to section 733.3101(3), Florida Statutes (2018), is granted. Per Florida Rule of Appellate Procedure 9.400(b), upon remand of this cause, the amount of attorney’s fees shall be assessed by the trial court upon due notice and hearing, subject to review by this court under Florida Rule of Appellate Procedure 9.400(c). If a motion for rehearing is filed in this court, then services rendered in connection with the filing of the motion, including, but not limited to, preparation of a responsive pleading, shall be taken into account in computing the amount of the fee.

* * *

Insurance—Property—Discovery—Failure to comply—Sanctions—Case in which award of attorney’s fees and costs is only remaining issue is dismissed with prejudice and law firm is held in indirect criminal contempt for failure to comply with discovery orders

JEANNE SCOLNICK, Plaintiff, v. THE FIRST LIBERTY INSURANCE CORPORATION, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE18019107, Division 25. June 8, 2021. Carol-lisa Phillips, Judge. Counsel: Jose Pete Font and Frantz C. Nelson, Font & Nelson, Fort Lauderdale, for Plaintiff. Matthew J. Lavisky, Butler Weihmuller Katz Craig LLP, Tampa, for Defendant.

FINAL ORDER DISMISSING CASE WITH PREJUDICE

THIS CAUSE came before the Court on June 3, 2021 upon Defendant’s Motion to Dismiss with Prejudice, for Contempt, and for Attorneys’ Fees and Costs. The Court has reviewed the Motion, taken evidence, entertained argument of counsel, and is fully advised.

BACKGROUND

1. This lawsuit arises out of a property insurance claim.

2. On June 19, 2020, Plaintiff executed a release, which did not include claims for attorneys’ fees and costs.

3. On June 26, 2020, The First Liberty Insurance Corporation (“Liberty”) sent Font & Nelson PLLC checks in accordance with the settlement.

4. Plaintiff never filed a motion for attorneys’ fees and costs.

5. On November 2, 2020, Liberty served interrogatories and requests for production to Plaintiff regarding the claim for attorneys’ fees and costs.

6. Plaintiff did not timely respond.

7. On December 3, 2020, Liberty filed a Motion to Compel Discovery.

8. On December 29, 2020, this Court heard the Motion to Compel.

9. On January 4, 2021, this Court entered an order granting the motion, finding objections waived, other than as to privilege, and ordering Plaintiff to respond to the discovery fully and completely, with verified answers to interrogatories, by January 19, 2020.

10. Plaintiff failed to comply with this Order.

11. On January 21, 2021, Liberty filed a Motion for Sanctions and Contempt against Plaintiff for Failure to Comply with Order Compelling Discovery.

12. On April 5, 2021, this Court heard the Motion for Sanctions and Contempt against Plaintiff for Failure to Comply with Order Compelling Discovery.

13. Shortly before the hearing, Plaintiff served responses to the discovery. The responses included several objections that were waived based on the prior order. The answers to interrogatories were not verified.

14. This Court granted the motion, awarded attorneys’ fees and costs to Liberty, and ordered that Plaintiff provide complete and verified responses to the discovery requests within ten days. This Court entered an Order on April 16, 2021.[1]

15. Plaintiff failed to comply with this Order.

16. On May 13, 2021, Liberty filed a Motion to Dismiss with Prejudice, for Contempt, and for Attorneys’ Fees and Costs.

17. On June 3, 2021, this Court held a hearing on the Motion to Dismiss with Prejudice, for Contempt, and for Attorneys’ Fees and Costs.

FINDINGS

At the June 3, 2021 hearing, this Court took evidence and considered each of the factors set out in *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). The Court makes the following findings regarding each of the factors. The Court also incorporates its findings stated on the record at the hearing. *See Ham v. Dunmire*, 891 So. 2d 492, 495 (Fla. 2004) [30 Fla. L. Weekly S6a].

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

At a prior hearing, Plaintiff’s counsel attributed the non-compliance to turnover. However, the non-compliance has persisted, even after the second order which included a monetary sanction. The discovery was requested in November 2020, and, to date, Plaintiff still has not provided verified responses to interrogatories. In addition, Plaintiff has not filed amended responses without the waived objections despite two orders requiring Plaintiff to do so. The earlier of these orders was entered five months ago, on January 4, 2021. The Court finds that Plaintiff and her attorneys willfully and deliberately disregarded and disobeyed the Court’s orders compelling discovery.

2) whether the attorney has been previously sanctioned;

Two attorneys were listed on the complaint and amended complaint in this matter. One has left Font & Nelson. The evidence presented at the hearing establishes that the other attorney, Mr. Jose Font, who did not attend the hearing, has been sanctioned in multiple other cases. *See e.g., Plantation Open MRI, LLC v. Infinity Auto Ins. Co.*, 18-61825-CIV, 2018 WL 11191514 (S.D. Fla. Nov. 20, 2018); *Empire American Services Inc v. Citizens Property Ins. Corp.*, 2019 WL 2401346 (Fla. 17th Cir. Ct. June 2, 2019); *Pride Clean Restoration, Inc. v. Fla. Peninsula Ins. Co.*, 2020 WL 8254846 (Fla. Palm Beach Co. Ct. December 21, 2020).

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

The Court's prior orders required that Plaintiff verify the interrogatories. Plaintiff did not do so. Also, the issue remaining in this case—attorneys' fees and costs—inures only to the benefit of Font & Nelson.

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

The delay has prejudiced Liberty through undue expenses incurred to draft multiple motions and prepare for and attend multiple hearings.

5) whether the attorney offered reasonable justification for noncompliance; Plaintiff's attorneys have not offered reasonable justification for noncompliance.

6) whether the delay created significant problems of judicial administration.

The delay has created significant problems of judicial administration. This case has languished unnecessarily as a result of Plaintiff's disobedience with this Court's orders and this disobedience has caused this Court to waste significant hearing time that could have been used by other litigants.

RULING

Based on the findings above, and those stated on the record at the June 3, 2021 hearing, it is hereby **ORDERED and ADJUDGED**:

1. This case is **DISMISSED WITH PREJUDICE;**

2. The Court holds Font & Nelson, PLLC in **indirect civil contempt**. The Court awards a compensatory sanction for the attorneys' fees and costs incurred by Liberty to file the Motion to Dismiss with Prejudice, for Contempt, and for Attorneys' Fees and Costs and to prepare for and attend the June 3, 2021 hearing, including the cost of the court reporter. The Court reserves jurisdiction to enter a subsequent order awarding a specific amount to Liberty.

[1]At the April 5, 2021 hearing, the Court scheduled a hearing to resolve Plaintiff's claim for attorneys' fees and costs for June 3, 2021 from 1:30 pm - 4:00 pm.

* * *

Criminal law—Search and seizure—Vehicle—Traffic stop—Dog sniff—Search of defendant's person based only on canine alert on car is prohibited without probable cause to believe defendant may have contraband on his person—Under totality of circumstances, officers lacked probable cause to search defendant's person—Motion to suppress drugs found during search is granted—Officer's generalized suspicion that defendant was "possibly" transporting drugs was inadequate to establish probable cause for search—Discussion of precedents from district courts of appeal

STATE OF FLORIDA, Plaintiff, v. DAVID J. REDDING, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County, Criminal Action. Case No. 18-CF-1026. September 17, 2021. Ramiro Mañalich, Judge. Counsel: Christopher H. Brown, Brown, Suarez, Rios & Weinberg, P.A., Fort Myers, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

I. Introduction.

The Fourth Amendment search and seizure issues raised by the case sub judice are encapsulated by a quote from the late great United States Supreme Court Justice William Brennan.

> While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms. In the constitutional scheme they ordained, the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts.

United States v. Leon, 468 U.S. 897, 929-30 (1984), (Brennan, J., dissenting).

II. Findings of Fact and Applicable Law.

THIS CAUSE comes before the Court on Defendant's "Motion to Suppress," filed on January 9, 2020. A hearing on Defendant's motion was held on May 20, 2021, and continued to July 2, 2021. Subsequent to the May 20th hearing, Defendant filed a second Motion to Suppress, on May 28, 2021, based on the evidence presented during the May 20th hearing.

Having considered the evidence and testimony presented at the hearings, together with the arguments of counsel as to the applicable law supporting their respective positions, the Court grants the Defendant's motion to suppress based on the following findings of fact and conclusions of law.

1. On July 12, 2018, Defendant was charged by Information on two counts of Possession of Controlled Substance, and one count of Possession of Marijuana, not more than 20 grams. On July 9, 2019, an Amended Information was filed charging three counts of Possession of Controlled Substance and one count of Possession of Marijuana.

2. According to Detective Esteban Rodriguez of The Collier County Sheriff's Office ("CCSO"), information was received from a confidential informant in February and March, 2018 that Defendant might be selling narcotics in the Immokalee, Florida area. Defendant previously lived in Immokalee and on the date of arrest resided approximately 35 minutes away in Lehigh Acres, Florida. At the motion to suppress hearings, in addition to Detective Rodriguez, the State presented the testimony of arresting officers John Bell and Alex Silva. The State did not call as a witness the confidential informant who allegedly informed law enforcement that Defendant had been selling drugs several months before the arrest date. Other than a general endorsement of the CI's reliability, the Court does not recall any specific evidence being presented by the State as to the reliability of said confidential informant. The only specifics provided as to what the C.I. alleged as to Defendant being involved in criminal activity were that Defendant was using a particular vehicle to sell narcotics in Immokalee. The evidence received from the State's witnesses also indicated that the Interdiction Unit of CCSO surveilled Defendant on numerous occasions and found his driving locations (in a known high crime area) and pattern suspicious. They planned for a canine to perform an open-air sniff on Defendant's vehicle during a traffic stop. Defendant was never observed in possession of contraband.

On May 30, 2018, Defendant was stopped by Officer Bell ("Bell") of CCSO for following a vehicle too closely. Bell performed a traffic stop, noted that Defendant was the sole occupant of the vehicle and, upon inspection of documents, asked Defendant to exit his vehicle and come to the front of Bell's patrol vehicle while Bell wrote a warning. During this same time, Bell asked Defendant if he had any weapons

on him. Defendant answered in the negative and lifted up his shirt in support of his statement. Bell insisted on performing a pat-down, and told Defendant to put his hands on the hood of Bell's vehicle—with which Defendant complied. Defendant did not admit to being in possession of anything during the pat-down and nothing was found on Defendant. Officer Silva ("Silva") of CCSO arrived with a narcotics canine. While Bell was writing the warning ticket, Silva and his canine performed an open air-sniff around Defendant's vehicle. During the sniff, the canine alerted to the presence of an odor of narcotics coming from Defendant's vehicle. Bell and Silva performed a search of the vehicle, which yielded negative results. Because of this, and the canine's alert to the vehicle, Silva searched Defendant's outer person. A bulge was located in Defendant's lower buttocks area, inside his underwear—not consistent with human anatomy. Defendant was detained and searched underneath his clothing roadside (apparently behind an opaque barrier) and a plastic bag containing numerous smaller plastic bags was discovered. The four different types of narcotics found in the plastic bags were field-tested, and yielded positive results indicative of the drugs marijuana, heroin, cocaine, and crack cocaine. Defendant was read his Miranda Warnings, and placed under arrest.

3. The Second District Court of Appeal has held that the defendant has the burden to prove that a search is invalid; however, once the defendant establishes that the search was conducted without a warrant, the burden shifts to the State to produce clear and convincing evidence that the warrantless search was legal. *Palmer v. State,* 753 So. 2d 679 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D672a]; *State v. Lyons,* 293 So.2d 391 (Fla. 2d DCA 1974). Defendant's motion requests that the evidence in the instant case be suppressed because Defendant "was out of the car for minutes before the dog was utilized," and that Defendant "was several feet away from the car and the dog never gave any indication that [Defendant] had drugs on him." (Def. ['s] Mot. p.2, January 9, 2020). At the hearings, defense counsel cited to *Cady v. State,* 817 So. 2d 948 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1231a] [*Cady v. State*], and *Bryant v. State,* 779 So. 2d 464 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D2551a] in support of his argument. In *Cady.* the driver of a vehicle, in which Cady was a passenger, was a target of a narcotics investigation. After the vehicle was stopped for an improper lane change, a canine unit was called and performed a search while the driver and Cady were outside of the vehicle. The canine alerted to the driver's floor mat, center console, and passenger seat. Cocaine was found under the driver's floor mat, and the driver was placed under arrest. Cady was searched for the reason that the canine alerted to the passenger seat and Cady was found to be in possession of cocaine. Cady sought to suppress the evidence, which the trial court denied, and Cady appealed. Similar to the present case, Cady argued that the fact that the dog alerted to the passenger seat after Cady had exited the vehicle did not give the police probable cause to believe that Cady had drugs on his person. The Second District Court of Appeal agreed, reversed the trial court judgment, and remanded to grant the motion to suppress.

4. The State countered by distinguishing *Cady* from the circumstances in the instant case. The State argued that Officers Bell, and Silva possessed particularized suspicion and information that Defendant was in possession of drugs, and that he might be transporting drugs on the day and time of the arrest. In *Cady,* the driver was the target of the investigation, and not his passenger—giving the stopping officer no particular suspicion that Cady was involved in possession or transportation of narcotics. Moreover, the State supported its position by arguing: that the drug interdiction team possessed reliable knowledge that Defendant was observed to frequent a known narcotics area; that, according to a confidential informant, Defendant was known to be transporting drugs; and that when he was actively surveilled on the day of the arrest Defendant had what law enforcement opined was a "counter-surveillance" driving pattern. Lastly, once stopped and questioned by Bell, Defendant denied the recent presence of narcotics in his vehicle, the recent presence of passengers who could account for the odor of narcotics in his vehicle, and the recent consumption of marijuana inside the vehicle. As a result of the totality of the circumstances mentioned above, the State asserted that there were sufficient facts for probable cause to search Defendant's person.

5. In *Bryant,* the Defendant was driving a friend's vehicle when he was pulled over. The stopping officer detained Bryant on suspicion that the vehicle was stolen, and while Bryant was outside of the vehicle, a narcotics canine sniffed the vehicle. The canine alerted to the driver's door, and seat, but no drugs were found in the vehicle. The officer believed that the canine responded to a residual narcotics odor left by a person, and searched Bryant. Cocaine was found on Bryant's person. Bryant sought to suppress the evidence, which the trial court denied, and Bryant appealed. The Second District Court of Appeal Court held that "given the deputy's knowledge that Bryant did not own the car . . . , Bryant's mere recent proximity to a car seat on which someone at some time might have left a residual odor of narcotics fell woefully shy of establishing probable cause to believe Bryant possessed narcotics." *Id.* at 465. Said Court reversed the trial court judgment, and held that the trial court should have granted the motion to suppress.

6. In the instant case, the State distinguished *Bryant* by the same arguments used for *Cady.* The arguments consisted of the facts that Defendant was the sole occupant of the vehicle; that the vehicle was registered to Defendant; that Defendant had been observed, and multiple times, in his vehicle frequenting a known narcotics area; that, based on a confidential informant, there was particularized knowledge that Defendant might be transporting drugs; and that Defendant denied the recent presence of narcotics, passengers, and recent consumption of narcotics in his vehicle once pulled over and questioned by Bell.

7. The State further supported its stance by stating that the test for probable cause regarding a dog's alert should be based on the totality of the circumstances and fair probabilities, and not "rigid, bright-line tests, and mechanistic inquiries" as opined in *Florida v. Harris,* 568 U.S. 237 (2013) [24 Fla. L. Weekly Fed. S18a]. In *Harris,* the defendant was pulled over during a routine traffic stop for an expired license plate. The canine officer conducting the stop noticed that defendant was nervous and that there was an open beer can inside the vehicle. The officer asked if defendant consented to a search of the vehicle, which defendant declined. As a result, the officer and his narcotics canine performed a sniff test, with the canine alerting to the driver's door handle. Presumably, Harris was inside the vehicle during the sniff. During the search of defendant's vehicle, ingredients for cooking methamphetamine were uncovered under the driver's seat. In the case sub-judice, the State argued that the U.S. Supreme Court rejected the Florida Supreme Court's probable cause doctrine in *Harris* that the test for probable cause should be a bright-line test taking into account the dog's field performance history. The State argued, based on the U.S. Supreme Court opinion in *Harris,* that [a] police officer has probable cause to conduct a search when " 'the facts available to [him] would 'warrant a [person] of reasonable caution in the belief' ' " that contraband or evidence of a crime is present." *Id.* at 243. (internal citations omitted). Additionally, the State argues that if a narcotics dog alerts to a car in which no narcotics are found, "[t]he dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person." *Id.* at 245-46.

8. The First District Court of Appeal commented about *Cady,* and *Bryant,* in *State v. Griffin,* 949 So. 2d 309 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D496a]. In *Griffin,* a canine handler stopped Griffin for speeding and failing to maintain a lane. Another officer came to the stop while a sniff was conducted around the vehicle, with Griffin remaining inside the vehicle, and being the only occupant of the vehicle. It is noteworthy that the canine officer *in Griffin* did not possess information that the Defendant might be involved in criminal activity before walking the canine around Defendant's vehicle, unlike in the instant case. The canine alerted, and Griffin was asked to step out of the vehicle. A cylinder of crack cocaine fell from Griffin's pant leg during a pat down, with no drugs having been found inside the vehicle. Following arrest, drugs and paraphernalia were found in Griffin's purse. The State appealed the trial court's grant of the motion to suppress on the grounds that officers did not have probable cause to search defendant's person.

9. The *Griffin* Court affirmed the trial court's judgment in granting the motion to suppress because it held it was constrained by precedent under Fla. Const. Art. I, § 12, even though "such precedent is contrary to prevailing Fourth Amendment doctrine." *Id*. at 314. The precedent referred to is *Williams v. State,* 911 So. 2d 861 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2281a], where a dog alert provided probable cause to search Appellant's car, but not Appellant's person. The *Williams* Court reversed Appellant's convictions and sentences based on *Cady,* and *Bryant.* The *Griffin* Court reasoned that "[We would find that the cases this court relied on in *Williams* are no longer persuasive under [(*Maryland v. Pringle,* 540 U.S. 366 (2003) [17 Fla. L. Weekly Fed. S83a]]. *Griffin* at 312.The Court elaborated: "Although probable cause in *Pringle* was established by an actual seizure of contraband, we believe that it is the existence of probable cause, not the extent of probable cause, which authorized the search." *Griffin,* 949 So. 2d at 311. The Court continued:

> [T]he power of a well-trained narcotics-detection dog to alert the residue of contraband only *increases* the possibility that the car contains contraband. *State v. Cabral,* 159 Md. App. 354, 859 A.2d 285, 300 (stating that the fact that a trained dog is capable of detecting odors up to 72 hours after contraband is present in the vehicle only strengthens the probable cause finding due to the dog's superior sense of smell); accord *U.S. v. Johnson,* 660 F.2d 21, 23 (2d Cir. 1981) (noting the fact that a dog can alert to residual odors "misconstrues the probable cause requirement. Absolute certainty is not required by the Fourth Amendment. What is required is a reasonable belief that a crime has been or is being committed."). Here, the fact that the dog alert may have been in response to contraband no longer present in the car does not mean that law enforcement failed to rely on a reasonable probability that contraband was present on Appellee's person or in her car.

Id. at 312. In sum, the *Griffin* Court reasoned that the analyses in *Williams, Cady,* and *Bryant,* "run[ ] afoul of the Supreme Court's holding by confusing the quanta of proof necessary for conviction with the quanta of proof necessary to support a finding of a " 'reasonable ground for belief of guilt' " that a person possesses contraband." *Id*. at 313.

10. This Court finds that Judge Padovano's concurrence in *Griffin* sets forth a persuasive analysis as to why the *Griffin* majority's reliance on *Pringle* (as eroding the precedential value of *Bryant, Cady,* and *Williams*) is misplaced. As explained by Judge Padovano:

> The majority combines one principle from *Maryland v. Pringle* and another from *Illinois v. Caballes* to arrive at a conclusion that does not necessarily follow. We know from the holding in *Pringle* that the discovery of drugs in a car pursuant to a lawful search gives police officers probable cause to arrest the occupants of the car. We know from *Caballes* that a dog alert on a car establishes probable cause to search the car. The majority extrapolates from these two points to conclude that a dog alert on a car establishes probable cause to search the occupants. With all due respect, I believe this logic is unsound. It treats the probability that drugs may be in the car as if it were the same as the actual discovery of drugs in the car.
>
> An alert on a car by a trained narcotics dog establishes a probability that there are drugs in the car. That probability gives the police officers a right to search the car under the principle established in *Caballes.* If the probability turns out to be correct and the police find drugs in the car, then, and only then, do they have a right to arrest the occupants of the car under the principle established in *Pringle.* The Court did not state or even suggest in *Pringle,* that a dog alert on a car gives the officers the right to skip past all of the intermediate steps (searching the car, finding drugs, arresting the occupants, and then searching the occupants incident to the arrest) and to proceed directly with a warrantless search of the occupants of the car. The justification for the personal search in *Pringle* was that the officers had found drugs in the car, not that there might have been drugs in the car.
>
> The fallacy in the majority opinion is that it conflates the justification for searching a place with the justification for searching a person. It has never been the law that a police officer may search a person merely because that person is located in a place the officer is otherwise authorized to search. As the Supreme Court explained in *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S. Ct. 338, (1979),
>
> [w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person.* This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search . . . the premises where the person may happen to be.
>
> (emphasis added) Yet that is precisely what the majority is advocating in the present case. It has assumed that probable cause to search the car necessarily establishes probable cause to search a person in the car. That is simply not the law.

Id. at 316-17.

III. Analysis and Conclusions of law.

11. The facts in the case sub judice are very similar to what occurred in *Cady, Bryant,* and *Griffin.* Those cases prohibit a search of the Defendant's person based only on a dog alert to a car without probable cause facts that the Defendant may have contraband on his person. In the present case: Defendant was the sole occupant of his vehicle; he was pulled over for violating a traffic law while under generalized, conclusory, and assumed suspicions of possessing and transporting drugs; there was no specific information presented that Defendant was known to be selling or delivering drugs on the particular date of the traffic stop; he was initially patted down for weapons and nothing was found; Defendant denied possessing anything illegal; Defendant was outside of his vehicle when a narcotics canine performed an open-air sniff and positively alerted to Defendant's vehicle; and Defendant's person was searched as a result of a fruitless search of his vehicle and based on the assumption that drugs must be on his person due to the positive dog alert to the car.

The State's attempt to distinguish Mr. Redding's fact pattern from the controlling precedents is unpersuasive. The information that law enforcement claims to have for probable cause to search Defendant's person is based on stale, general allegations of Defendant being involved in illegal drug activities with said information attributed to a confidential informant; law enforcement surveillance; and assumptions made from a driving pattern observed as to Mr. Redding. As officer John Bell testified on cross examination, the intelligence he received from Detective Rodriguez indicated that Defendant was travelling to Immokalee in a particular vehicle and Defendant was **"possibly"** transporting drugs. This additional information is inadequate to support probable cause and the State fails to produce clear and convincing evidence that the warrantless search of Mr. Redding was

legal as required by *Palmer v. State,* 753 So. 2d 679 (Fla. 2nd DCA 2000) [25 Fla. L. Weekly D672a].

12. This Court is required to apply well-reasoned precedents that are on point from the First and Second District Courts of Appeal. Judge Padovano's concurrence in *Griffin* explains why the principles of law prohibiting a search of the person based on a dog alert to a car, with nothing found in the car search, endure after the U.S. Supreme Court decisions in *Pringle* and *Harris.* The constitutional search limitations described above protect cherished Fourth Amendment values of reasonable expectations of personal privacy and should be upheld in the absence of current and sufficient probable cause facts that are particular to a person, as opposed to a vehicle.[1] In light of the precedents from the the First and Second District Courts of Appeal, and the evidence from the suppression motion hearings, this Court concludes that there was no probable cause to search Defendant's person. Having so found, the Court declines to address the remainder of the grounds raised in the motion to suppress. Accordingly, it is,

ORDERED AND ADJUDGED that Defendant's Motion to Suppress is hereby GRANTED.

---

[1]In the present case, Defendant's lower buttocks area was manually searched underneath his clothing while at a busy roadside to extract the contraband. The principle justifications for this indignant and intrusive search were: that the dog alerted to a car where nothing was found, so the contraband must be on Defendant; other months old tips from an informant; and general surveillance of Defendant, without ever observing him in actual possession of any drugs.

* * *

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

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, Plaintiff, v. STERLIN SAINT ANGE, LOURDES JOSEPH and MIRLANDA BRUNO, Defendants. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 21-CA-001845. August 11, 2021. James Shenko, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Sterlin Saint Ange, Pro se, Leigh Acres; and Lourdes Joseph and Mirlanda Bruno, Pro se, Cape Coral, Defendants.

ORDER ON PLAINTIFF, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS, STERLIN SAINT ANGE, LOURDES JOSEPH AND MIRLANDA BRUNO

THIS CAUSE having come before this Court at the hearing on August 9, 2021, on the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendants, STERLIN SAINT ANGE, LOURDES JOSEPH and MIRLANDA BRUNO, 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, Imperial Fire And Casualty Insurance Company brought the instant Action for Declaratory Judgment against the named insured Defendant, Sterlin Saint Ange, and the Defendants, Lourdes Joseph and Mirlanda Bruno, regarding the policy rescission as a result of the insured's material misrepresentation on the application for insurance dated August 18, 2020. Plaintiff rescinded the policy of insurance on the basis that Sterlin Saint Ange failed to disclose that his girlfriend, Mirlanda Bruno, 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 August 18, 2020, Sterlin Saint Ange was required to disclose:

> *"all persons living in your household who are at least 14 years of age. This includes all household members, licensed or not licensed, students living away from home and persons in the Armed Services and any children/stepchildren or dependents of the applicant or applicant's spouse between the ages of 14 and 21 who do not reside in the household."*

In addition, on the application for insurance, Defendant, Sterlin Saint Ange answered "No" to the following application question, which provides:

> *"Have you failed to disclose any household residents, whether licensed or not, including but not limited to children/step-children or dependents who may reside temporarily elsewhere?"*

During the investigation of the subject claim, the named insured, Sterlin Saint Ange, unequivocally confirmed during his Examination Under Oath (EUO) taken on January 21, 2021, that his girlfriend, Mirlanda Bruno, was a household resident/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 Sterlin Saint Ange provided the proper information at the time of the insurance application on August 18, 2020, then Plaintiff would have charged the insured a higher premium rate. Therefore, Imperial Fire and Casualty Insurance Company declared the policy void *ab initio* due to a material misrepresentation and returned the paid premiums to Sterlin Saint Ange. 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 Sterlin Saint Ange, Imperial Fire and Casualty Insurance Company may void the insurance policy as follows:

> **1. Voiding for Fraud or Misrepresentation**
>
> Because **we** rely on the information provided by or for **you** on **your application** when **we** agree to issue a policy to **you, we** have the right to void this policy from its inception if **we** learn that **you** or **your** representative, at the time of the **application**
>
> a. Made incorrect statements or representations to **us** as to any material fact of circumstance;
>
> b. Concealed or misrepresented any material fact or circumstance; or
>
> c. Engaged in fraudulent conduct.
>
> No coverage is provided for any **accident** or **loss** if **we** void this policy.

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, Imperial Fire and Casualty 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 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 Mirlanda Bruno, as a household resident/member living at the policy garaging address at the time of the application. Therefore, it is irrelevant whether the undisclosed household resident/member, Mirlanda Bruno, was involved in the subject motor vehicle accident on December 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, Kimberly Willcox, provided sworn testimony to knowledge of the application for insurance and administration of the underwriting guidelines for the insurance policy issued to Sterlin Saint Ange, 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 (Fla. 5DCA 2015) [40 Fla. L. Weekly D1502a]. 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. Bretton,* 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 (Sterlin Saint Ange) to disclose all household residents/members living at the policy garaging address at the time of the policy inception. In addition to providing a "NO" response to application question #2, the applicant (Sterlin Saint Ange) signed the Driver Statement, which provided the following acknowledgment:

Driver Statement

I agree that the persons listed below of eligible driving or permit age do not reside in my household nor have access to drive the vehicles insured on my policy. I understand that the Company may declare no coverage will be provided if said answers are false or misleading, and materially affect the risk the Company assumes by issuing this policy.

Driver(s) Selection

Tiffany E. Barker
Mirlanda Bruno

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

In addition, since Sterlin Saint Ange 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 Imperial Fire and Casualty 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 (EUO) of Sterlin Saint Ange are Admissible Evidence for Summary Judgment

The Court agreed with the Plaintiff, Imperial Fire and Casualty Insurance Company's position that the statements provided by Sterlin Saint Ange during his Examination Under Oath (EUO) 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 (EUO) 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 Sterlin Saint Ange is admissible and proper summary judgment evidence.

Conclusion

This Court finds that the Plaintiff, Imperial Fire and Casualty Insurance Company's application for insurance unambiguously required Defendant, Sterlin Saint Ange, to disclose Mirlanda Bruno, as a household member living at the policy garaging address, that Plaintiff provided the required testimony to establish that Defendant, Sterlin Saint Ange's failure to disclose Mirlanda Bruno 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, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY's Motion for Final Summary Judgment against Defendants, STERLIN SAINT ANGE, LOURDES JOSEPH and MIRLANDA BRUNO, is hereby **GRANTED**.

b. This Court ***hereby enters final judgment*** for Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, and against the Defendants, STERLIN SAINT ANGE, LOURDES JOSEPH and MIRLANDA BRUNO.

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

d. This Court finds that the facts alleged by the Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the Motion for Final Summary Judgment, the transcript of the Examination Under Oath (EUO) of Sterlin Saint Ange, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

e. The IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY Policy of Insurance, bearing policy # XXXXXX4837, 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 IMPERIAL FIRE AND CASUALTY 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 IMPERIAL FIRE AND CASUALTY 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, STERLIN SAINT ANGE, failed to disclose that an additional resident over the age of 15 lived within his household at the time of the application for insurance, which occurred prior to the assignment of any benefits under the policy of insurance, bearing policy # XXXXXX4837, issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

i. The Defendant, STERLIN SAINT ANGE breached the insurance policy contract and application for insurance, under the policy of insurance, bearing policy # XXXXXX4837, issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

j. The material misrepresentation of Defendant, STERLIN SAINT ANGE on the application for insurance dated August 18, 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 # XXXXXX4837, issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY;

k. There is no insurance coverage for the named insured, STERLIN SAINT ANGE for any property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

l. There is no insurance coverage for the Defendant, LOURDES JOSEPH for any property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

m. There is no insurance coverage for the Defendant, MIRLANDA BRUNO for any property damage liability coverage, personal injury protection benefits coverage, collision coverage and comprehensive coverage, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy

XXXXXX4837;

n. Notwithstanding the rescission, the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX4837, does not provide any bodily injury liability insurance coverage;

o. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify the insured, STERLIN SAINT ANGE, for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

p. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, LOURDES JOSEPH, for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

q. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, has no duty to defend and/or indemnify the Defendant, MIRLANDA BRUNO, for any claims made under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

r. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify STERLIN SAINT ANGE for any bodily injury claim for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts arising from the accident of December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

s. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify LOURDES JOSEPH for any bodily injury claim for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts arising from the accident of December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

t. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify MIRLANDA BRUNO for any bodily injury claim for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts arising from the accident of December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

u. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify STERLIN SAINT ANGE for any property damage claim for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts arising from the accident of December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

v. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify LOURDES JOSEPH for any property damage claim for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts arising from the accident of December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

w. The Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, owes no duty to defend and/or indemnify MIRLANDA BRUNO for any property damage claim for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts arising from the accident of December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

x. There is no personal injury protection ("PIP") insurance coverage for MIRLANDA BRUNO for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

y. There is no collision insurance coverage for LOURDES JOSEPH for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

z. There is no comprehensive insurance coverage for LOURDES JOSEPH for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

aa. There is no collision insurance coverage for Westlake Services, LLC d/b/a Westlake Financial Services for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

bb. There is no comprehensive insurance coverage for Westlake Services, LLC d/b/a Westlake Financial Services for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

cc. There is no bodily injury liability insurance coverage for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

dd. There is no property damage liability insurance coverage for Ruby Jewel Roberts, or any estate that may be established for or on behalf of Ruby Jewel Roberts for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

ee. There is no property damage liability insurance coverage for Progressive American Insurance Company for the accident which occurred on December 14, 2020, under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

ff. 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 December 14, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX4837;

gg. The Defendant, STERLIN SAINT ANGE, is excluded from any insurance coverage under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837, for the December 14, 2020 accident;

hh. The Defendant, LOURDES JOSEPH, is excluded from any insurance coverage under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837, for the December 14, 2020 accident;

ii. The Defendant, MIRLANDA BRUNO is excluded from any insurance coverage under the policy of insurance issued by IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837, for the December 14, 2020 accident;

jj. Donna D. Woods, as Personal Representative of the estate of Ruby Jewel Roberts, is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND

CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837, for the December 14, 2020 accident;

kk. Westlake Services, LLC d/b/a Westlake Financial Services is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837, for the December 14, 2020 accident;

ll. Progressive American Insurance Company is excluded from any insurance coverage under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837, for the December 14, 2020 accident;

mm. Since IMPERIAL FIRE AND CASUALTY 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 IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, bearing policy # XXXXXX4837, for the December 14, 2020 motor vehicle accident;

nn. There is no insurance coverage for the motor vehicle accident which occurred on December 14, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

oo. There is no personal injury protection ("PIP") insurance coverage for the accident which occurred on December 14, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

pp. There is no property damage liability coverage for the accident which occurred on December 14, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

qq. There is no comprehensive coverage for the accident which occurred on December 14, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

rr. There is no collision coverage for the accident which occurred on December 14, 2020, under the policy of insurance issued by Plaintiff, IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY, under policy # XXXXXX4837;

ss. Since the policy of insurance issued to the Defendant, STERLIN SAINT ANGE, bearing policy # XXXXXX4837, is rescinded and is void ab initio, any assignment of personal injury protection ("PIP") benefits from MIRLANDA BRUNO to any medical provider, doctor and/or medical entity is void;

tt. 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.

* * *

Volume 29, Number 6
October 29, 2021
Cite as 29 Fla. L. Weekly Supp. ____

COUNTY COURTS

Landlord-tenant—Eviction—Default—Failure of tenants to deposit rent into court registry or file motion to determine amount of rent—Landlord entitled to possession where tenant testified that he had been unemployed due to various infections but did not testify that infections were related to COVID-19

DOWNTOWN EAST APARTMENTS, Plaintiff, v. ERIC S. BAILEY; CARRIE A. BAILEY, Defendants. County Court, 4th Judicial Circuit in and for Duval County. Case No. 2020-CC-005696, Division O. January 6, 2021. Ronald P. Higbee, Judge. Counsel: Steven C. Fraser, Steven C. Fraser, P.A., Hallandale Beach, for Plaintiff.

FINAL JUDGMENT FOR POSSESSION

THIS CAUSE came before the court upon Plaintiff's Motion for Judicial Default, the Court finds that Defendant, ERIC S BAILEY has been duly served with process, and that a default has been entered pursuant to §83.60(2), Florida Statute for the failure to deposit funds into the Clerk of Court Registry or to file a motion to determine the amount of rent to be paid into the registry within 5 days, excluding Saturdays, Sundays and legal holidays, after the date of service of process constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon. *Stephens-Williams vs. Johnson,* 181 So. 3d 577 (4th DCA 2016) [41 Fla. L. Weekly D141a]. Furthermore, the Court finds, CARRIE A BAILEY has been defaulted on August 25, 2020, by the Clerk. A hearing was set, the Defendant testified that he had been out of work because of various infections and did not testify they were in any way related to COVID-19. The plaintiff is, therefore entitled to possession of the property set forth in said Complaint, and that the plaintiff is entitled to possession by law of said property.

ORDERED AND ADJUDGED:

1. That Final Judgment be and is hereby entered in favor of the Plaintiff, DOWNTOWN EAST APARTMENTS against following named Defendant ERIC S BAILEY and CARRIE A BAILERY for possession of the following described premises: [Editor's note: Address redacted] Jacksonville, Florida 32206

WHICH LET WRITS OF POSSESSION NOW ISSUE FORTHWITH

* * *

Landlord-tenant—Eviction—Default—Failure of holdover tenant to demonstrate that she made best efforts to obtain further assistance in compliance with CDC Declaration or include Declaration in court record

BUSINESS SOLUTIONS OF HILLSBOROUGH LLC, 401K Plan Trust, Plaintiff, v. KIMBERLYN MARIE MORRIS, aka KIMBERLYN MORRIS, Defendant. County Court, 5th Judicial Circuit in and for Sumter County. Case No. 2020-CC-000704. February 23, 2021. Paul L. Militello, Judge. Counsel: Steven C. Fraser, Steven C. Fraser, P.A., Hallandale Beach, for Plaintiff.

DEFAULT

THIS MATTER having come before the Court, on February 15, 2021 on the Court's Compliance Hearing. Defendant, Kimberlyn Marie Morris testified under oath. After her testimony, Counsel for Plaintiff, Steven C Fraser, Esquire made an *Ore Tenus Motion for Default.* The Court having reviewed the Case file, and moving papers and otherwise being informed in the Premises, the Court makes the following findings of fact:

1. Court finds that Defendant, based upon her sworn testimony, has failed to demonstrate proof of best efforts to obtain further assistance and otherwise provide documentation of such efforts. Therefore, the Court finds Defendant is not in compliance with CDC Declaration and not in compliance with this Court's Order entered on January 12, 2021.

2. After a review of the Court file, the Court further finds that there is no CDC Declaration which has been filed of record and there has been no such declaration otherwise provided.

3. Alternatively, the Court finds that Defendant is a Holdover Tenant because her lease expired on January 31, 2021 and Plaintiff has effectively terminated the leasehold interest.

4. In light of the findings of fact, the Court ORDERS that a DEFAULT be entered against Defendant and that Plaintiff is entitled to a Final Judgment for Possession.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle—Stop—Traffic infraction—Continued detention for purpose of conducting DUI investigation—Where deputy developed immediate suspicion of DUI during traffic stop of defendant, who was driving wrong way on road; deputy requested assistance of experienced DUI investigator but was advised that none was available; and deputy detained defendant at roadside for nearly an hour before he began in earnest to conduct DUI investigation, duration of detention was unreasonable—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. NADINE DASS, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2021 CT 487. June 28, 2021. Hal C. Epperson, Jr., Judge. Counsel: Jazmin Scarborough, Office of the State Attorney, Kissimmee, for Plaintiff. Jake Parton, Leppard Law, Orlando, for Defendant.

ORDER GRANTING MOTION TO SUPPRESS

This matter came before the Court for hearing on June 1st 2021 on the defendant's motion to suppress. In her motion, the defendant asks the court to suppress evidence, arguing that the initial traffic stop was illegal, that the prolonged detention following the traffic stop was illegal, that the officer lacked reasonable suspicion to investigate the defendant for DUI, and that the officer did not have probable cause to make a DUI arrest. Additionally, in her motion, the defendant asks the Court to suppress statements made by the defendant as having been obtained in violation of her Fifth Amendment privilege against self-incrimination. However, at the outset of the hearing, the defendant indicated she was only pursuing relief based upon the grounds that Deputy Sweeney did not have reasonable suspicion to prolong the traffic stop for the duration which he did for the purposes of a DUI investigation. Prior to receiving evidence on the motion, the State of Florida and the defendant stipulated to the proposition that the defendant enjoyed legal standing to challenge the warrantless detention which followed the traffic stop. Additionally, the parties stipulated to the admissibility of a thumb drive containing evidence from the body worn camera of Deputy Sweeney. At hearing, the State of Florida offered the sworn testimony of Deputy Sweeney who was examined and cross-examined by the respective parties.

STATEMENT OF FACTS

On February 7, 2021, at approximately 3:00am, Deputy Sweeney was dispatched to the report of a reckless driver travelling down the wrong side of a divided, four lane highway. Specifically, Deputy Sweeney was advised that a motorist was travelling against the flow of traffic in a westerly direction in the eastbound lanes of Highway 192. The caller had provided a description of the vehicle and direction of travel and had initially observed the motorist near Deer Park Road and Highway 192, estimated by Deputy Sweeney to be at least 10 miles east of the location of the eventual traffic stop. According to

Deputy Sweeney, he responded to the call and observed the defendant driving directly towards him in the wrong lane, compelling the deputy to pull over on the shoulder of the roadway and to conduct a U-turn to affect a traffic stop of the defendant. When Deputy Sweeney approached the defendant-driver and sole occupant, she handed the deputy her insurance card though this had not been requested. Deputy Sweeney observed that the defendant's eyes were a little red, glassy and watery, and he testified that he smelled an odor of alcohol emitting from the defendant's breath. During cross-examination, Deputy Sweeney conceded that he did not use the word "red" to describe the defendant's eyes in his reports. He also conceded that he characterized the odor of alcohol as "slight". In speaking with the defendant, Deputy Sweeney concluded that the defendant was disoriented both as to her direction of travel as well as her actual location within Osceola County. The defendant told Deputy Sweeney that she worked at Publix in Celebration, that she lived in Davenport, and that she was on her way home after dropping off a friend. In reality, the defendant had been travelling from the far eastern side of Osceola County to the location of the traffic stop which was several miles east of the St. Cloud city limits. Apparently perplexed by her statement, Deputy Sweeney asked her opinion as to her present location. The defendant told Deputy Sweeney that she thought she was in the Davenport/Haines City area. In reality, the defendant was located on the eastern side of Osceola County whereas Davenport and Haines City are located in Polk County, adjacent to the western border of Osceola County, approximately 35 miles away.

According to the hearing testimony of Deputy Sweeney, he believed the defendant was impaired by alcoholic beverages or controlled substances and he attempted to call for a specially trained DUI officer to conduct an investigation before asking the defendant to exit the vehicle. Once Deputy Sweeney learned that a special DUI investigator was not available, he testified that he had the defendant exit the vehicle and conducted the investigation himself. Deputy Sweeney testified that it took between 10 to 15 minutes between the time he initially called for a DUI investigator and the time he learned none were available to assist. While waiting to hear back from his request for assistance, Deputy Sweeney testified that he conversed with the defendant and also separated her a short distance from her vehicle. Deputy Sweeney also testified during redirect examination that he was speaking with other officers on scene during this time concerning the investigation. Once learning no assistance was available, Deputy Sweeney continued with his investigation and administered field sobriety exercises which are depicted on the body worn camera. According to Deputy Sweeney, the defendant admitted to having consumed alcoholic beverages but stated that she only had "one shot and one beer". During cross-examination, Deputy Sweeney acknowledged there were two other officers on scene during the initial contact and ultimately a third officer present. Deputy Sweeney also conceded during cross-examination that the defendant appeared to walk without difficulty, responded to his questions in a timely manner, and had no wild sways of emotion, and that there were no open containers of alcoholic beverages observed in the defendant's vehicle.

As indicated above, the audio-visual evidence from Deputy Sweeney's body worn camera was admitted into evidence by stipulation of the parties. Neither side published the evidence during hearing based upon the court's affirmation that it would review the entirety of the evidence prior to issuing a ruling. This court has reviewed the body worn camera evidence in its entirety. It lasts approximately two hours and thirty-two minutes. However, given the issue raised by the instant motion, the relevant and most salient time frame runs from 3:14:29 a.m. to 4:12:02 a.m., which depicts events transpiring from just before the actual traffic stop to the point in time when Deputy Sweeney commences the administration of field sobriety exercises. This would include that period of time during which the defendant asserts she was the subject of an unreasonable, prolonged detention. In conjunction with the issuance of the instant Order, the court has provided the following log of material events as depicted on video:

- 3:16:00—traffic stop of the defendant conducted; Deputy Sweeney makes personal contact with the defendant at 3:16:30 a.m. and converses with the defendant until 3:19:44; it is during this interaction that Deputy Sweeney determines that the defendant was unaware that she had been travelling westbound in the eastbound lanes of Highway 192 and that the defendant was disoriented as to both her direction of travel as well as the locales which for which she professed familiarity; during this conversation, the defendant initially denied having consumed alcoholic beverages but later confirmed she had consumed "a beer and a "shot" at an establishment known as Mulligans, after work.
- After this initial conversation with the defendant, Deputy Sweeney tells the defendant "give me one second" and the audio of his body worn camera is then muted.
- Audio of Deputy Sweeney's body worn camera is muted for the next 54 ½ minutes while he remains on scene with other law enforcement officers; audio is unmuted at 4:14:47 during the administration of the HGN field sobriety exam.

As to the events which are depicted on video during the 54 ½ minutes in which Deputy Sweeney's audio is muted, below are the material observations:

- 3:20:52-3:22:16—Deputy Sweeney reinitiates contact with the defendant who is still seated in the driver's seat of her vehicle, acquires her driver's license and continues to dialogue with her.
- 3:25:07-3:26:00—Deputy Sweeney enters patrol vehicle and appears to be using the defendant's driver's license to run customary checks via his computer system;
- 3:30:50-3:33:06—Deputy Sweeney is observed using his telephone and appears to be having a conversation; as indicated by time stamps.
- 3:33:28-3:33:39—Law enforcement officers can be seen talking to the defendant while she still remains in her vehicle.
- 3:37:50—Defendant exits her vehicle and it appears that she is directed to stand or sit against a guardrail by law enforcement officers on scene.
- 3:38:34-3:39:04—It appears that one of the officers on scene may be conducting a preliminary HGN as he is seen using his hand held light to look into the face or eyes of the defendant; however, it is not possible to determine this with certainty as the officer and defendant are not fully within the screenshot.
- 3:43:22-3:52:37—Deputy Sweeney returns to his patrol vehicle with the defendant's driver's license and re-accesses his computer database for close to two minutes before initiating another phone call using his cell phone; Deputy Sweeney is on the telephone for approximately two minutes; Deputy Sweeney is then seen filling out a uniform traffic citation while having the defendant's driver's license attached to his clipboard and his computer screen data viewable; Deputy Sweeney spends just over five minutes completing the traffic citation before exiting his patrol car.
- 3:52:57—several officers can be seen interacting with the defendant.
- 3:55:00-4:00:37—Deputy Sweeney and the other officers on scene step away from the defendant and converse together.
- 4:00-4:09:30—during this period of more than nine minutes, it is not possible to describe what is taking place on scene; there are intermittent conversations which appear to take place between officers but given the muted audio the substance of the conversations is unknown.

• 4:09:30-4:10:57—Deputy Sweeney reinitiates conversation with the defendant and there is dialogue back and forth, though audio is still muted.

• 4:12:02-4:23:00—Deputy Sweeney administers field sobriety exercises to the defendant, including the HGN, the Walk and Turn, and the One Leg Stand; during the HGN Exercise, the audio of Deputy Sweeney's body worn camera is unmuted at 4:14:15.

• 4:23:00—the field sobriety exercises are concluded and the defendant is asked to sit down on the curb.

• 4:23:05—audio of body worn camera is again muted.

• 4:26:30-4:27:30—lighting is poor preventing a determination of the exact moment of handcuffing but the defendant is placed under arrest during this time frame.

LEGAL ANALYSIS

Deputy Sweeney conducted a lawful traffic stop after responding to a call of a reckless driver driving down the wrong side of a divided state highway in the dark of night. Having received a description of the subject vehicle and direction of travel, Deputy Sweeney responded to the rural location and actually observed the defendant driving towards him on the wrong side of the highway. At this point, Deputy Sweeney had probable cause to believe not only that the defendant had committed a traffic infraction but that the defendant posed an imminent and serious threat to the safety of other motorists. Under these circumstances, not only was the traffic stop warranted but failure to take action would have been a dereliction of duty and would have potentially jeopardized human life. Though the instant motion to suppress asserted that the traffic stop was illegal, the defendant conceded prior to hearing that the stop was no longer being challenged.

The issue presented to the court arises from the facts and circumstances subsequent to the traffic stop. Once a motorist has been lawfully detained for a traffic violation, the law enforcement officer may detain the motorist long enough to accomplish the legitimate purpose of the stop. This would typically include allowing sufficient time for the officer to check the defendant's driver's license, vehicle registration, proof of insurance, determine whether there are any outstanding warrants, write any citations or warnings, return these documents to the motorist, and to issue the actual citation or warning. *Rodriguez v. United States*, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) [25 Fla. L. Weekly Fed. S191a]; *Presley v. State*, 227 So.3d 95 (Fla. 2017) [42 Fla. L. Weekly S817a]. Of course, if an officer conducts a traffic stop for a traffic violation and while the motorist is lawfully detained the officer makes observations or acquires information providing a reasonable suspicion to believe the defendant is driving under the influence, then the officer may detain the defendant for so long as is reasonably necessary to confirm or dispel those suspicions by conducting a DUI investigation. *Origi v. State*, 912 So.2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]; *State v. Sookdeo*, 13 Fla. L. Weekly Supp. 872a (Fla. 17th Cir. Ct. May 22, 2006) (officer had reasonable suspicion to extend detention for DUI investigation where the defendant had been stopped for driving the wrong way down a street and defendant had an odor of alcoholic beverages and bloodshot eyes).

In the instant case, the statement of facts as set out above establishes to the court's satisfaction that Deputy Sweeney had a reasonable suspicion to believe that the defendant was driving under the influence within minutes after conducting the traffic stop. This is based upon a multitude of factors—the officer had reason to believe the defendant had been driving down the wrong side of divided state highway for at least a ten mile stretch; upon the officer's approach, the defendant handed the officer her insurance card without solicitation; the defendant was grossly mistaken as to both her direction of travel and her location; defendant manifested various signs of impairment by alcohol, including watery and glassy eyes and a slight odor of alcohol emitting from her breath as she spoke. She also admitted to having consumed alcoholic beverages after getting off of work at Publix. The totality of these circumstances certainly warranted that the officer detain the defendant beyond the normal time of simply issuing a civil traffic citation and warranted that he conduct a criminal investigation for driving under the influence.

In argument, the defendant asserts that the defendant was unreasonably detained based in part upon the presupposition that Deputy Sweeney's DUI investigation did not begin until he commenced the administration of field sobriety exercises some fifty-three (53) minutes after the initial stop. Certainly, if an officer conducting a traffic stop immediately notices signs of impairment but does nothing in furtherance of that investigation for fifty-three (53) minutes, that scenario supports an argument that the motorist's detention was unreasonably prolonged. The presence of reasonable suspicion to investigate justifies an extended detention so that the officer can conduct the appropriate investigation. If no investigation takes place, then the continued detention is not proper. While the administration of field sobriety exercises is a standardized and customary tool utilized in a DUI investigation, it does not necessarily mark the starting point of a DUI investigation for purposes of determining whether the investigating officer unreasonably prolonged the detention of a lawfully stopped motorist. Rather, in evaluating whether a motorist has been the subject of an unreasonably prolonged detention, one must consider all of the attendant circumstances surrounding the length of the detention and all of the actions taken by the detaining officer. The gravamen of constitutional analysis is the *reasonableness* of the officer's actions based on the particular facts before him.

The log set out above chronicles the actions of Deputy Sweeney as depicted on his body worn camera. During most of this on-scene visual evidence, Deputy Sweeney's audio is muted. However, the sworn testimony offered at hearing does lend some enhanced understanding to some of the events which are depicted on camera. Following the traffic stop but before the commencement of field sobriety exercises, Deputy Sweeney did the following: had two roadside conversations with the defendant while she was still in her vehicle; acquired the defendant's driver's license and returned to his vehicle to access information from his computer; makes at least two telephone calls consistent with his hearing testimony that he was attempting to solicit assistance from a fellow officer with specialized DUI training; discusses the investigation with fellow officers on scene; has the defendant exit the vehicle and proceed to a safe location; and finally, completes a uniform traffic citation. All of these events took place between 3:16 a.m. and 4:09:30 a.m., a span of time of fifty-three and one-half (53 ½) minutes. At 4:09:30 a.m., Deputy Sweeney reinitiates conversation with the defendant which immediately precedes the actual administration of field sobriety exercises which commences at 4:12:02 a.m.

All of the actions taken by Deputy Sweeney described above were proper investigative actions. Moreover, when an officer conducts a traffic stop and develops reasonable suspicion to believe that the motorist is driving under the influence, it is permissible to prolong the traffic stop for a reasonable amount of time to wait for a more experienced DUI investigator to arrive on scene. Whether the length of such a delay is reasonable, of course, depends upon the length of the delay and the particular circumstances of the case. There are a host of published circuit court appellate opinions and trial court opinions in the State of Florida which address this issue. As one might surmise, there is no bright line test for determining what constitutes a reasonable amount of time an officer may prolong a stop to wait for specialized assistance. The following cases represent delays which were deemed reasonable: *State v. Hall*, 25 Fla. L. Weekly Supp. 408a (Fla.

6th Cir. Ct. Dec. 16, 2015) (following accident, deputy observed signs of impairment; deputy contacted FHP to do the accident investigation pursuant to policy but FHP was delayed; after about an hour, a supervisor called another deputy to conduct the accident investigation; that deputy arrived about **an hour and 10 minutes** after the accident, completed the accident investigation and began a DUI investigation; appellate court opined "the question before the court is not whether it was possible for the officers on the scene to accomplish the objectives by alternative means, but whether the officers' actions were unreasonable"; court held that the policy and delay waiting for FHP was not unreasonable.); *Bartholomew v. DHSMV*, 20 Fla. L. Weekly Supp. 312b (Fla. 9th Cir. Ct. Jan. 11, 2013) (where officer had reasonable suspicion for DUI stop, **28 minute delay** waiting for DUI investigator was not unreasonable; motorist was not handcuffed or placed in patrol car but rather she sat on the curb.); *Sterbenz v. State*, 12 Fla. L. Weekly Supp. 612a (Fla. 6th Cir. Ct. March 4, 2002) (where defendant had many of the indicia of impairment, it was proper for the officer to detain him for 25 to 30 minutes for the arrival of a DUI unit.); *State v. Cage*, 25 Fla. L. Weekly Supp. 668c (Fla. Volusia Cty. Ct. Jan. 21, 2016) (after witnessing the defendant crash into the rear of a van, deputy developed reasonable suspicion for a DUI investigation immediately upon contacting defendant; **90 minute delay** in starting DUI investigation not unreasonable where during 24 minutes after accident, deputy called dispatch, contacted FHP to respond pursuant to policy, checked defendant's license, allowed paramedics to clear scene, trooper arrived and started accident investigation 24 minutes after crash and concluded their report on scene); *State v. Ivanova*, 25 Fla. L. Weekly Supp. 458a (Fla. Pasco Cty. Ct. Oct. 27, 2015) (once deputy had reasonable suspicion for DUI investigation, it was not unreasonable for the officer to wait **17 minutes** for a more experienced officer to do the DUI investigation.); *State v. Hart*, 25 Fla. L. Weekly Supp. 461a (Fla. Volusia Cty. Ct. June 15, 2017) (once officer had reasonable suspicion for DUI, **15 minute delay** for DUI investigator to arrive was reasonable.)

There are also a host of circuit court appellate opinions and trial court opinions in the State of Florida involving cases where courts determined that prolonged detentions were unreasonable: *State v. Swick*, 25 Fla. L. Weekly Supp. 995a (Fla. 7th Cir. Ct. Dec. 18, 2017) (where lawful traffic stop and reasonable suspicion for DUI, **27 to 28 minute delay** in starting the DUI investigation was unreasonable because three officers at the scene could have done the investigation rather than waiting for a fourth with a video camera); *State v. Freeman*, 21 Fla. L. Weekly Supp. 680a (Fla. Volusia Cty. Ct. March 24, 2014) (officer developed grounds for DUI investigation but did nothing for **½ hour** while waiting for another officer to arrive on scene, deemed unreasonable detention); *State v. Nicholson*, 21 Fla. L. Weekly Supp. 582b (Fla. Sarasota Cty. Ct. Sept. 20, 2013) (officer made valid stop and developed grounds for a DUI investigation but waited **17 minutes** for another officer to arrive to do the investigation and stopping officer did nothing during that time—court held that once the investigation stopped the detention became unlawful.); *State v. Niehans*, 15 Fla. L. Weekly Supp. 365a (Fla. Escambia Cty. Ct. Jan. 15, 2008) (**30 to 35 minute delay** for arrival of officer to conduct field sobriety exercises was deemed unreasonable); *State v. Nesseler*, 12 Fla. L. Weekly Supp. 966a (Fla. Dade Cty. Ct. May 20, 2005) (where officer lawfully stopped boat and had reasonable suspicion for BUI, it was improper to detain the defendant for **two hours** for the arrival of another officer when the other officers could have carried out the investigation.)

While a survey of this relevant common law does not yield up an empirical answer to the question immediately before the court, an instructive principle emerges—the reasonableness of a prolonged detention is not determined or measured merely by the passage of time. Rather, one must assess whether law enforcement is diligently using the time of detention to actively investigate for the purpose of dispelling or confirming the reasonable suspicion which served to initially justify a continued detention. To put it simply, reasonable suspicion warrants further investigation but not indefinite detention amidst idle police activity. Turning to the instant case, nearly an hour passed between the time of the initial traffic stop and the time when Deputy Sweeney began in earnest to investigate the crime of Driving under the Influence. To be sure, the actions taken by the deputy prior to the administration of field sobriety exercises are fairly considered part of the investigation. However, other than the telephone call seeking assistance from a DUI specialist, the actions taken by Deputy Sweeney while the defendant was detained for nearly an hour are those customary actions an officer would take following any routine traffic stop—talking to the motorist, acquiring license, running checks, and issuing citation. These routine actions should not take nearly an hour. The evidence at hearing failed to establish that Deputy Sweeney or any of the other officers on scene were diligently investigating their suspicions of DUI during the nearly hour long detention. While it is permissible for an officer having reasonable suspicion for DUI to prolong a traffic stop to await the arrival of a DUI specialist, none of the delay in the instant case is attributable to awaiting the actual arrival of such an officer. Rather, Deputy Sweeney learned at some undetermined point that no such officer was available. It appears from the body worn camera evidence that Deputy Sweeney did use his cell phone on two occasions, once at approximately 3:31 a.m. and once at approximately 3:45 a.m. Each call lasts for a couple of minutes. The testimony at hearing did not specifically establish whether these phone calls were the actual calls seeking a DUI specialist. Moreover, Deputy Sweeney's body worn camera was muted during each call, precluding disclosure of the substantive nature of the calls. Based upon the evidence at hearing, it is not possible to determine precisely when the initial call for assistance was made nor precisely when Deputy Sweeney learned that no such assistance was forthcoming. Even if one were to improperly speculate that the second phone call must have been the moment Deputy Sweeney learned of the unavailability of a DUI specialist, approximately twenty-seven minutes passed subsequent to this call before the commencement of field sobriety exercises.

The State of Florida has the burden of proving that the warrantless detention of the defendant was reasonable. Deputy Sweeney conducted a lawful traffic stop for an infraction and within minutes of the traffic stop developed reasonable suspicion to believe the defendant was impaired by either alcohol or controlled substances. Therefore, it was reasonable to prolong the detention for the purpose of a prompt and diligent investigation to confirm or dispel those suspicions. Such promptitude and diligence in investigation did not occur. Rather, the defendant was detained at roadside for nearly an hour before Deputy Sweeney began to earnestly conduct a DUI investigation. The duration of this prolonged detention was unreasonable.

WHEREFORE the Motion to Suppress is **GRANTED** and all evidence seized or obtained subsequent to Deputy Sweeney's completion of the uniform traffic citation at 3:52:45 a.m. is suppressed.

* * *

Insurance —Automobile—Windshield repair— Appraisal—Complaint for additional windshield repair benefits is dismissed where policy contained mandatory appraisal provision, insurer invoked appraisal by filing motion to dismiss, and policy required appraiser to determine amount of loss—Insurer did not waive appraisal right by invoking appraisal at start of litigation—Prohibitive cost doctrine is not applicable—No merit to argument that plaintiff's right of access to courts is violated by appraisal provision—Plaintiff relinquished that right by contractually agreeing to provision—No merit to argument that requiring plaintiff to pay costs associated with appraisal would violate statutory bar to deductible being applied to windshield damage

APEX AUTO GLASS, LLC, a/a/o DMA DISTRIBUTION, LLC, Plaintiff, v. GRENADA INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-039002-O. August 20, 2021. Carly S. Wish, Judge. Counsel: John Z. Lagrow, Malik Law, P.A., Maitland, for Plaintiff. Lisa M. Lewis, Cole, Scott, & Kissane, P.A., Tampa, for Defendant.

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

THIS MATTER is before the Court on "Defendant's Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal." On July 27, 2021, the Court held a hearing on the instant Motion. After hearing argument of both Plaintiff and Defendant, as well as reviewing all court filings related to the instant Motion by both Plaintiff and Defendant, the Court finds as follows:

This case involves a claim for comprehensive windshield insurance benefits by Plaintiff, an assignee. The Complaint alleges only a breach of contract action. When ruling on a motion to dismiss for failing to state a cause of action, the Court is confined to the four corners of the complaint and any documents attached thereto or incorporated within. The law is well settled that a motion to dismiss a complaint is not a motion for summary judgment at which time the court may rely on facts adduced in depositions, affidavits, or other proofs. On a motion to dismiss, the trial court is necessarily confined to the well-pled facts alleged in the four corners of the complaint and contrary to Defendant's argument, is not authorized to consider any other facts, including, as here, other claimed facts asserted by defense counsel relating to unpled affirmative defenses, even if argued by counsel for the parties on the motion to dismiss. *See Lewis v. Barnett Bank of South Florida, N.A.*, 604 So. 2d 937 (Mem) (Fla. 3d DCA 1992). A complaint does not need to anticipate a defendant's affirmative defenses. Rather, any affirmative defenses, with few exceptions, which do not apply here, should be raised by the defendant in an answer, not in a motion to dismiss. In deciding whether a cause of action is stated, this Court must not consider any affirmative defenses raised by the defendant or any evidence likely to be produced by either side, only what is contained within, or attached to the Complaint.

On May 12, 2021, Defendant filed "Defendant's Notice of Filing Insurance Policy." The Court finds it can consider the Policy as it is incorporated by reference into the Complaint and Plaintiff's standing to bring suit is premised on the terms of the Policy. In *One Call Property Services Inc.*, the appellate court found the lower court did not err in considering the contents of the insurance policy because the policy was referred to in the complaint. *See also Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So. 2d 1246 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a].

In the instant Motion, Defendant contends Plaintiff's Complaint should be dismissed in order for the parties to comply with the Policy's appraisal provision, which is a mandatory condition precedent to both the filing and maintaining of the subject lawsuit.

The Complaint in this case specifically states:

> [a]t all times material hereto, the Insured was insured under a policy of motor vehicle insurance coverage issued by the Defendant, a for profit corporation (the "Insurance Policy"). Said Insurance Policy is well known to the Defendant, a copy of which is in the possession of the Defendant and the said Insurance Policy ***is incorporated herein by reference.***

Therefore, this Court can consider the Policy at issue as it has been incorporated by Plaintiff in its Complaint. There are three (3) elements for courts to consider in ruling on a motion to compel appraisal: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. *Heller v. Blue Aerospace, LLC,* 112 So. 3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. The Court finds the existence of all three (3) elements.

The Policy contains an Appraisal Clause in the Endorsement, as well as a Legal Action Against Us Clause which state:

> **APPRAISAL**
>
> If you and we disagree on the amount of "loss", either may demand an appraisal of the "loss". Upon notice of a demand for appraisal, the opposing party may, prior to appraisal, demand mediation of the dispute in accordance with the Mediation provision contained in this endorsement. The mediation must be completed before a demand for appraisal can be made. In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If we submit to an appraisal, we will still retain our right to deny the claim.
>
> **LEGAL ACTION AGAINST US**
>
> No one may bring a legal action against us under this Coverage Form until: a. There has been full compliance with all the terms of this Coverage Form.

Plaintiff argues in its Response: (1) there is no appraisable issue; (2) appraisal is not binding under the express terms of the Policy, or is ambiguous; (3) there are material differences between appraisal and arbitration; (4) the appraisal provision is unenforceable because it does not describe the critical procedures that will govern the appraisal process or the determinations of the appraisers and/or the umpire; (5) the appraisal provision violates the Plaintiff's fundamental rights of access to the courts, to due process, and to a jury trial under the Florida Constitution; (6) Defendant's appraisal provision violates public policy; (7) Defendant has waived any right to appraisal; (8) Defendant is challenging coverage, which is a waiver of the appraisal process; (9) Defendant has selected a biased appraiser, which is a waiver of an appraisal; (10) Defendant's appraisal provision violates the "Prohibitive Cost Doctrine;" (11) Plaintiff was not required to invoke appraisal; and (12) If appraisal is compelled, the Court should abate this lawsuit.

The Court finds the arguments set forth by Plaintiff lack merit. Once appraisal is properly invoked, it becomes a condition precedent to the right to maintain an action on the policy. *U.S. Fire Ins. Co. v. Franko*, 443 So. 2d 170, 172 (Fla. 1st DCA 1983). An appraisal clause contained in an insurance contract acts as a condition precedent to bringing a claim under that contract. *United Community Insurance Company v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994). Here, Defendant invokes appraisal by the filing of the instant Motion. Florida law permits a party to invoke an appraisal provision for the first time during suit. *See Gonzalez v. State Farm Fire & Cas. Co.,* 805 So. 2d 814, 817-818 (Fla. 3d DCA 2000) [26 Fla. L. Weekly D390a]. Defendant has demanded appraisal during the lawsuit by virtue of its

motion to compel appraisal. *Id*.

In *United Community Insurance Company,* which contains a near identical appraisal provision as in this case, the court held that "neither party has the right to deny that demand once it is made" and found the appraisal was mandatory and enforceable by the court. 642 So. 2d at 60. Defendant has never denied coverage of the claim in this case, but did not pay what Plaintiff's invoice requested. "When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." *Johnson v. Nationwide Mut. Ins, Co.,* 828 So. 2d 1021, 1025 (Fla. 2002) [27 Fla. L. Weekly S779a] (quoting *Gonzalez v. State Farm Fire & Cas. Co.,* 805 So. 2d at 816-17). Further, the subject Policy's appraisal clause clearly states the appraisers are to determine the amount of loss. The appraisal provision does not contain language which requires the appraiser to determine the amount of loss "under this policy" or "payable." The nonexistence of this language in the appraisal provision is a critical factor. *State Farm Fire & Casualty Company v. Middleton,* 648 So. 2d 1200, 1202 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D99b].

Plaintiff further argues this Court should find the subject appraisal provision void based on the prohibitive cost doctrine. This Court rejects Plaintiff's argument that the appraisal clause is invalid as prohibitively costly and in violation of the prohibitive cost doctrine. The prohibitive cost doctrine is inapplicable to matters where a party has filed a breach of contract action and wishes to void an appraisal provision in the underlying contract they are purportedly seeking enforcement of, as no statutory rights are inherently implicated therein. *Zephyr Haven Health & Rehab Center, Inc. v. Hardin*, 122 So. 3d 916 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D2070a] (a litigant is required to make some showing of individualized prohibitive expense to invalidate an arbitration agreement on the ground that fee splitting would be prohibitively expensive and that they will actually be paying any and all costs of appraisal, not the attorney). *See also Green Tree Financial Corp.—Alabama v. Randolph*, 31 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Furthermore, this Court is currently bound by the recent decision from the Fourth District Court of Appeal in *Progressive American Ins. Co., v. Broward Ins. Recovery Ctr.*, 2021 WL 2134060 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1209a], which declined to extend the prohibitive cost doctrine to a contractually-mandated appraisal process in a windshield case such as the instant case, and found that "[t]he sole focus of the appraisal is the amount of the loss. Such a narrowly-focused, bargained-for dispute resolution mechanism may deliver benefits to both sides—lower rates for the insured and lower litigation costs for the insurer. Absent a directive from the Florida Supreme Court, this Court should not rewrite the contract by imposing a judge-crafted doctrine to bypass the contractual remedy." Moreover, the Fourth District found that the "significant Florida cases discussing the prohibitive cost doctrine all recognize its applicability to cases where arbitration is at issue." Accordingly, the Court finds the prohibitive cost doctrine does not apply in this case.

To the extent Plaintiff requests the Court rewrite the mandatory appraisal provision, this Court declines to do so. In Florida, appraisal clauses are enforceable unless the clause violates statutory law or public policy. *See Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d at 143; *see also Green v. Life & Health of America*, 704 So. 2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a]. Florida law permits retained rights provisions, and these provisions do not render the appraisal clause unenforceable. This Court finds the subject Policy appraisal provision language is clear, unambiguous, and provides a simple and informal appraisal process, which gives both parties an efficient and inexpensive means of determining the value of the loss.

As it relates to Plaintiff's claim that Defendant waived its right to appraisal, there are numerous Florida cases finding there is no basis for a claim of waiver where an appraisal provision is invoked at the start of litigation. *See Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d at 817 (holding that insurer did not waive right to appraisal by participating in the litigation where it "promptly answered and in the answer, demanded appraisal"); *Fla. Ins. Guar. Ass'n v. Castilla*, 18 So. 3d 703, 705 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2000a] ("FIGA has never acted inconsistently with its right to an appraisal, having raised that right at the earliest opportunity in this suit and continu[ing] to claim it through its subsequent pleadings."); *U.S. Fire Ins. Co. v. Franko,* 443 So. 2d at 172 (holding that petitioner's motion to dismiss constituted a demand for arbitration sufficient to trigger arbitration clause); *Balboa Insurance Co. v. W.G. Mills, Inc.,* 403 So. 2d 1149 (Fla. 2d DCA 1981) (holding that where the allegations of a motion to dismiss are based on a contractual right to arbitration, the motion to dismiss is, in substance, also a motion to compel arbitration). The issue in this case is regarding the value of the loss, not one of coverage. Defendant has admitted there is a covered loss, thus the issue should go to appraisal to determine the value of the loss.

Plaintiff has further alleged their right of access to courts, to a jury trial, and due process are violated by compliance with the appraisal clause. However, by contractually agreeing to arbitration/appraisal, a party relinquishes the right of access to courts. *See Kaplan v. Kimball Hill Homes Fla., Inc.*, 915 So. 2d 755, 761 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2787a], *review denied,* 929 So. 2d 1053 (Fla. 2006); *see also Infinity Design Builders, Inc. v. Hutchinson*, 964 So. 2d 752 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2032a]. Parties that agree to arbitration clauses, or appraisal clauses as in this case, waive the right of access to courts. *Terminix Intern. Co., LP v. Ponzio*, 693 So. 2d 104 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1184a]. Were Defendant to fail to comply with their own appraisal provision, Plaintiff would then have a right to maintain a lawsuit, but only after complying with the terms of the policy, which includes the appraisal provision.

Further, this Court finds no merit in the argument that requiring Plaintiff to pay any costs associated with appraisal would violate § 627.7288 and result in a de facto deductible. Section 627.7288 clearly provides that only a deductible shall not be applicable to windshield damage, and deductibles are well defined by Florida law. *See General Star Indem. Co. v. West Florida Village Inn, Inc.,* 874 So. 2d 26, 33-34 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1070b]; *Int'l Bankers Ins. Co. v. Arnone,* 552 So. 2d 908, 911 (Fla. 1989); *Mercury Ins. Co. of Florida v. Emergency Physicians of Cent.,* 182 So. 3d 661 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2364a].

In *Progressive American. Ins. Co. v. SHL Enterprises, LLC*, 264 So. 3d 1013 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2434a], the Second District Court of Appeal held the circuit court departed from the essential requirements of law by failing to properly analyze and interpret § 627.7288, Florida Statutes, and found that if the legislature intends for insurers to solely bear the costs of appraisal in windshield damage claims, it knows how to express that intention. The statute, as currently written, only prohibits the imposition of a deductible as applied to a windshield damage claim. It does not prevent a requirement for each party to bear its own appraisal costs in an insurance payment dispute. Thus, where the contracting parties have freely contracted for such a requirement, such as in this case, they or their assignees may not rely on § 627.7288 to avoid their responsibility to pay such costs. *Id.* at 1018.

Finally, the Policy contains express language requiring Plaintiff comply with all the terms of the Policy before Plaintiff may sue Defendant. Thus, the parties should be compelled to appraisal for the appraisers to determine the amount of loss. In *United Community Ins.,* the Third District Court of Appeal ordered the case back to the trial

court to enter an order finding that appraisal was a mandatory condition precedent once invoked by one of the contracting parties. 642 So. 2d at 60. Furthermore, the court in *Franko* held an insurer's motion to dismiss the complaint constituted the necessary demand for arbitration and that once the clause was appropriately invoked arbitration became a condition precedent to the right of the insured to *maintain an action on the policy*. (emphasis added). 443 So. 2d at 172. In *Franko,* the trial court found it was not clear whether an affirmative and formal demand for arbitration was ever made by petitioner, but the appellate court held that the motion to dismiss constituted such a demand. *Id.*

The court in *Franko* relied on the decision in *Balboa Insurance Co. v. W.G. Mills, Inc.,* 403 So. 2d 1149 (Fla. 2d DCA 1981), in which the court held where the allegations of a motion to dismiss are based on a contractual right to arbitration, the motion to dismiss is, in substance, also a motion to compel arbitration. The *Balboa* court opined that a pleading is to be governed by its substance rather than its label. As in *Balboa,* the allegations of petitioner's motion to dismiss were based on the contractual right to arbitration. Therefore, the motion to dismiss was a motion to compel arbitration and a demand for arbitration.

At the hearing, Plaintiff argued the Policy defines "Loss" as "direct and accidental loss or damage." Plaintiff alleges the definition creates an ambiguity and must be read against the insurer, and that the definition does not include a monetary value. The Court disagrees. Courts and the parties to an insurance contract must read a contract as a whole to give "every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) [25 Fla. L. Weekly S211a]. *See Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 941 (Fla. 1979) (noting that every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible). "A reasonable interpretation of a contract is preferred to an unreasonable one." *Id*. at 941. Plaintiff's interpretation of the appraisal provision and the definition of loss is unreasonable and it would not give every provision its full meaning and operative effect. The purpose of appraisal is to determine a monetary value, and here, the dispute is over the cost to replace the windshield. "When the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid." *Johnson,* 828 So. 2d at 1025 (quoting *Gonzalez,* 805 So. 2d at 816-17). Specifically, the Policy has a "Section III—Physical Damage Coverage—Section C" provision which explains how a loss is "paid." Therefore, when read as a whole, the Policy's definition of loss does not create an ambiguity, nor does it change the requirement to complete appraisal to determine the monetary value of the loss, which is the sole issue in this case.

Based on the foregoing, this Court finds that compliance with the subject policy's appraisal provision is a mandatory condition precedent which Defendant invoked by the filing of the instant Motion. *Franko*, 443 So. 2d at 172 (once an appraisal clause is properly invoked, appraisal becomes a condition precedent to right of an insured to maintain an action on the policy). If one party to the insurance contract demands appraisal under the contract, the proper action is dismissal until the condition precedent has been met.

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

1. Defendant's Motion to Dismiss, or Alternatively Motion to Stay and Compel Appraisal is **GRANTED**.

2. This case is Dismissed without prejudice for the parties to comply with the appraisal provision of the policy.

* * *

Landlord-tenant—Public housing—Eviction—Notice—Defects—Non-renewal notice that alleged damage caused by carelessness, misuse, or neglect on part of tenant or tenant's family or visitors was not specific enough to allow tenant to prepare defense to eviction action—Further, landlord did not satisfy condition precedent where tenant was not provided with requested meeting to discuss non-renewal notice—Complaint dismissed

REDWOOD APARTMENTS, LTD., d/b/a REDWOOD APARTMENTS, Plaintiff, v. YALEY GRADYS, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2021CC-2593. August 18, 2021. Kevin M. Kohl, Judge. Counsel: John E. McMillan, Temple Terrace, for Plaintiff. Monica T. Schomisch, Florida Rural Legal Services, Inc., Lakeland, for Defendant.

JUDGEMENT FOR DEFENDANT AS TO COUNT I OF THE COMPLAINT

THIS CAUSE came before the Court for Trial on August 3, 2021 upon the Plaintiff's Eviction Complaint. Present before the Court were Plaintiff's counsel, John E. McMillan, Esq., and Defendant's counsel, Monica T. Schomisch, Esq., along with the Defendant, Yaley Gradys. The Court, after having received the testimony of witnesses and exhibits introduced into evidence by the Plaintiff and Defendant, having heard argument of counsel, and being otherwise fully informed in the premises, the Court does hereby make the following:

FINDINGS OF FACT

1. The Defendant, Yaley Gradys, occupies residential real property owned by Plaintiff, under a federally subsidized housing lease.

2. The Plaintiff filed an Eviction Complaint against the Defendant based on a Corrected Notice of Non-renewal of Lease dated March 22, 2021.

3. The Plaintiff's March 22, 2021 non-renewal notice states as follows:

"This action is taken because:

1. Damage caused by carelessness, misuse, or neglect on the part of the Tenant, his/her family or visitors; *and*

2. Failure to reimburse the Landlord for the repair charges."

4. The Plaintiff's March 22, 2021 non-renewal notice states:

"You have 10 days within which to discuss this proposed termination of your tenancy with the landlord. If you request a meeting, we will meet with you."

5. The Defendant requested a meeting with the Plaintiff to discuss the March 22, 2021 non-renewal notice.

6. The Plaintiff never conducted a meeting with the Defendant to discuss the March 22, 2021 non-renewal notice.

7. Paragraph 23(e) of the Lease states that if the Tenant requests a meeting, the Landlord agrees to discuss the proposed termination with the Tenant.

CONCLUSIONS OF LAW

8. The Plaintiff's March 22, 2021 non-renewal notice was insufficient and was not specific enough to allow the Defendant to adequately prepare a defense to the eviction action. While it may be that there were conversations about the lease being terminated due to a broken toilet, and there may have been knowledge of the broken toilet by the Defendant, the nonrenewal notice was lacking the specificity that is required.

9. The Plaintiff has failed to provide the Defendant with a proper termination notice pursuant to the lease, thus Plaintiff has failed to meet the prerequisites necessary to the filing of the Eviction Complaint herein.

10. It is uncontroverted that the Defendant asked for a meeting to discuss the non-renewal notice pursuant to the lease and that the meeting was not held prior to the eviction action being filed. By failing to hold the requested meeting, the Plaintiff has failed to satisfy a condition precedent to the eviction action being filed.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

a.) The Court finds in favor of the Defendant.

b.) Plaintiff's Eviction Complaint is dismissed.

c.) The funds in the court registry shall be dispersed to Plaintiff.

d.) The Defendant is the prevailing party as provided in Fla. Stat. §83.48 and Fla. R. Civ. P. 1.420. The Court reserves jurisdiction to determine any properly and timely pled request for attorneys' fees and costs.

e.) The Court reserves jurisdiction as to Count II of the Complaint.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Conditions precedent—Examination under oath—Where both PIP statute and policy provide that EUO is condition precedent to receipt of benefits, neither insured who failed to appear at two scheduled EUOs nor medical provider/assignee is entitled to benefits—Insured's claim that she did not receive EUO notices is unavailing—Section 627.736(6)(g) does not include any mitigating factors for court to consider

RED DIAMOND MEDICAL GROUP, LLC, a/a/o Barbara Sori, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-003172-SP-26, Section SD05. March 3, 2021. Michaelle Gonzalez-Paulson, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Alberto J. Sabates and Camille Riviere, Progressive PIP House Counsel, Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT RELATING TO THE FAILURE TO APPEAR FOR EXAMINATION UNDER OATH

THIS MATTER came before the Court on February 4, 2021 for hearing on "Defendant's Motion for Final Summary Judgment," (the "Motion"), filed on April 2, 2020 by PROGRESSIVE AMERICAN INSURANCE COMPANY (the "Defendant"). After considering the Motion, oral arguments, the Court file, and being otherwise advised in the premises, this Court **ORDERS AND ADJUDGES** as follows:

Analysis and Findings of Fact

This action arises out of a claim for Personal Injury Protection ("PIP") benefits by Plaintiff RED DIAMOND MEDICAL GROUP, LLC. (the "Plaintiff"), as the assignee of claimant, Barbara Sori (the "Claimant") submitted to Defendant. On May 5, 2019, Claimant was purportedly involved in an automobile accident in which she allegedly sustained injuries. Claimant subsequently sought medical treatment from Plaintiff for the injuries allegedly arising from said automobile accident. Plaintiff billed Defendant for services rendered to Claimant on May 7, 2019 and June 12, 2019. Defendant denied payment as Claimant failed to submit to an examination under oath ("EUO"), as required by contract and permitted by Fla. Stat. § 627.736(6)(g) (2019). On July 9, 2019, Defendant sent a request to Claimant for an EUO to take place on August 7, 2019. Defendant sent the EUO notice to Claimant's policy address—Claimant is the Defendant's named insured. Claimant failed to appear for the EUO on August 7, 2019. A Certificate of Non-appearance was issued for the August 7, 2019 EUO and filed with the Court. On August 7, 2019, Defendant sent Claimant a second request for an EUO to take place on August 16, 2019. Claimant failed to appear for the EUO on August 16, 2019. A Certificate of Non-appearance was issued for the August 16, 2019 EUO and filed with the Court. It is undisputed that the Claimant did not appear for either of the EUOs. Based on the evidence presented, the Court finds that there is no genuine issue of material fact as to whether Claimant received proper notice for both EUOs.

An EUO provision in an insurance contract is a valid and binding term of an insurance policy. *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 305 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a]. In that same vein, conditions in insurance policies are part of the consideration for assuming the risk, and the insured, by accepting the policy, becomes bound by these conditions. *Id.* at 304. In this case, the insurance policy requires that an insured seeking PIP benefits must attend an EUO, if requested by Defendant. By failing to attend the EUO, the Claimant, as in the instant case, has breached the contract by depriving Defendant of a valuable right for which it had contracted. *Id.* at 300.

An insured's refusal to submit to an EUO is a material breach of an insured's contract that creates a complete defense to coverage under the policy. *See Savin Medical Group, LLC a/a/o Teresita Machado v. State Farm Mut. Auto. Ins. Co.*, 23 Fla. L. Weekly Supp. 762b (Cannava, J.) (Miami-Dade Cty. Ct. Dec. 4, 2015); *Central Therapy Center, Inc. v. Progressive Select Ins. Co.*, Case No. 2014-003027-CC-26 (Gonzalez-Paulson, J.) (Miami-Dade Cty. Ct. Oct. 5, 2020); *Palmetto Physical Therapy a/a/o Alan Mancia v. Progressive Select Ins. Co.*, Case No. 16-588-CC-26 (Gonzalez-Meyer, J.) (Miami-Dade Cty. Ct. Mar. 1, 2019) [28 Fla. L. Weekly Supp. 1140c]. A provision in the policy putting the insured on notice that she must submit to an EUO creates a true condition precedent to receipt of PIP coverage. *See Savin Medical Group, LLC a/a/o Teresita Machado*, 23 Fla. L. Weekly Supp. 762b.

"When the material facts are undisputed, they form a question of law which the trial court is empowered to decide on a motion for summary judgment." *Richmond v. Florida Power & Light Co.*, 58 So.2d 687 (Fla. 1952). The Defendant contends that the Plaintiff—standing in the shoes of the Assignor—is not entitled to benefits because the Assignor failed to satisfy a condition precedent when she did not appear at the scheduled EUOs. Plaintiff contends that Defendant had already breached the contract by this time by failing to pay the bills the Defendant had received over thirty (30) days before the EUO was ever scheduled.

Plaintiff relies on *Amador v. United Auto Ins. Co*., 748 So. 2d 307 (Fla. 3rd DCA 1999) [24 Fla. L. Weekly D2437a], which held that an insurer could not use its investigative right to toll the thirty day time limit provided for in sub-section Fla. Stat. § 627.736(4)(b) and that failure to complete that investigation within thirty days and not pay the bills is a breach of the contract.

This case is controlled by the version of *Fla. Stat. § 627.736* that went into effect on January 1, 2019. Since the ruling in *Amador* in 1999, the statute has undergone several significant revisions. Relevant to this case, sub-section Fla. Stat. § 627.736(4)(b) has also changed in that it is now titled "Payment of Benefits" instead of "Benefits; When Due." Additionally, sub-section Fla. Stat. § 627.736(6)(g), was specifically added and provides:

> 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**. The scope of questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information. **Compliance with this paragraph is a condition precedent to receiving benefits**.

Fla. Stat. § 627.736(6)(g) (2019) (Emphasis added).

This Court finds the statutory language provided in Fla. Stat. § 627.736(6)(g) (2019) to be clear and unambiguous. When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction. That is, the statute must be given its plain and obvious meaning. *See State of Florida v. Warren,* 796 So.2d 489 (Fla. 2001) [26 Fla. L. Weekly S434b]. The 2019 version of the No-Fault Statute makes clear that a person seeking PIP must appear for an EUO, if requested by the insurer, as a condition precedent to receiving benefits. A plain reading of the clear and unambiguous language of the statute authorizes insurance carriers,

like Defendant, to require an insured seeking benefits under the No-Fault Statute to submit to an EUO.

The Defendant incorporated the above statutory language into the applicable insurance policy. In addition, the policy reads:

> A person seeking coverage must allow us . . . to take an **examination under oath**, which we may conduct outside the presence of you or any other person claiming coverage, and answer all reasonable ques-tions we may ask and provide any documents, records, or other tangible items that we request, when, where, and as often as we may reasonably require.

(Emphasis added).

"When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment." *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968) citing to *Sharrer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962) and *Webb v. Hill*, 75 So. 2d 596, 603 (Fla. 1954).

Post *Amador*, the legislature amended the statute to specifically include EUOs as a condition precedent to benefits as well as revise sub-section Fla. Stat. § 627.736(4)(b). Therefore, *Amador*, does not apply to the case at bar as it concerns a different version of Fla. Stat. § 627.736. The Court cannot rely on case law that predates an amendment to the statute as that would defeat any intent the legislature had to change the law as they see fit. *USI Insurance of Florida v. Pettineo*, 987 So. 2d 763 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1788a].

Furthermore, in *United Automobile Ins. Co., v. Rodriguez*, 808 So.2d 82 (Fla. 2001) [26 Fla. L. Weekly S747a], the Florida Supreme Court interpreted sub-section Fla. Stat. § 627.736(4)(b). The Court held that the insurer's failure to pay PIP benefits within thirty days after receiving written notice of a covered loss does not forever bar it from contesting a claim. Additionally, the Court found that statutory sanctions, including interest and attorney's fees, are the only penalties approved by the legislature once payment becomes overdue. *Id*. at 87.

Next, Plaintiff relies on the affidavit of Defendant's named insured and claimant in this case, Barbari Sori. In her affidavit, the insured testifies that she did not receive any notice for an EUO. Sub-Section Fla. Stat. § 627.736(6)(g) does not include any mitigating factors for the Court's consideration. *Savin Medical Group, LLC a/a/o Teresita Machado*, 23 Fla. L. Weekly Supp. 762b; *Palmetto Physical Therapy a/a/o Alan Mancia*, Case No. 16-588-CC-26 [28 Fla. L. Weekly Supp. 1140c] (holding that "[r]egardless of any reason the claimant may have had for failing to attend the EUOs, Fla. Stat. § 627.736(6)(g) does not include any mitigating factors for this court to consider). For comparison purposes, the next section of the No-Fault Statute, Fla. Stat. § 627.736(7)(b), states in pertinent part as follows:

> If requested by the person examined, a party causing an examination to be made shall deliver to him or her a copy of every written report concerning the examination rendered by an examining physician, at least one of which reports must set out the examining physician's findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled, upon request, to receive from the person examined every written report available to him or her or his or her representative concerning any examination, previously or thereafter made, of the same mental or physical condition. By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the person examined waives any privilege he or she may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined, or may thereafter examine, him or her in respect to the same mental or physical condition. **If a person unreasonably refuses to submit to or fails to appear at an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits. An insured's refusal to submit to or failure to appear at two examinations raises a rebuttable presumption that the insured's refusal or failure was unreasonable.**

Fla. Stat. § 627.736(7)(b) (2019) (Emphasis Added).

In sub-section Fla. Stat. § 627.736(7)(b), the Legislature expressly mentions and therefore creates an *unreasonable refusal standard*, or mitigating factors, with respect to Independent Medical Examinations. The Legislature did not include such a provision or create such a standard in sub-section Fla. Stat. § 627.736(6)(g). This Court finds that an insurer need not prove the absence of, and the claimant may not plead the presence of, reasonable circumstances leading to the failure to attend.

Like the court in *American Health Providers, Corp. a/a/o Dayan Perez*, this Court also finds that it is the responsibility of the named insured to advise their insurer of any changes to their residence to move forward on claims investigations, especially when it comes to noticing the named insured for an EUO. *See American Health Providers, Corp. a/a/o Dayan Perez v. Windhaven Ins. Co.*, 26 Fla. L. Weekly Supp. 309b (Rubenstein, J.) (Miami-Dade Cty. Ct. Jun. 1, 2018) (finding that the PIP insurer proved that it mailed the Notice for EUO to the address listed by the named insured as his residence on his policy application, declarations page, and medical bills); *see also Rodriguez v. Security Nat. Ins. Co.*, 138 So.3d 520, 523 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D909b] (holding that an insurer provided sufficient proof of notice by mailing renewal offers and notice of policy lapse to the address provided by insured in their application, even though the mailings did not contain the insured's apartment number because the insured himself failed to include the apartment number in their own application). Similarly, in the case at bar, Defendant has provided proof of mailing the two notices for EUO to the only address on record for this claimant.

In summary, Fla. Stat. § 627.736(6)(g) makes an Examination Under Oath a condition precedent to receiving benefits. Defendant scheduled and properly noticed an EUO of the Claimant—twice. As the claimant failed to appear both times, she failed to satisfy a condition precedent and is not entitle to benefits. As the Plaintiff stands in the shoes of the Claimant and is entitled to no greater rights or benefits than the Claimant, Plaintiff is not entitled to benefits either. *See Fla. East Coast Railway Co. v. Eno,* 128 So. 622 (Fla. 1930). As such, this Court finds that benefits cannot be overdue when a condition precedent to receiving benefits or obtaining coverage was not met.

Accordingly, the Defendant's Motion for Final Summary Judgment is hereby GRANTED. Plaintiff shall take nothing by this action, and Defendant shall go henceforth without day. This suit is now disposed. The Court reserves jurisdiction to determine entitlement to and reasonable amount for an award of attorney's fees and costs to Defendant.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonable, related and necessary services—Where insurer clearly and unambiguously elected fee schedule method of reimbursement and put insured on notice of election, medical provider's motion for summary judgment as to reasonableness of charges is denied—Entry of summary judgment on issues of relatedness and necessity of services is precluded by disputed issues of material fact evinced by conflicting affidavits of parties' experts and issue as to whether services were actually rendered

CENTRAL THERAPY CENTER, INC., a/a/o Yunaisky Machado, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-001482-CC-26, Section SD04. August 3, 2021. Lawrence D. King, Judge. Counsel: Maria Corredor, for Plaintiff. Megan Pearl and Maury L. Udell, Beighley, Myrick, Udell + Lynne, P.A., Miami, for Defendant.

ORDER DENYING PLAITNIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before this Court on July 21, 2021, on Plaintiff's Motion for Summary Judgment, and this Court, having reviewed the Motion, the entire Court file and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised of the premises, it is hereby,

ORDERED AND ADJUDGED as follows:

ANALYSIS AND FINDINGS OF FACT

Plaintiff filed a motion for summary judgment on the issue of reasonable, related, and medically necessary services ("RRN") as to the medical services allegedly provided to Yunaisky Machado, ("Claimant") by Plaintiff. In support, Plaintiff filed the affidavit of its expert, Kevin Wood, D.C., and affidavit of its Spanish-speaking records custodian, Carlos Sanchez, in English which had not been translated and was withdrawn at the hearing. In opposition to Plaintiff's Motion, Defendant filed the affidavit of Gene Jenkins, Jr. D.C., the deposition of Plaintiff's employee Belkys Hernandez, and multiple other documents, including the policy of insurance.

"[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986). The party seeking summary judgment bears the initial burden of informing the court of the basis of its motion and identifying the portions of the declarations (if any), pleadings, and discovery that demonstrate an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). If the moving party meets its initial burden, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts—it must come forward with specific facts which show that there is a *genuine issue for trial*. *Id.* at 586-587

First, it is undisputed that the policy of insurance clearly and unambiguously elects the fee schedule. Numerous Florida Courts have made it clear that Insurers must specifically notify insureds of the election to use the Medicare Fee Schedule in determining a "reasonable" amount under the statute. *See generally, Geico Gen. Ins. Co. v. Virtual Imaging Servs. Inc.*, 141 So. 3d 147 (Fla. 2013) [38 Fla. L. Weekly S517a]; *DCI MRI, Inc. v. Geico Indem. Co.,* 79 So. 3d 840, 842 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D170e]; *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 67 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]. Here, Defendant properly elected the permissive fee schedule and put the insured on notice of such an election. *See* Policy of Insurance, Amendatory Endorsement 6126LS, filed April 1, 2021; *see also High Definition Mobile MRI, Inc. v. State Farm Mut. Auto. Ins. Co.,* 4D21-192, 2021 WL 2213289 (Fla. 4th DCA June 2, 2021) [46 Fla. L. Weekly D1280a] (affirming trial court stating "the trial court properly determined that an endorsement became part of the policy and permitted the insurer to limit reimbursement based on a schedule of maximum charges"); *Virtual Imaging Servs. Inc.*, 141 So. 3d 147. Accordingly, Plaintiff's motion with respect to reasonableness is **DENIED**, as Defendant properly elected the permissive fee schedule.

Furthermore, as Plaintiff withdrew the untranslated English language affidavit of its Spanish-speaking records custodian, Carlos Sanchez[1], Plaintiff has put forth no evidence to authenticate the records. Accordingly, the records attached to the affidavit of Plaintiff's expert, Dr. Wood, have not been authenticated because attaching documents which are not "sworn to or certified" to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla. R. Civ. P. 1.510(c). *See Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1325a]; *Toyos v. Helm Bank, USA*, 187 So. 3d 1287 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D913a].

An expert may not be used as a conduit for the admission of evidence for purposes of a motion for summary judgment where the sole purpose is to introduce inadmissible hearsay evidence through an affidavit to establish Plaintiff's prima facie case for a claim for PIP benefits. *See* Fla. Stat. § 90.403; Fla. R. Civ. P. 1.510(c)(4); *Hayes v. Wal-Mart Stores, Inc.*, 933 So. 2d 124, 127 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1547a]; *Kelly v. State Farm Mut. Auto Ins.*, 720 So. 2d 1145 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2500b]; *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1384a]; *Falsetto v. Liss*, 275 So. 3d 693, 694 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1340d]. In *Hayes v. Wal-Mart Stores, Inc.*, 933 So. 2d 124, 127 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1547a], the Fourth District Court of Appeal stated that while "an expert may base his or her opinion on facts or data which may not be admissible in evidence if the facts or data are reasonably relied upon by such experts. . . . inadmissible facts or data may not be introduced through the direct testimony of the expert."

A party can lay a foundation for the business records exception to hearsay in three ways: (1) offering testimony of a records custodian, (2) presenting a certification or declaration that each of the elements has been satisfied, or (3) obtaining a stipulation of admissibility. *Yisrael v. State*, 993 So. 2d 952, 956-57 (Fla. 2008) [33 Fla. L. Weekly S577a]. For purposes of admissibility, Plaintiff has not established any of these predicates and therefore it has failed to comply with Fla. R. Civ. P. 1.510(c). Specifically, Plaintiff failed to properly identify via Fla. R. Civ. P. 1.510 either through stipulation or proper affidavit to support the authenticity of the document which they cite in their motion. Failing to meet the proper evidentiary predicate to be considered competent substantial evidence on a motion for summary judgment requires the motion be summarily denied.

Even still, the parties have submitted conflicting expert affidavits which are diametrically opposed on virtually every issue of material fact, and pursuant to Florida Rule of Civil Procedure 1.510, summary judgment would be improper. *See James v. Pneuma Const. Corp.*, 190 So. 3d 678, 680 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1027e]; *Garcia v. First Comm. Ins. Co.*, 241 So. 3d 254, 257 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D671a] (holding that the trial Court erred in granting summary judgment where the conflicting reports of the parties' experts established that there was a genuine issue of material fact). "On summary judgment, the trial court may neither adjudge the credibility of the witnesses nor weigh the evidence." *Gidwani v. Roberts*, 248 So. 2d 203 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1024a].

Accordingly, where legally sufficient, conflicting affidavits are submitted, a Court cannot conclude a party is entitled to a summary judgment without first impermissibly resolving material issues of fact, presented by such affidavits. *See United Auto. Ins. Co. v. Progressive Reha. and Orthopedic Servs., LLC, a/a/o Yasel Alonso*, No. 3D21-0108, 2021 WL 3072936 (Fla. 3d DCA July 21, 2021) [46 Fla. L. Weekly D1669a]; *United Auto. Ins. Co. v. Cent. Therapy Ctr., Inc.*, No. 3D21-58, 2021 WL 3177319 (Fla. 3d DCA July 28, 2021) [46 Fla. L. Weekly D1710a]; *James,* 190 So. 3d at 680 (Fla. 3d DCA 2016); *see also Grant Builders Group, Inc. v. S. Bay Ace Hardware Lumber and Painting Co.,* 58 So.3d 348 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D683c]; *Charles E. Burkett & Assocs., Inc. v. Vick,* 546 So. 2d 1190, 1191 (Fla. 5th DCA 1989); *Goodman v. Anthony,* 269 So.2d 756, 757 (Fla. 3d DCA 1972).

Further, multiple panels of the 11th Judicial Circuit sitting in its appellate capacity have determined that it is error to accept a Plaintiff's affidavit while rejecting a defendant's conflicting affidavit on whether the medical bills at issue were reasonable in price, related and medically necessary. *State Farm Mut. Auto. Ins. Co. v. Gables Ins. Recovery, Inc. a/a/o Nelson Vanegas*, 28 Fla. L. Weekly Supp. 591a (Fla. 11th Cir. Ct. Sept. 4, 2020); *see also State Farm Mutual Ins. Co. v. Gables Ins. Recovery a/a/o Alexis Revollo,* 28 Fla. L. Weekly Supp. 453b (Fla. 11th Cir. Ct. Aug. 13, 2020); *United Auto. Ins. Co. v. Miami Dade MRI a/a/o Bermudez,* 28 Fla. L. Weekly Supp. 299a (Fla. 11th Cir. Ct. June 3, 2020); *State Farm Mutual Ins. Co. v. Gables Ins. Recovery a/a/o Yuderis Rego,* 27 Fla. L. Weekly Supp. 860a (Fla. 11th Cir. Ct. Nov. 20, 2019); *United Auto. Ins. Co. v. Open MRI of Miami Dade, Ltd. a/a/o Rosa Castillo,* 27 Fla. L. Weekly Supp. 791b (Fla. 11th Cir. Ct. Nov. 6, 2019) [27 Fla. L. Weekly Supp. 791b]; *United Auto. Ins. Co. v. Miami Dade County MRI, Corp. a/a/o Marta Figueredo,* 27 Fla. L. Weekly Supp. 506b (Fla. 11th Cir. App. July 30, 2019); *United Auto. Ins. Co. v. Miami Dade Cnty. MRI, Corp. a/a/o Javier Rodriguez,* 27 Fla. L. Weekly Supp. 225c (Fla. 11th Cir. Ct. July 25, 2019); *United Auto. Ins. Co. v. Miami Dade Cnty. MRI, Corp. a/a/o Rene Dechard,* 27 Fla. L. Weekly Supp. 226a (Fla. 11th Cir. Ct., August 12, 2019); *United Auto. Ins. Co. v. Millennium Radiology, LLC a/a/o Javier Rodriguez,* 25 Fla. L. Weekly Supp. 911b (Fla. 11th Cir. Ct. July 19, 2019). In coming to their ultimate and contradictory conclusions, both experts in the instant case did the same thing—namely they reviewed only the purported medical records of the claimant as **neither expert treated the patient.** This demonstrates the existence of a genuine issue of material fact, precluding summary judgment.

Lastly, there is a genuine issue of material fact as to whether the services were rendered at all, precluding summary judgment. Defendant submitted the deposition testimony of Belkys Hernandez, the office manager of Central Therapy who was employed during the period in which the Claimant purportedly treated. Hernandez testified at her deposition that during her employment with Plaintiff, she witnessed ongoing and pervasive fraud. *See* Hernandez Dep. (Aug. 15, 2017). Specifically, she stated that 98% of the bills were inflated. *Id.* at 25:16-26:6. There is no dispute that Hernandez worked at Plaintiff during the claim at issue in this case.

Where a medical provider has provided a false or misleading statement relating to a claim for PIP benefits, the insurer does not owe the provider PIP benefits for any of the claims pursuant to Fla. Stat. §627.736(5)(b)(1)(c). *See Chiropractic One, Inc. v. State Farm Mut. Auto.*, 92 So. 3d 871 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1565a]. Specifically, in *Chiropractic One*, the Fifth District Court of Appeals held:

> the plain language of section 627.736(5)(b)(1)(c) supports the invalidation of the claims. **The statute relieves both the insurer and the insured from paying the claims of 'any person who knowingly submits a false or misleading statement relating to the claim or charges.'** Although 'claim' and 'charges' are not defined by the PIP statutes, and no cases have been suggested to us that define those terms in the context of PIP claims, it is **logical to conclude that the Legislature established that dichotomy to be certain that not only the specific individual offensive "charges" were invalidated, but also that the entire "claim,"** i.e., the collective of all charges, was invalidated, as well.

(Emphasis added). The Fifth District further stated that "[a]ny knowingly misleading or false charge, **by definition, is unreasonable, not medically necessary, and in excess of permitted amounts**." *Id.* at 874; *see also Bosem v. Commerce and Industry Ins. Co.*, 35 So. 3d 944 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D892a] ("Fraud provisions are enacted to provide a disincentive to individuals considering the commission of such misrepresentations. **Allowing for payment of one portion of a claim would nonsensically allow an insured to engage in a 'cost-benefit analysis' with respect to the contemplation of such fraud.** The "arising from" and 'relating to" language [under §627.736] clearly seeks to encompass all claims pertaining to a single event resulting in purported losses."). Thus, in light of the sworn testimony of Plaintiff's own employee regarding the pattern of fraud that the clinic engaged in, there is a genuine issue of material fact as to whether the treatment was rendered at all. *See State Farm Auto. Ins. Co. v. Central Therapy Center, Inc. a/a/o Alfredo Torres*, 3D21-0069 (Fla. 3d DCA June 23, 2021) [46 Fla. L. Weekly D1477a] (reversing summary judgment regarding reasonableness, relatedness, and necessity and fraud where there were material facts in direct conflict). Accordingly, Plaintiff's motion for summary judgment is also **DENIED** as to relatedness and medical necessity.

---

[1]By Sanchez's own admission, he does not he does not read, write, or speak English. *See* Dep. of Carlos Sanchez, 4:12-13; 23:8-9 (June 21, 2016). The English language affidavit filed by Plaintiff does not indicate that it was ever translated to a language which the affiant understands and is insufficient summary judgment evidence.

* * *

Insurance—Personal injury protection—Attorney's fees and costs—Prevailing party—Determination of amount—Prejudgment interest

NEW LIFE MEDICAL AND REHAB CENTER INC., a/a/o Justo Gonzalez, Plaintiff, v. PROGRESSIVE SELECT INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2014-008940-CC-05, Section CC04. August 2, 2021. Diana Gonzalez-Whyte, Judge. Counsel: Michael I. Libman, for Plaintiff. Katherine E. Arnholt, Beighley Myrick Udell + Lynne, Miami, for Defendant.

AMENDED ORDER AND FINAL JUDGMENT AWARDING PLAINTIFF'S ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before the Court on The Law Firm of Michael I. Libman, Esq.'s Motion for Attorney's Fees, Interest on Attorney's Fees and Costs, and having heard argument of counsel regarding services performed, time and expertise required, the nature of the suit and the results obtained, having reviewed the time records of Plaintiff's counsel and the entire record in this matter, and being otherwise fully advised in the premises therein, it is hereby

ORDERED AND ADJUDGED as follows

1. This was an action for Personal Injury Protection ("PIP") filed by Plaintiff on or about May 6, 2014. Plaintiff's Amended Complaint was then filed on May 29, 2014. Defendant ultimately confessed judgment on or about July 31, 2015. The Law Office of Michael I. Libman, Esq. and Michael I. Libman, Esq. (hereinafter referred to collectively as "Libman"), Plaintiff's counsel in this matter, filed its Motion for Attorney's Fees, Interest on Attorney's Fees and Costs on August 7, 2015.

2. The Honorable Alexander Bokor commenced a hearing Libman's Motion on March 6, 2018, but was unable to fully adjudicate the issues before his appointment to the Third District Court of Appeal, and therefore and thereafter this Court assumed the responsibility for this matter. This Court commenced the evidentiary hearing on May 27, 2021, and took testimony but was unable to conclude on that day. The hearing was then continued to June 30, 2021, but due to technological issues on behalf of Plaintiff's counsel it was again continued to July 26, 2021. On July 26, 2021, after hearing testimony of Libman, Libman's expert witness, Stuart Yanofsky, Esq., and Defendant's expert witness, Dawn Jayma, Esq., this Court concluded the evidentiary hearing on Libman's Motion.

3. After hearing testimony from the aforementioned witnesses and

reviewing all exhibits and the full record in this matter, the Court determines, sitting in its fact- finding capacity, the number of reasonable hours expended by Michael I. Libman, Esq. in the representation of Plaintiff in this matter to be **45** hours.

4. In determining this number of reasonable hours, the Court has considered the factors set forth in Rule 4-1.5, *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985) and *Standard Guaranty Insurance Company v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), as well as other cases and rules to be discussed in more detail below.

5. "When deciding what constitutes a reasonable sum as compensation, Judges are not required to abandon their common sense or what they learned as lawyers." *Herssein v. AGA Service Company d/b/a Allianz Global Assistance, Jefferson Ins. Co., and American Airlines, Inc.,* 28 Fla. L. Weekly Supp. 411b (Miami-Dade County Court 2020) (citing *Ziontz v. Ocean Trail Unit Owners Ass'n, Inc.,* 663 So. 2d 1334, 1335 (Fla. 4th DCA 1993).

6. The Court agrees with Defendant that the pre-suit time billed in this matter is not compensable. *See United States Fidelity & Guarantee Co. v. Rosado,* 606 So. 2d 628 (Fla. 3d DCA 1992); *United Auto. Ins. Co. v. Affiliated Health Ctrs., Inc.,* 22 Fla. L. Weekly Supp. 687a (11th Jud. Cir. App. Div. 2015); *Apple Medical Center, LLC a/a/o Melianie Melien v. Progressive Select Ins. Co.,* 25 Fla. L. Weekly Supp. 748a (11th Jud. Cir. App. Div. 2017). There is no evidence in the record showing that Defendant acted unreasonably which would justify the award of pre-suit time. *See Rosado,* 606 So. 2d at 629. The record does establish that Plaintiff filed its Complaint alleging six counts, paid the corresponding filing fee, and properly served that on Defendant. That initial Complaint alleged an amount at issue of $99.00 or less. Then, after obtaining service, Plaintiff filed an Amended Complaint alleging a jurisdictional amount of over $5,000.00 and stated that the amount owed was $11,491.22. Both pleadings allege that the bills at issue are attached as "Exhibit B" but only the Amended Complaint actually includes the attachment. Additionally, both pleadings include five frivolous and outdated counts which were ultimately dismissed by Plaintiff. The Court is not persuaded by the order cited by Plaintiff in the matter of *Douglas Price, P.A., d/b/a Florida Pain, Trauma & Injury Clinic, a/a/o Dikenson Chery v. MGA Ins. Co*., 21 Fla. L. Weekly Supp. 976a (Hillsborough County Court 2014). Plaintiff and its counsel may have decided to roll the dice with the pleadings in this matter, but it is not reasonable to expect Defendant to pay for it. Likewise, fees incurred in transferring the case from Small Claims to County Court are not compensable. The hours and costs of amending the complaint is wholly plaintiff's doing. Had the proper counts been alleged and not counts that that were no longer viable as well as attaching the required documentation from the beginning of the lawsuit the time would not have been necessary.

7. The Court also agrees that the time billed after the confession is not compensable. *See Pepper's Steel & Alloys, Inc., v. United States of America,* 850 So. 2d 462 (Fla. 2003) [28 Fla. L. Weekly S455a]; *Danis Industries, Corp. v. Ground Improvement Techniques,* 645 So. 2d 420 (Fla. 1994). The record clearly demonstrates that Defendant confessed judgment and Plaintiff did not challenge that confession. Nonetheless, Plaintiff's counsel continued to file motions, propound discovery and set depositions. The Court finds that Defendant cannot reasonably be expected to pay for such billing, nor for Plaintiff's counsel to review or respond to anything filed or served by Defendant in response to Plaintiff's continued litigation post-confession.

8. The record in this matter is demonstrates that Plaintiff's counsel refused to take reasonable steps to coordinate depositions, even after being ordered by the Court to do so, leading to countless unilaterally scheduled depositions, motions for protective order and hearings on same. The record contains letters and emails from Defendant seeking to coordinate and set depositions, but no cooperation from Plaintiff's counsel. Plaintiff's counsel testified that his practice was to set depositions by the mailing of letters back and forth and that his office policy was to not accept telephone settings. The Court does not find these practices to be reasonable or in line with what is required by the Florida Rules of Professional Conduct. Many unnecessary hours were billed by Plaintiff's counsel as a direct result of these practices and the Court agrees with Defendant that they are not compensable. A client would not reasonably expect to pay for a motion to compel which could have been avoided if Plaintiff's counsel allowed depositions to be coordinated via phone or email and not just by snail mail.

9. Another example of the lack of diligence displayed by Plaintiff's counsel is the multiple motions for additional time to respond to Defendant's discovery requests that were filed. The record does not show any attempt by Plaintiff's counsel to have these motions heard or any good cause for why they should have been granted. The filing of a motion in an of itself is insufficient. It must be set for hearing or presented to the court via electronic means. Parking a motion is a strategy which on leads to unnecessary delay. The record is devoid of satisfactory evidence as to why these hours were reasonable and therefore the Court is disallowing them.

10. The Court was also troubled by Plaintiff's Motion to Set Summary Judgment which states that "[d]espite repeated requests, Defendant refuses to coordinate the setting of Plaintiff's Summary Judgment." Plaintiff's counsel billed to dictate this motion on December 18, 2014, which was the very same day Plaintiff filed its Motion for Summary Judgment was filed. Assuming the allegations are correct, and Plaintiff's counsel did make "repeated requests," it was done the same day the Summary Judgment Motion filed and it is not reasonable to expect Defendant's counsel to have even had the opportunity to review the motion at that point.

11. It is also unreasonable to expect Defendant to pay the legal fees of Dr. Marquez. Plaintiff's counsel testified that Dr. Marquez was retained to serve as Plaintiff's expert in this matter, and was compensated as such. At some point, however, Dr. Marquez retained Libman to represent him. Instead of charging his client, Libman instead added Dr. Marquez's legal fees to the bill he now wants Defendant to pay. This Court simply does not find it reasonable to expect Defendant to pay the legal fees of a client who was not a party to the litigation at all.

12. The Third District Court of Appeal recently issued its opinion in the matter of *Universal Property & Casualty Ins. Co. v. Deshpande,* 314 So. 3d 416 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2511a] which this Court finds instructive in this matter. "[A] fee applicant bears the burden of presenting satisfactory evidence to establish . . . that the hours are reasonable." *Id.*, at 419 (citing *22nd Century Props., LLC v. FPH Props., LLC,* 160 So. 3d 135, 142 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D782a]. "When calculating the number of hours reasonably expended on the litigation, '[f]ee applicants are expected to exercise 'billing judgment' and, if they do not, 'courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are excessive, redundant, or otherwise unnecessary.' " *Id.* "Courts must be particularly concerned with notorious 'billable hours' syndrome, with its multiple evils of exaggeration, duplication, and invention. *Id.,* at 420 (citing *Miller v. First Am. Bank & Trust,* 607 So. 2d 483, 485-86 (Fla. 4th DCA 1992). "Likewise noncompensable is excessive time spent on simple ministerial tasks such as reviewing documents or filing notices of appearance." *Id.,* at 420 (quoting *N. Dade Church of God, Inc. v. JM Statewide, Inc.,* 851 So. 2d 194, 196 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b].

13. In *Deshpande,* the Third District Court of Appeal found that the fee applicant failed to present evidence that it was reasonable for five

attorneys to expend 469 hours on a first-party property insurance case which settled after minimal discovery and in which no significant motions were litigated. *Id.,* at 419-420. Conversely, the opponent of the fee award met its burden of pointing out with specificity which hours should be deducted by having its expert identify with specificity which hours should be deducted based on an itemized analysis of the billing entries. *Id.,* at 420.

14. Similar to the facts in *Deshpande,* this was a case in which minimal discovery occurred, no depositions actually went forward, and no substantive motions were argued. The record shows that the few hearings that were set are attributable to the lack of diligence and unwillingness to coordinate by Plaintiff's counsel. The Motion for Summary Judgment was never set for hearing, nor was the Motion to Set Summary Judgment discussed above. Defendant never even filed an answer or raised any affirmative defenses and ultimately confessed after exhausting attempts to locate a crucial witness.

15. Plaintiff's counsel has not met his burden of showing with competent, substantial evidence why all of his fees should be paid in this matter. Defendant, however, has met its burden as the party opposing the fee award. Defendant's expert, Ms. Jayma, provided the Court with a detailed report and testimony explaining why certain hours should be reduced or disallowed completely. For the reasons discussed above, and based upon the testimony and other evidence presented at the hearing, as well as the record in this matter, that the Court determined the number of hours stated above to be reasonable.

16. "Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys its power to perform adequately the function of its creation." *Baruch v. Giblin,* 164 So. 831, 833 (Fla. 1935).

17. Plaintiff's counsel, Michael I. Libman, Esq. is entitled to a reasonable hourly rate of **$500.00** for the services rendered in this matter. In determining this amount, the Court takes into account Mr. Libman's years of experience in PIP litigation. Mr. Yanofsky cited numerous attorneys and their rates as examples of why Mr. Libman is entitled to a higher current market rate, but did not provide any testimony as to why those attorneys rates were relevant or how they compared to Mr. Libman in terms of skill, experience and reputation and that their rate was charged for similar services. Ms. Jayma, however, provided testimony regarding her familiarity with the other attorneys cited and that their skill, quality of work and reputation were not comparable to Mr. Libman and did not provide a reasonable basis for awarding the fees they request.

18. Pursuant to *Quality Engineered Installation, Inc. v. Higley South, Inc.,* 670 So. 2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a] the Court also finds, over Defendant's objection, that Plaintiff is entitled to recover pre-judgment interest on the attorney fee award in this order. Such interest shall accrue from July 31, 2015, at which time Defendant served its confession of judgment. The total amount of pre-judgment interest to be paid to Plaintiff by Defendant is **$5,884.11**.

19. As the prevailing party in this matter, Plaintiff is also entitled to recover reasonable taxable costs incurred in the litigation of this matter. The Court finds that Plaintiff reasonably incurred and shall recover **$575.00** in costs.

FINAL JUDGMENT

In the view of the foregoing, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's counsel Michael I. Libman, Esq. shall recover from Defendant, PROGRESSIVE SELECT INSURANCE COMPANY, the sum of **$28,959.11** for attorney's fees, pre-judgment interest, and costs, which shall bear interest from the date of entry of this Final Judgment until satisfied at the rate of **4.25%** per annum.

IT IS FURTHER ORDERED that Plaintiff's expert witness, Stuart Yanofsky, Esq., is entitled to recover a fee for services rendered by him in this matter. The Court concludes that Mr. Yanofsky is entitled to recover a reasonable hourly rate of **$500** for **26.5** hours, totaling **$13,250.00**.

Based upon the above and foregoing findings, final judgment is hereby entered by which Plaintiff, Plaintiff's attorney and fee expert shall recover from Defendant those amounts which are contained in this order and judgment, totaling **$42,209.11**, which shall bear post-judgment interest at the rate of **4.25%** per annum from the date of this order and judgment until it is satisfied, ***for all of which let execution issue.***

Defendant is directed that payment of the amounts in this order be made payable and directed as follows: The Law Firm of Michael I. Libman, at 2439 NW 7th Street, Suite 5, Miami, Florida 33125 (attorney's fees and costs); and Stuart B. Yanofsky, P.A., at [redacted by court] (expert fee).

* * *

Criminal law—Driving under influence—Discovery—Defense motion to produce field sobriety exercises training records for state witnesses is denied—Materials are not likely to lead to admissible evidence and cannot be used to cross-examine witnesses on proper administration of exercises where witnesses are not offered as experts—State's motion to exclude National Highway Safety Administration Instructor Manual is granted

STATE OF FLORIDA, v. JACOB MICHAEL OLIVER, Defendant. County Court, 12th Judicial Circuit in and for Manatee County. Case No. 2019 CT 001835. August 9, 2021. Jacqueline B. Steele, Judge. Counsel: Angela Greenwalt, Office of the State Attorney, for State. Carly Robbins-Gilbert, Office of the Public Defender, for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO PRODUCE TRAINING RECORDS OF STATE WITNESSES AND GRANTING STATE'S MOTION IN LIMINE

THIS CAUSE came before the Court on August 5, 2021 upon Defendant's Amended Motion to Produce Training Records of State Witnesses, which was filed on June 17, 2021. The Court, having heard argument from both the State and Defense, as well as having reviewed in depth case law submitted by the Parties, does hereby find as follows:

1. The Defendant's motion is denied as the materials requested are not likely to lead to admissible evidence and cannot be used to cross-examine an officer on the proper administration of field sobriety exercises as the officers scheduled to testify in this matter are not being offered as expert witnesses. See *State v. Meador,* 674 So.2d 816 (4th DCA 1996) [21 Fla. L. Weekly D1152a]. Further, pursuant to *State v. Arment,* 25 Fla. L. Weekly Supp. 666b (Fla. Brevard Cty. Ct. 2017), where there is no expert testimony, this Court finds that the use of training manuals or materials used in 2017 "in house" Standard Field Sobriety Testing Course is no different than use of any field sobriety exercise manuals, their administration, or anything contained in the National Highway Traffic Safety Administration manual regarding same which is impermissible as such is hearsay without exception. *See also, State v. Gladding,* 10 Fla. L. Weekly Supp. 985a (Fla. 15th Cir. Ct. 2003).

2. In light of the above, the State's motion in limine to exclude the use of the National Highway Traffic Safety Administration Instructor

Manual in hereby granted.

* * *

Insurance—Automobile—Windshield repair—Plaintiff repair shop's motion to set aside verdict in favor of insurer in action for balance of reduced repair claim is granted and judgment is entered in favor of shop—There was no evidence upon which jury could properly rely to find that shop gave up its right to recover additional payment from insurer or to find that amount paid by insurer was what service would cost in competitive market in normal, arms' length transaction from competent and conveniently located repair facility

SUPERIOR AUTO GLASS OF TAMPA BAY, INC., a/a/o Matthew Dick, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 15-CC-009347, Division I. August 13, 2021. Joelle Ann Ober, Judge. Counsel: Anthony Prieto, Morgan & Morgan, Tampa; Christopher P. Calkin and Mike N. Koulianos, The Law Offices of Christopher P. Calkin, P.A., Tampa; David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa; and Raymond T. (Tom) Elligett, Jr. and Amy S. Farrior, Buell & Elligett, P.A., Tampa, for Plaintiff. Frank A. Zacherl, Shutts & Bowen, LLP, Miami; and Lindsey R. Trowell, Steven E. Brust, and Kristen L. Wenger, Smith, Gambrell & Russell, LLP, Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO SET ASIDE VERDICT AND FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR NEW TRIAL and FINAL JUDGMENT FOR PLAINTIFF

THIS MATTER came before this Court at a hearing on June 2, 2021, on Plaintiff's Motion to Set Aside Verdict and for Judgment in Accordance with Motion for Direct Verdict, or for New Trial filed April 23, 2021 ("Motion"). Having reviewed and considered Plaintiff's Motion, Plaintiff's Supplemental Memorandum of Law filed May 19, 2021, Defendant's Response in Opposition to Plaintiff's Motion filed May 21, 2021, the history of the case, the evidence and arguments presented at the jury trial conducted April 12-14, 2021, the arguments of counsel on this Motion, the applicable law, and being otherwise fully advised, the Court finds:

I. Background

A. Procedural History

1. This is a breach of contract action arising out of damage to Defendant's insured's windshield. Defendant, Geico General Insurance Company (Geico), issued a policy of automobile insurance to Matthew Dick, which provided coverage for physical damage to the windshield of Mr. Dick's vehicle. Mr. Dick retained the services of Plaintiff, Superior Auto Glass of Tampa Bay, Inc. (Superior), to remedy damage to the windshield of his 2010 Ford Escape. Plaintiff obtained an assignment of benefits from Mr. Dick and replaced the subject windshield on or about February 18, 2015. The undisputed facts reflect that Plaintiff billed Defendant $818.60 for the windshield replacement and Defendant remitted payment of $379.88, leaving a balance of $438.72.

2. Plaintiff's Amended Statement of Claim for breach of contract filed July 17, 2015, alleges that Defendant materially breached the contract by failing to pay the prevailing competitive price as required by the insurance policy.

3. On December 8, 2015, Defendant filed its Answer and Affirmative Defenses to Plaintiff's Amended Complaint. Therein, Defendant asserted two affirmative defenses that were presented at the eventual jury trial of this matter. Affirmative defense number one states Defendant "paid in full the prevailing competitive price for the repair at issue" in accordance with the terms of its policy and "Plaintiff's invoice exceeds the prevailing competitive price." Def.'s Answer and Affirmative Defenses 3-4. Affirmative defense number four states: "At all times material hereto, Plaintiff knew and understood GEICO would not pay the price it claims in this litigation and with that full knowledge and understanding agreed to do the work, thus waiving any right to collect more monies for the repair/replacement than GEICO has already paid." *Id.* at 5 ¶ 4.

4. On April 11, 2016, this case came before the Court on Defendant's Motion for Final Summary Judgment and Memorandum of Law in Support filed March 22, 2016, Plaintiff's Motion for Summary Judgment in Opposition to Defendant's Motion for Summary Judgment filed April 5, 2016, and Defendant's Response to Plaintiff's Motion for Summary Judgment in Opposition to Defendant's Motion for Summary Judgment filed April 7, 2016.

5. The key issue in this case, which has been extensively litigated, has been the definition of the phrase "prevailing competitive price," which is included in Defendant's limit of liability section in the subject policy of insurance. The policy reads as follows:

> LIMIT OF LIABILITY
>
> The limit of our liability for ***loss***:
>
> 1. Is the ***actual cash value*** of the property at the time of the ***loss***;
>
> 2. Will not exceed the prevailing competitive price to repair or replace the property at the time of ***loss***, or any of its parts, including parts from non-original equipment manufacturers, with other of like kind and quality and will not include compensation for any diminution of value that is claimed to result from the ***loss***. Although ***you*** have the right to choose any repair facility or location, the limit of liability for repair or replacement of such property is the prevailing competitive price which is the price we can secure from a competent and conveniently located repair facility. At ***your*** request, we will identify a repair facility that will perform the repairs or replacement at the prevailing competitive price."
>
> Section III—Physical Damage Coverages.

6. On the initial summary judgment motions, Defendant argued the policy language was unambiguous, and because Defendant would have been able to secure the price it paid from another competent and conveniently located repair facility, it paid the prevailing competitive price and did not breach the policy. Final Summ. J. in Favor of Pl. ¶ 3 (May 2, 2016).

7. Plaintiff argued the plain language of prevailing competitive price required Defendant to pay the amount billed by Plaintiff because Plaintiff was competent, conveniently located, used like kind and quality parts, and Defendant could have secured the price Plaintiff billed. In the alternative, Plaintiff argued there was more than one reasonable interpretation of the term prevailing competitive price under the policy language and therefore, the term was ambiguous. *Id.* at ¶ 4.

8. This Court found the parties presented more than one reasonable interpretation of the prevailing competitive price policy language, and therefore found the language to be ambiguous and resolved the ambiguity in favor of Plaintiff's interpretation. *Id.* at ¶ 5.

9. This Court's Final Summary Judgment in Favor of Plaintiff entered May 2, 2016, was appealed by Defendant along with related judgments from three different divisions of the county court to the Thirteenth Judicial Circuit Court in its appellate capacity. The circuit court reversed and remanded the cases for further proceedings. *See Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc. (a/a/o Matthew Dick) et al*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Cir. Ct. (appellate) Mar. 27, 2018) (*Dick I*). The *Dick I* opinion will be discussed in more detail in the following section.

10. On remand, this Court heard Plaintiff's Renewed Motion for Summary Judgment filed on April 10, 2018. The Court indicated agreement with another decision of the county court[1] regarding the burden of proof in this matter and the relevant market in which the prevailing competitive price must be determined. *See* Final Summ. J.

in Favor of Pl. ¶¶ 6-7 (Mar. 6, 2019).

11. The evidence before the Court included the affidavit of Plaintiff's owner, who is also the owner of Auto Glass Industry Services, Inc. (an appraisal service for auto glass cases for Progressive Insurance Company), regarding "her extensive knowledge, training, and experience in the auto glass industry and a foundation upon how she set the usual and customary charges for Superior in the non-affiliated competitive market." *Id.* at ¶ 8. This included National Auto Glass Specification (NAGS) pricing and the pricing in the relevant community. *Id.*

12. The evidence also included the affidavits of the owner of Auto Glass America regarding his knowledge of the usual and customary charges for the services charged by Auto Glass America based on the relevant community and NAGS. *Id.* at ¶ 10. Additionally, the affiant provided invoices relative to the amounts billed by Auto Glass America for three windshield replacements done on the same type of vehicle within the same timeframe as the services rendered in this case. *Id.*

13. Defendant provided no evidence of the prevailing competitive price as outlined by *Dick I*.

14. After reviewing and considering the Renewed Motion, Defendant's Opposition to same filed November 21, 2018, the record, the summary judgment evidence, the arguments of counsel, and the circuit court's controlling opinion (*Dick I*), this Court found for the Plaintiff on summary judgment. *See* Final Summ. J. in Favor of Pl. (Mar. 6, 2019).

15. Defendant appealed and Plaintiff cross appealed on the issue of which party has the burden of proving prevailing competitive price. The circuit court, in its appellate capacity, set aside the judgment in favor of Plaintiff and remanded the matter for further proceedings. *See Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc. (a/a/o Matthew Dick)*, 28 Fla. L. Weekly Supp. 785a (Fla. 13th Cir. Ct. (appellate) Oct. 2, 2020) (*Dick II*). The *Dick II* opinion will also be discussed in more detail in the following section.

16. Upon remand from the circuit court in the *Dick II* opinion, the Court scheduled this matter for jury trial to begin on April 12, 2021.

B. Controlling Thirteenth Circuit Appellate Decisions[2]

i. *Dick I*[3]

17. After this Court's entry of its May 2, 2016, Final Summary Judgment in Favor of Plaintiff in this case, Defendant appealed that judgment, as well as four other "county court judgments that rejected [Defendant's] contention that its policy language limits the extent of its liability for windshield glass replacement claims." *Dick I*, Case No.: 16-CA-5106, Slip. Op. at p. 2. The appellate court "conclude[d] that the relevant policy language does limit GEICO's liability, but not as much as GEICO contends." *Id.* The court indicated:

> The pertinent policy language unambiguously limits GEICO's liability to the 'prevailing competitive price,' which means the price the service would bring in a competitive market, not the price set in an agreement between GEICO and a particular provider.

Id.

18. In analyzing the policy language and arguments, the appellate court stated:

> The policy language clearly limits GEICO's liability to the 'prevailing competitive price.' The term is used in three locations in the relevant section of the policy, but both sides seek to focus the court only on the second instance, which characterizes the 'prevailing competitive price' as the 'price we can secure from a competent and conveniently located repair facility.' Both sides have called the latter phrase a 'definition' of the former, and focus on its language exclusively. GEICO contends the 'definition' means any price it elects to pay that can get the repair done, while the windshield companies contend the same words mean any price they charge because GEICO could, as could any customer, also get the repairs done at that price.

Id. at p. 7 (footnote omitted).

19. The court took issue with both parties' interpretations:

> Essentially, the windshield companies maintain that GEICO should pay the windshield companies' proposed rates, which have been negotiated with *no one*. That simply is not a 'prevailing competitive rate.'
>
> GEICO's arguments are similarly uninformed by context. The carrier cannot say 'prevailing competitive price' is the limit of its liability and then effectively limit its exposure to a lower price it alone could obtain through a non-open-market transaction.

Id. at p. 8 (emphasis in original). The court went on to state "[u]nder the policy language the test is what the service would cost in a competitive market in a normal, arms' length non-insurance transaction." *Id.*

20. The court then noted "that when a policy redefines a term, that language should control," however, the court found "the 'price we can secure' language does not redefine 'prevailing competitive price.' Rather, it modifies it." *Id.* As such, the court "reject[ed] both parties' interpretations of the subject policy provision because they focus on the wrong language and are unreasonable." *Id.*

21. The court went on to "conclude the more reasonable and logical interpretation of this limitation provision is that it requires GEICO to pay the price of the repair it can secure in a competitive market from a competent and conveniently located repair facility." *Id.* Further, it held that " 'prevailing competitive price' is a question of fact, in the same sense that 'fair market value,' 'reasonable and necessary,' 'usual customary charges,' and plain 'reasonable' are in other contexts." *Id.*

22. The judgments were vacated and remanded each case for further proceedings. *Id.* at p. 9. The court did "not direct any particular process or result on remand" and indicated that the trial court was to "decide on a case-by-case basis whether to entertain additional summary judgment proceedings." *Id.*

ii. *Dick II*[4]

23. After this Court's entry of its March 6, 2019, Final Summary Judgment in Favor of Plaintiff, Defendant appealed. Plaintiff cross-appealed "asking [the appellate] court to determine which party bears the burden of proof in cases such as this one in which the insurer's payment, made in reliance on the policy's limitation of liability, was lower than the invoiced price." *Dick II*, Case No.: 19-CA-3571, Slip Op. at p. 1.

24. The appellate court found, "[b]ecause a material issue of fact remains, summary judgment was not appropriate" and "where coverage is not an issue, but GEICO nonetheless relies on the policy's limitation of liability as a defense to the suit, it is GEICO's burden to prove payment was made in accordance with the policy." *Id.*

25. The court outlined the history of this matter including its previous decision in *Dick I*, and then proceeded to its discussion of the matter before it. *Id.* at pp. 1-2. The court cited back to *Dick I* reiterating and quoting "the prevailing competitive price was neither 'the price set in an agreement between GEICO and a particular provider' nor 'the windshield companies' proposed rates, which have been negotiated with no one.' " *Id.* at p. 2 (footnote omitted). The court then went on to restate the test for prevailing competitive price, indicating, "[u]nder the policy language, the test is what the service would cost in a competitive market in a normal, arms' length transaction." *Id.* at pp. 2-3.

26. For multiple reasons, the court found the evidence offered by Superior failed to establish prevailing competitive price. *Id.* at 3-4. In outlining these reasons the court included that: (1) there was a lack of

evidence the pricing was negotiated or the result of arm's length transactions; (2) "[e]vidence that invoices were paid in full by other insurers can only be relevant if the policy language of those insurers is the same as GEICO's policy"; (3) "GEICO has previously paid some invoices in full is misleading where there are signs that the invoices were disputed"; (4) there was lack of detail as to the effect of price setting factors on the competitive prevailing price; (5) there was lack of data showing how NAGS sets prices and relationship to the local market; (6) "the usual and customary charge is, again, not necessarily the prevailing competitive price in a limitation of liability context." *Id.* at pp. 3-4.

27. On the cross-appeal, the court found "limitations of liability are the insurer's to prove." *Id.* at p. 5. "An insured or policy beneficiary—like Superior—has the burden of proving *coverage*, but the insurer bears the burden of proving applicability of a claimed exclusion." *Id.* (emphasis in original).

28. The court set aside the judgment and remanded the case to this Court, directing "[o]n remand the burden of proof will be on GEICO to show the price paid was within the applicable policy limits." *Id.* at p. 6.

iii. *Gilbo/Robbins* [5]

29. The *Gilbo* and *Robbins* cases were remanded back to the county court in the *Dick I* decision, and a multi-day non-jury trial was conducted. *Gilbo/Robbins*, Case No.: 19-CA-575, Slip Op. at p. 2. The trial court found "that Superior had met its burden showing that its invoiced price was 'a reasonable, fair market price that did not exceed the prevailing competitive price,' and "that 'GEICO's evidence failed to overcome it.' " *Id.* Defendant appealed the judgment and Plaintiff filed a cross-appeal regarding which party should have the burden regarding prevailing competitive price. *Id.*

30. The appellate court addressed two issues—the sufficiency of the evidence in support of the trial court's judgment and which party bears the burden of proving the policy's prevailing competitive price. *Id.* at pp. 2-3.

31. The court agreed with the analysis and conclusion in *Dick II*, and held "when an insurer seeks to defend against a *covered* claim, and GEICO has already made some payment on the claim, the insurer has the burden of pleading and persuasion of each element of the defense." *Id.* at p. 3 (emphasis in original0.

32. As to the issue of the sufficiency of the evidence, the court, as it had in *Dick II*, cited and quoted from *Dick I*, indicating "the prevailing competitive price was neither 'the price set in an agreement between GEICO and a particular provider' nor 'the windshield companies' proposed rates, which have been negotiated with no one.' " *Id.* at p. 3 (footnote omitted). The court then restated the test for prevailing competitive price, indicating, "[u]nder the policy language, the test is what the service would cost in a competitive market in a normal, arms' length transaction." *Id.* at p. 3.

33. The court concluded "none of Superior's evidence was responsive to the standard set out in *Matthew Dick I*." *Id.* at p. 5. It stated: "Superior's survey of other providers in litigation with GEICO offered in the underlying proceeding will not yield the result articulated in *Matthew Dick I*. Nor will the opinion of an economist who points to no open market transactions." *Id.*

34. The court determined Superior was entitled to a new trial because "the burden of proof was placed on Superior when it should have been on GEICO" and "[b]ecause this undoubtedly altered the way each side formulated its case." *Id.* As such, the judgments were set aside and the cases remanded to the trial court. *Id.*

iv. Application of the Test

35. At first glance, "prevailing competitive price" appears to be a relatively simple term; however, this term, and the "definitions" and test under which to evaluate it, have proven to be much more complex when it comes to how a litigant in these particular cases must prove the same.

36. Since the issuance of the *Dick I* opinion the parties have argued over the sufficiency of the evidence needed to prove the standard set forth therein. Much of the argument has centered on the use of the modifier "non-insurance" in the prevailing competitive price test in *Dick I* [6] and what would constitute same.

37. The arguments have continued to persist after the issuance of the *Dick II* and *Gilbo/Robbins* decisions. Notably in both *Dick II* and *Gilbo/Robbins*, while portions of *Dick I* were directly quoted for what the prevailing competitive price "is not," the court did not direct quote the "test" from *Dick I*. Rather, the court restated the test with the omission of the term "non-insurance."[7]

38. The parties over the course of the litigation have both advanced varying arguments, depending on which of them bore the burden of proof on the issue of prevailing competitive price. At one point or another, both sides have argued that there is a lack of a non-insurance or cash market in this area, and certain transactions involving insurance can, and should, be used in proving the prevailing competitive price.

39. This argument over the inclusion or exclusion of "non-insurance," and what exactly non-insurance means in this particular context, has continued to be a—perhaps ***the***—major source of contention in this trial, impacting both the admission of key evidence in this matter and the structuring of the jury instructions.

40. While Plaintiff argues "non-insurance" was removed in *Dick II* unintentionally and it was a scrivener's error, the Court does not agree. The removal of the "non-insurance" term in *Dick II* does complicate the interpretation of the test and has brought uncertainty to the parties on what constitutes permissible evidence in proving prevailing competitive price. The "removal" of the term in the restated test along with the ambiguity the term has posed in light of the fact that a non-insurance or cash market does not really exist, coupled with the fact neither *Dick II* nor *Gilbo/Robbins* specifically found the evidence was insufficient because it involved insurance transactions,[8] leads to the conclusion it is just as possible the removal of "non-insurance" in reiterating the test was intentional.

41. This Court determined the test to be used is the most current restatement of the test—without the term "non-insurance." As discussed below—and in Plaintiff's arguments on the current Motion—this Court has relied on the restated test in *Dick II*, without the use of the term non-insurance, in its rulings leading up to and during this trial.

C. Pre-Trial Motions

42. On January 20, 2021, Plaintiff filed a Plaintiff's Motion in Limine seeking to exclude evidence and argument regarding the Florida Motor Vehicle Repair Act (FMVRA) and standing. The Court granted Plaintiff's Motion. *See* Order Granting Pl.'s Mot. *In Limine* Concerning Motor Vehicle Repair Act and Standing (Mar. 22, 2021). However, this grant was without prejudice to Defendant's ability to present evidence to meet its burden under the Thirteenth Judicial Circuit Court appellate decisions and to challenge the admissibility of the assignment of benefits. *See id.* at ¶ 3 n. 1 & ¶ 4.

43. On March 2, 2021, Plaintiff's filed its Motion in Limine Concerning Prevailing Competitive Price, which sought "to prohibit the Defendant . . . from presenting certain inadmissible evidence at trial concerning the 'prevailing competitive price.' " Pl.'s Mot. in Limine Concerning Prevailing Competitive Price (Mar. 2, 2021).

44. Plaintiff's Motion was granted in part and denied in part as follows:

2. Evidence concerning the "prevailing competitive price" in this matter shall be limited to matters that satisfy the test set forth by the Thirteenth Judicial Circuit Court in its appellate capacity—"what the service would cost in a competitive market in a normal, arms' length transaction." *Government Employees Insurance Company v. Superior Auto Glass of Tampa Bay, Inc., a/a/o Matthew Dick*, 28 Fla. L. Weekly Supp. 785a (Fla. 13th Cir. Ct. (appellate) Oct. 2, 2020) ("*Matthew Dick II*"); see also *Government Employees Insurance Company v. Superior Auto Glass of Tampa Bay, Inc., a/a/o Matthew Dick*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Cir. Ct. (appellate) March 27, 2018) ("*Matthew Dick I*"); *Government Employees Insurance Company a/a/o David Gilbo*, 28 Fla. L. Weekly Supp. 787a (Fla. 13th Cir. Ct. (appellate) Oct. 13, 2020) ("*Gilbo*"). This includes transactions involving competent and conveniently located repair facilities, but does not include transactions involving Safelite or affiliated/network repair facilities.

3. As such, the parties are prohibited from presenting evidence and testimony, opinions, or arguments concerning any pricing set by an agreement between GEICO and a particular repair facility and any transactions involving Safelite or involving affiliate/network repair facilities.

4. As to the admissibility of the GEICO Glass Claims History document, the Court reserves ruling. Defendant shall be afforded the opportunity to lay the proper predicate for admission of the Claims History through a qualified witness at the trial of this matter. However, even upon establishment of the proper predicate, the admission of the document will be limited to entries on the document that reflect transactions that comply with the requirements and prohibitions set forth in paragraphs 2 and 3 of this Order.

5. As it pertains to the testimony of Dr. Jim McClave, Defendant's retained expert witness, Dr. McClave's testimony will be limited to testimony based on transactions that fall within the parameters set forth in paragraphs 2 and 3 of this Order.

Order on Pl.'s Mot. in Limine Concerning Prevailing Competitive Price ¶¶ 2-5 (Mar. 29, 2021) (footnote omitted).

45. Defendant filed a Motion to Continue and Determine the Infeasibility of Conducting a Two-Day, In-Person Jury Trial During the Covid-19 Pandemic on March 17, 2021. Citing public health and safety concern, as well as the limited capacity of the courthouse, Defendant argued having the trial in this matter was "entirely infeasible." Def.'s Mot. to Continue and Determine the Infeasibility of Conducting a Two-Day, In-Person Jury Trial During the Covid-19 Pandemic (Mar. 17, 2021). Defendant asserted in order to meet its burden under the standard set forth in the circuit appellate cases, and this Court's rulings, "the testimony from Non-Affiliate Shop witnesses regarding their competency is *necessary* and *material*." *Id.* at p. 2 (emphasis in original). Defendant further asserted that "because the material Non-Affiliate Shop witnesses include *over 100 different shops*, it is simply impractical and would be nearly impossible to conduct a two-day, in-person jury trial given the specific circumstances of this case." *Id.* (emphasis in original).

46. On March 24, 2021, the Court denied Defendant's Motion to Continue noting the trial was set for the week of April 12, 2021 with express permission of the Chief Judge. On April 1, 2021, Defendant filed a Petition for Writ of Certiorari regarding the Court's denial of the Motion to Continue and filed a Motion to Stay pending the Second District Court of Appeal's resolution of the Petition. The Court denied the Motion to Stay extending the trial period to five days and allowing witnesses to appear by electronic means, if necessary.[9]

47. On March 29, 2021, Defendant filed a "Request for Judicial Notice of the Business License Records of 88 Windshield Repar [sic] Shops from the Florida Department of Agriculture's Website," which went to the issue of competency. The documents were printouts from the online "Find a Business or Individual License/Complaint Lookup." The Court denied the request without prejudice.

II. Jury Trial

48. The case proceeded to jury trial on April 12-14, 2021.

A. Evidence

i. Exhibits[10]

49. The following exhibits were admitted into evidence:

a. Plaintiff's Exhibit 1: Policy of Insurance

b. Plaintiff's Exhibit 2 (composite): Invoices

c. Plaintiff's Exhibit 3 (composite): Invoice and assignment of benefits

d. Plaintiff's Exhibit 4 (composite): Payment to Superior Auto Glass

e. Plaintiff's Exhibit 6: Geico's 2012 letter re: pricing agreement

f. Defendant's Exhibit 2: Work Order for Referral #443967

g. Defendant's Exhibit 13 (composite): Geico work orders for Superior Auto Glass

ii. Plaintiff's Witness Linda Rollinson

50. Plaintiff called Linda Rollinson as its sole witness in this matter. Ms. Rollinson is Plaintiff's owner and operator since 2007. Plaintiff is licensed in Pasco County and is a brick and mortar shop, as opposed to a mobile operation. Plaintiff is certified by the Auto Glass Safety Council. All of the techs working for Plaintiff are also certified by the Auto Glass Safety Council and Dow DuPont. Ms. Rollinson served on the Board, and as the chair, of the National Windshield Service for 7-8 years and on the Board of the Auto Glass Safety Council. Ms. Rollinson owns a windshield glass appraisal company and serves as an appraiser for Liberty Mutual and Progressive insurance companies.

51. With regard to Plaintiff's business, Ms. Rollinson does everything except the actual glass repair or replacement services (although she is a certified repair tech through two organizations and holds certifications in urethane kit application and calibration of equipment). She processes all claims, orders needed parts, schedules, does book keeping and billing, and sets the prices.

52. Ms. Rollinson testified that in setting Plaintiff's pricing she considers the National Auto Glass Specifications (NAGS) pricing, which is the national standard in windshield repair and replacement. NAGS provides pricing for all parts and hourly rates for every kind of repair or replacement. These standards are updated three times a year. She testified she has knowledge of the local market and what other repairs shops in the area charge for these services. Ms. Rollinson indicated Plaintiff's pricing is at 100% of the NAGS pricing for the parts and labor rates and Plaintiff's rates are usual, customary, competitive, and fair.

53. Ms. Rollinson stated 98% of the work done by Plaintiff is covered by insurance, and that Defendant makes up 15-20% of that work. She indicated Geico has never objected to how she processes claims.

54. In this case, Ms. Rollinson did not see the repair work order. Replacement was selected by the insured. Plaintiff billed Geico $818.60 for the windshield replacement service provided to Mr. Matthew Dick. Plaintiff received payment in the amount of $379.88 from Defendant, with no reason for the lower payment.

55. Ms. Rollinson also testified Plaintiff never accepted anything less than the billed amount from Defendant and Plaintiff would not take less than 100% of NAGS.

iii. Defendant's Witness 1: Susanna Eberling

56. Defendant called Susanna Eberling as its first witness. Ms. Eberling is the corporate representative for Defendant in this matter. She has been a continuing unit examiner for Defendant for six years and assists in claims processing. Prior to this position, she served as a telephone claims representative.

57. Ms. Eberling testified that Defendant pays 50% of the NAGS price for parts, $40/hour for labor, and $15 for urethane kits (although the pricing for these kits may vary). She noted that the pricing outside of Florida is different.

58. Notably, Ms. Eberling stated she does not know what the

competitive market pricing is for windshield repair or replacement services and that she only knows what amount is billed and what amount Defendant pays.

59. Ms. Eberling agreed the pricing parameters she testified to, and in Defendant's 2012 "Pricing Agreement" letter (Plaintiff's Exhibit 6), were not contained in the relevant insurance policy. Additionally, she agreed that in some cases Defendant makes payments in excess of the parameters, sometimes even paying bills at 100%.

60. For this particular claim, Ms. Eberling is not sure how the claim was received. Despite not producing a copy of a work order for this claim in discovery,[11] at trial Defendant was able to produce a work order in this case from February 11, 2015. However, the work order provides an estimate in the amount of $60 for a repair, but does not contain any information with regard to a windshield replacement, which was the service actually performed in this matter.

61. According to Ms. Eberling, she has 81 lawsuits from Plaintiff. She also agreed that Plaintiff is a competent and conveniently located repair shop.

62. During Ms. Eberling's testimony, Defendant introduced work orders from Safelite to Plaintiff for services to different vehicles dated in 2014 and 2015—none of these invoices were for the same make and model as the insured's in this case.

iv. Defendant's Witness 2: Jim McClave, Ph.D.

63. As its second witness, Defendant called Dr. Jim McClave, a statistician and econometrician. Dr. McClave testified his opinions were solely based on information supplied by Defendant including an interview with Ms. Eberling and the review of the data claims history of Defendant's cases. Dr. McClave focused on 100 or more claims, narrowed to claims in a seven county area and limited to non-affiliated shops. He reviewed how much was billed and how much was paid. The information reviewed included both shops that are involved in litigation and ones that are not.

64. Dr. McClave did not independently verify the information provided to him by Defendant. He did not verify that the shops on the claims he reviewed were actually located in the local area or that they were non-affiliated shops. He also did not verify the invoices.

65. Dr. McClave did not conduct any type of market survey or analysis on windshield repair and replacement pricing. Dr. McClave admitted that his analysis did not include the entire market, rather it only included claims involving Defendant. He agreed the formula for payment is Defendant's formula and he is unaware of how Defendant determined that its payment would be set at 50% of NAGS. Further, Dr. McClave indicated he did not check to see if there were any settlements or additional payments made on any of the claims.

B. Jury Instructions and Verdict Form

66. After the close of Defendant's case, Plaintiff moved for directed verdict. The Court denied Plaintiff's Motion allowing the case to go to the jury.

67. The parties were overwhelmingly in agreement over the jury instructions to be used in this case. However, the jury instruction regarding Defendant's affirmative defense relating to payment of the prevailing competitive price was disputed—particularly whether "non-insurance" should be included. After hearing the parties' arguments on same, the Court ultimately rejected Plaintiff's proposed jury instruction on the matter.[12]

68. Given the disagreement over the language of the test, in particular what a non-insurance transaction means in this context and the apparent lack of a "cash" market in the windshield replacement area,[13] the Court used the test as restated in *Dick II*, which did not include "non-insurance."

69. The parties agreed Plaintiff had met its burden on breach of contract action—Plaintiff's claim was a covered loss—and the only matters remaining for resolution by the jury were Defendant's affirmative defenses and Plaintiff's damages. As such, the verdict form contained only questions for the jury on those issues.

70. The jury returned a verdict in favor of Defendant on both the waiver and prevailing competitive price affirmative defenses.

III. Plaintiff's Motion to Set Aside Verdict and for Judgment in Accordance with Motion for Directed Verdict, or for New Trial

A. Plaintiff's Argument

71. Following the jury verdict, Plaintiff moved to set aside the jury's verdict or for new trial. *See* Pl.'s Mot. to Set Aside Verdict and for J. in Accordance with Mot. for Directed Verdict, or for New Trial (Apr. 23, 2021). Plaintiff argues the admissible evidence was insufficient to prove the prevailing competitive price or that Plaintiff intentionally waived its right to full payment under the subject insurance policy. *Id.* Additionally, Plaintiff argues Defendant's evidence was not responsive to the standard for establishing the prevailing competitive price set forth in the binding Thirteenth Circuit appellate opinions. *Id.* As such, Plaintiff argues it is entitled to judgment notwithstanding the verdict.

72. In the alternative, Plaintiff argues it must be granted a new trial because Defendant's "presentation to the jury was comprised of large amounts of inadmissible evidence" and that "[t]he jury's verdict was also against the manifest weight of the admissible evidence." *Id.* at ¶¶ 119 & 120.

B. Defendant's Response

73. In response, Defendant argues Plaintiff has not met its burden in moving to set aside the verdict in that Defendant "presented competent, sufficient evidence from which the jury could, *and did*, infer that [Defendant] paid the prevailing competitive price *and* that Plaintiff waived its right to seek additional benefits under the policy." *See* Def.'s Resp. in Opp'n to Pl.'s Mot. to Set Aside Verdict and for J. in Accordance with Mot. for Directed Verdict, or for New Trial p. 2 (May 21, 2021) (emphasis in original).

74. Further, Defendant argues Plaintiff has not demonstrated that the "verdict is not supported by the manifest weight of the evidence," as such Plaintiff is not entitled to a new trial. *Id.*

C. Legal Standard for Setting Aside a Jury Verdict

75. On a motion to set aside a jury verdict,

> [T]he trial court must 'view all of the evidence in a light most favorable to the non-movant, and, in the face of evidence which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made. Similarly, every reasonable conclusion which may be drawn from the evidence must also be construed favorably to the non-movant. Only where there is no evidence upon which a jury could properly rely, in finding for the [non-movant], should a directed verdict be granted.'

Irven v. Dep't of Health and Rehab. Sers., 790 So. 2d 403, 406 n. 2 (Fla. 2001) [26 Fla. L. Weekly S253a] (quoting *Stokes v. Ruttger*, 601 So. 2d 711, 713 (Fla. 4 DCA 1992)); *see Martinez v. Lobster Haven, LLC*, __ So. 3d __, 2021 WL 1773273 *4 (Fla. 2d DCA May 5, 2021) [46 Fla. L. Weekly D1012a] (stating "[a] motion for judgment in accordance with a motion for directed verdict tests the sufficiency of the evidence presented"); *City of Boca Raton v. Basso*, 242 So. 3d 1141, 1143 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D702a] (indicating "'[a] JNOV is appropriate only in situations where there is no evidence upon which a jury could rely in finding for the non-movant. A jury verdict must be sustained if it is supported by competent substantial evidence' " (citation omitted)); *Melgen v. Suarez*, 951 So. 2d 916, 917 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D540a] (stating "[m]otions for JNOV 'should be resolved with extreme caution since the granting thereof holds that one side of the case is essentially devoid of probative evidence' " (citation omitted)); *Alterra Healthcare Corp. v. Campbell*, 78 So. 3d 595, 601-602 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2450b].

D. Conclusion

76. With regard to Defendant's affirmative defense of waiver, as outlined in the jury given instruction, in the context of this case Defendant was required to prove the following elements to establish

the defense: (1) Plaintiff's right to recover more payment from Defendant existed; (2) Plaintiff knew or should have known that it had the right to recover more payment from Defendant; and (3) Plaintiff freely and intentionally gave up its right to recover more payment from Defendant either orally, in writing, or through Plaintiff's conduct.

77. There was no evidence upon which the jury could properly rely to find Plaintiff freely and intentionally gave up its right to recover additional payment under the subject policy of insurance. There was no evidence Plaintiff had entered into any agreement or specified either orally or in writing that it was willing to accept what Plaintiff deems to be an underpayment under the language of the subject policy of insurance. Further, Defendant failed to adduce any evidence that Plaintiff's conduct showed that Plaintiff freely and intentionally gave up any right to full reimbursement under the policy.

78. To the contrary, the evidence reflected Plaintiff did not accept less than the amount it charged and would institute litigation against Defendant in order to recover its full bill. Plaintiff also testified that there were times when Defendant did pay the bill in full.

79. Additionally, Defendant's 2012 "Pricing Agreement" letter was not an agreement with any entity. It simply outlined amounts Defendant would pay for services. However, these pricing parameters were not in the subject insurance policy. Further, the 2012 Letter was not specifically addressed to Plaintiff and there was no testimony Plaintiff agreed to the contents.

80. Similarly, the work orders from Safelite to Plaintiff dated in 2014 and 2015—none of which were for the same make and model as the insured's vehicle in this case—simply showed pricing of 50% of NAGS and $40 an hour labor charge. There was no evidence that these numbers were agreed to by the parties or that the pricing related to any matter outside of the claim at issue on the unrelated invoices.

81. With regard to Defendant's affirmative defense that it had paid the prevailing competitive price required by the insurance policy's limitation of liability provision, in the context of this case Defendant was required to prove the amount paid "was what the service would cost in a competitive market in a normal, arms' length transaction from a competent and conveniently located repair facility."

82. There was no evidence upon which the jury could properly rely to find Defendant's payment constituted what the service would cost in a competitive market in a normal, arms' length transaction from a competently and conveniently located repair facility.

83. First, there was no evidence the amount paid by Defendant in this case, or any of the amounts paid in the data provided to and analyzed by Defendant's expert, were based on a competitive market and constituted what the service would cost in such a situation. Nothing in Dr. McClave's testimony reflected the data he relied upon was rooted in a competitive market. It was based solely on Defendant's information regarding the amounts charged and paid on various claims. There was no market survey regarding the pricing and Dr. McClave's testimony was based entirely on Geico claims, certainly not an open, competitive market. Further, Ms. Eberling simply indicated the payment was based on the Geico formula, without knowledge of how that formula was determined.

84. Second, there was no evidence the information used in the analysis of prevailing competitive price was based on competent repair facilities. The testimony of Dr. McClave did not provide that the information he considered in making his determination was based on data from competent repair shops. Likewise, Ms. Eberling did not establish that Defendant's data, used by Dr. McClave, only included competent and conveniently located repair shops. Further, although Defendant listed more than 100 witnesses, including unnamed corporate representatives of various auto glass repair facilities, and moved to continue this case based on the need to call those individuals on the issue of competence, none of those witnesses were called by Defendant.

85. Given that the testimony and evidence regarding the amount paid by Defendant did not reflect a competitive market driving the amount of the payments or the involvement of only competent repair facilities, Defendant failed to provide evidence upon which the jury could properly rely in finding that prevailing competitive price was paid in this matter.

86. Based on the foregoing, the jury verdict in favor of Defendant with regard to both Defendant's affirmative defenses must be set aside and final judgment entered in favor of Plaintiff.

87. This Court concludes that Plaintiff is entitled to damages in the amount of $438.72 ($818.60-$379.88).

It is therefore **ORDERED AND ADJUDGED**:

A. Plaintiff's Motion to Set Aside Verdict and for Judgment in Accordance with Motion for Directed Verdict, or for New Trial is hereby **GRANTED** as to setting aside the verdict and enter judgment in favor of Plaintiff. The alternative portion of the motion for new trial is rendered moot by the Court's decision.

B. Final Judgment is entered in favor of the Plaintiff, SUPERIOR AUTO GLASS OF TAMPA BAY, INC. Plaintiff shall recover from the Defendant the amount of $438.72, plus pre-judgment interest, plus post-judgment interest on the combined amount at the interest rate established pursuant to Florida Statutes section 55.03(1), for which let execution issue.

C. The Court retains jurisdiction to determine entitlement to and the amount of attorney's fees, if any, and costs in this matter.

---

[1]Final Judgment for the Defendant, *AutoGlass America, LLC a/a/o Neilson Cordero v. Geico Gen. Ins. Co.*, Case No. 17-CC-19839 (Fla. Hillsborough Cty. Ct. Aug. 1, 2018).

[2]For clarity and being able to provide more precise pinpoint citations, although the appellate decisions cited herein are published in Florida Law Weekly Supplement, the Court cites to the slip opinions for the discussion in this section.

[3]*Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc. (a/a/o Matthew Dick) et al*, 26 Fla. L. Weekly Supp. 876a (Fla. 13th Cir. Ct. (appellate) March 27, 2018) (*Dick I*)

[4]*Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc. (a/a/o Matthew Dick)*, 28 Fla. L. Weekly Supp. 785a (Fla. 13th Cir. Ct. (appellate) Oct. 2, 2020) (*Dick II*).

[5]*Gov't Emps. Ins. Co. v. Superior Auto Glass of Tampa Bay, Inc. (a/a/o David Gilbo & Ronald Robbins)*, 28 Fla. L. Weekly Supp. 787a (Fla. 13th Cir. Ct. (appellate) Oct. 13, 2020) (*Gilbo/Robbins*). The Court notes this decision is currently on review with the Second District Court of Appeal in case number 2D20-3251.

[6]"Under the policy language the test is what the service would cost in a competitive market in a normal, arms' length non-insurance transaction." *Dick I*, Slip. Op. at p. 8.

[7]"Under the policy language, the test is what the service would cost in a competitive market in a normal, arms' length transaction." *Dick II*, Slip Op. at pp. 2-3; *Gilbo/Robbins*, Slip Op. at pp. 3.

[8]In fact, the court in *Dick II* specifically mentioned evidence involving insurance transactions, and while the court found the evidence insufficient for other reasons, it being an insurance transaction was not the stated basis for its insufficiency, and the court actually contemplates its potential relevancy. *See Dick II*, Slip Op. at p. 3 (stating "[e]vidence that invoices were paid in full by other insurers can only be relevant if the policy language of those insurers is the same as GEICO's policy" and "that GEICO has previously paid some invoices in full is misleading where there are signs that the invoices were disputed" (footnote omitted)).

[9]On April 9, 2021, the Second District Court of Appeal temporarily stayed trial of this matter pending that court's resolution of Defendant's motion to review this Court's denial of the stay. However, a few hours later, the Second District Court of Appeal ruled on Defendant's motion to review and approved this Court's ruling, thereby allowing the matter to proceed to trial on April 12, 2021.

[10]At trial, the Court denied Defendant's motion for the Court to take judicial notice of online business license information for various windshield repair shops. Additionally, Defendant sought to have its glass claims history data admitted into evidence. The Court denied admission of the evidence as it would not be helpful to the jury and would be misleading and confusing.

[11]This included not producing any work order for this claim at Ms. Eberling's deposition.

[12]Plaintiff's rejected proposed jury instruction on this issue was filed. *See* Pl.'s Notice of Filing Rejected Jury Instruction (Apr. 16, 2021).

[13]As the Court has noted during proceedings in this matter, the importance and interpretation that the parties have given the "non-insurance" phrase in the prevailing competitive price test has varied depending on which party had the burden on the issue. As the binding case law developed with regard to the burden, so did each parties' argument, with the parties essentially changing their positions on whether non-insurance transactions mean cash transactions, or something else, and whether a cash market in this realm truly exists.

* * *

PATH MEDICAL, LLC, a/a/o Zachary Decarlo, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20-CC-026373, Division J. July 7, 2021. Monique M. Scott, Judge. Counsel: Alexander D. Licznerski, Landau & Associates, P.A., Tampa, for Plaintiff. Rhamen Love-Lane, Orlando, for Defendant.

ORDER

THIS CAUSE having come to be heard on May 11th 2021 upon Defendant's Motion for Leave to Amend Answer and Affirmative Defenses, Defendant's Motion for Final Summary Judgment and Motion for Protective Order (filed on June 18, 2020), Defendant's Motion for Final Summary Judgment, Motion for Protective Order (filed July 15, 2020), Plaintiff's Motion for Reconsideration, and Plaintiff's Amended Emergency Motion to Continue, and the Court having been duly advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

1. Defendant's Motion for Leave to Amend Answer and Affirmative Defenses (filed on July 15, 2020) is hereby **GRANTED**. Because Defendant's Motion for Leave to Amend has been granted, Plaintiff is entitled to file a Reply pursuant to Florida Rule of Civil Procedure 1.100(a). Therefore, Plaintiff's Reply that was filed on May 14, 2021, is hereby deemed timely filed.

2. Plaintiff's Amended Emergency Motion to Continue Hearing on Plaintiff's Motion for Summary Judgment is **GRANTED**.

3. Defendant's Motion for Final Summary Judgment and Motion for Protective Order (filed on June 18, 2020) is hereby **DENIED**.

4. Defendant's Motion for Final Summary Judgment, Motion for Protective Order (filed July 15, 2020) on improper demand is hereby **DENIED**.

5. Plaintiff's Motion for Summary Judgment (filed June 29, 2020) and Plaintiff's Second Motion for Summary Judgment Regarding Non-Application of Limiting Charge Price (filed May 8, 2021) will be **RE-SET** for hearing and Plaintiff is hereby granted permission to amend its initial Motion for Summary Judgment (filed June 29, 2020) to comply with the new summary judgment standard as ordered by the Supreme Court of Florida in *In Re: Amendments to Florida Rule of Civil Procedure 1.510*, No. SC-20-1490 (Fla. 2021) [46 Fla. L. Weekly S95a].

6. Defendant's Motion for Summary Judgment filed on April 8th 2021, will be **RE-SET** for hearing.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Deductible—Insurer should have applied deductible to 100% of charges before making reductions under statutory fee schedule—Medical provider awarded difference between full charges and reduced charges

SPORTS SPINE OCCUPATIONAL REHABILITATION INC., Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO16003651, Division 73. January 12, 2021. Steven P. Deluca, Judge. Counsel: Chad L. Christensen, Ged Lawyers, LLP, Boca Raton, for Plaintiff. Shutts & Bowen, LLP, Miami, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT/DISPOSITION, DENYING DEFENDANT'S CROSS-MOTION FOR FINAL SUMMARY JUDGMENT AND ENTRY OF FINAL JUDGMENT FOR PLAINTIFF

THIS MATTER came before the Honorable Steven P. DeLuca on Plaintiff's Motion for Final Summary Judgment/ Disposition and Defendant's Cross Motion for Summary Judgment and this Honorable Court having heard argument of counsel and otherwise being fully advised in the premises, finds as follows:

1. Plaintiff filed the instant action alleging breach of contract for the failure to pay personal injury protection benefits for treatment provided to June Richards as a result of injuries arising as the result of a motor vehicle accident.

2. Plaintiff mailed its bill to Defendant in the amount $495.00 which was the first bill received by Allstate. Plaintiff's bill was received on 4/24/2013.

3. Defendant reduced Plaintiff's bill to $352.28 pursuant to the schedule of maximum charges in F.S. 627.736, and applied the $352.28 to the deductible.

4. On 5/21/2013, Defendant received a second bill on the claim from South Florida Imaging & Diagnostic Center, Inc. in the amount of $3,000.

5. On 5/24/2013, Defendant applied the balance of the deductible in the amount of $647.72 to the bill received from South Florida Imaging & Diagnostic Center, Inc. and issued payment to South Florida Imaging & Diagnostic Center, inc.

6. On 5/24/2013, the $1,000.00 deducible was met and Allstate issued its first payment of PIP benefits on the claim.

7. Defendant asserts that Plaintiff does not have a claim for damages because its total bill was less than the $1,000 deductible.

8. This Court finds as a result of Defendant's application of the deductible to the reduced amount, Plaintiff has incurred damages in the amount of $142.72 which Defendant is responsible for.

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

1. Plaintiff's Motion for Final Summary Judgment/ Disposition is **GRANTED**.

2. Defendant's Cross Motion for Summary Judgment is **DENIED**.

3. Plaintiff shall recover from Defendant the sum of $142.72 in PIP benefits plus interest of $50.85 pursuant to the terms of the insurance policy and Florida Statute §627.736 for which let execution issue.

4. The Court finds the Plaintiff is entitled to attorney's fees and costs pursuant to Florida Statute 627.428, as this Court has found that the Plaintiff is the prevailing party. The Plaintiff shall also be entitled to post judgment statutory interest pursuant to Florida Statute 55.03 and the prevailing rate.

5. The Court hereby reserves jurisdiction to determine the amount of attorney's fees and costs.

FOR SUCH SUMS LET EXECUTION ISSUE FORTHWITH.

* * *

Attorney's fees—Appellate—Amount

PARK FINANCE OF BROWARD, INC., Plaintiff, v. QUINCY B. BLUE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO06002600, Division 62. July 13, 2021. Terri-Ann Miller, Judge. Counsel: Ronald R. Torres, Torres Law Offices, Weston, for Plaintiff. Tyrone A. Latour, Latour Esquire, P.A., Tamarac, for Defendant.

FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

THIS CAUSE having come before the Court via Zoom teleconferencing on **July 12, 2021** for an evidentiary hearing on *Plaintiff's Motion to Tax Costs and Fees*, and the Court having

reviewed the file, including the preliminary Order Granting Plaintiff's Motion to Tax Costs and Fees, dated May 24, 2021, and having considered the testimony offered at the evidentiary hearing, including the testimony of fee expert Joanne Garone, Esquire, the Court finds as follows:

1. The Defendant, QUINCY B. BLUE, filed a timely appeal directed to the Court's *Order Denying Defendant's Motion to Dissolve Garnishment Order*, dated November 30, 2018.

2. The Court's *Order Denying Defendant's Motion to Dissolve Garnishment* was affirmed Per Curiam by the Fourth District Court of Appeal on February 18, 2021. The motion of Plaintiff, PARK FINANCE OF BROWARD, INC., for appellate attorney's fees was granted by the Fourth District Court of Appeal on February 18, 2021, and this Court was directed to set the amount of the attorney's fees to be awarded for the appellate case.

3. The Court has reviewed the factors to be considered in determining reasonable fees and costs as set forth in the factors enumerated in Rule 4-1.5, Rules Regulating the Florida Bar, as otherwise discussed in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), and *Standard Guarantee Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990).

4. The Court finds that the hourly rate sought by Plaintiff's counsel, Ronald R. Torres, of $450.00 per hour is in the range of the fees customarily charged for comparable or similar cases in the local area and community.

5. The testimony of fee expert for the Plaintiff, Joanne Garone, a local attorney practicing in the areas of commercial litigation and foreclosure law, confirmed an hourly rate of $450.00 to be reasonable, and confirmed the entire amount sought by Plaintiff's counsel to be reasonable.

6. Ronald R. Torres, Esquire, has experience in the field of commercial litigation, debt collection, and appellate litigation. The skill, expertise and efficiency of effort are reflected in focused work, resulting in 35.70 hours expended on the appellate case.

7. The Court therefore finds that 35.70 hours to be a reasonable number of hours expended and finds $450.00 to be a reasonable hourly rate. The lodestar amount is $16,065.00.

8. The Plaintiff declined to seek reimbursement of its costs, and the Court finds that costs of $0.00 to be reasonable.

9. The Court further finds the expert fee for Joanne Garone, Esquire (2.0 hours expended at $450.00 per hour) to be reasonable and necessary. Joanne Garone, Esquire spent substantial time reviewing the file and meeting and discussing the subject matter with Plaintiff's counsel, to confirm the factual basis for her expert testimony.

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

(A) Plaintiff's counsel, RONALD R. TORRES, P.A. d/b/a TORRES LAW OFFICES shall recover from Defendant, QUINCY B. BLUE, the sum of Sixteen Thousand Sixty-Five Dollars ($16,065.00) for attorney's fees.

(B) JOANNE GARONE, ESQUIRE, is deemed an expert for the purposes of determining the reasonableness of Plaintiff's attorneys fees and is awarded Nine Hundred Dollars ($900.00) for her services.

(C) Accordingly, Plaintiff's counsel **RONALD R. TORRES, P.A. d/b/a TORRES LAW OFFICES**, whose address is 2645 Executive Park Drive, Suite 657, Weston, Florida 33331, shall recover from Defendant, **QUINCY B. BLUE**, whose address is [Editor's note: Address redacted], Douglasville, Georgia 30135, the sum of **Sixteen Thousand Nine Hundred Sixty-Five Dollars ($16,965.00)** for attorney's fees which shall bear interest at the statutory rate from the date of this Order, all for which let execution issue forthwith.

* * *

STUART B. KROST, M.D., P.A., a/a/o Quovadis Daniels, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO19010125, Division 60. August 5, 2021. Allison Gilman, Judge. Counsel: Mitzi Espino, for Plaintiff. Ryan M. McCarthy, Shutts & Bowen LLP, Miami, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO DEEM ITS REPLY TIMELY FILED

THIS CAUSE, having come before the Court on August 2, 2021, on Plaintiff's Motion to Deem its Reply Timely Filed; and, the Court having reviewed the motion, heard the argument of counsel, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED**:

1. Plaintiff's Motion to Deem its Reply Timely Filed is **DENIED**.

2. Pursuant to Rule 1.140(a)(1), Florida Rules of Civil Procedure, Plaintiff's Reply was due within twenty (20) days of Allstate's Answer and Affirmative Defenses. Here, Plaintiff filed an untimely Reply, along with its Motion to Deem its Reply Timely Filed.

3. The Court rejects Plaintiff's argument about the amendment of pleadings because Plaintiff's Motion pertains to the filing of an entirely new Reply.

* * *

Insurance—Personal injury protection—Conditions precedent—Demand letter that includes itemized statement specifying dates of service and charges for each date complies with presuit requirements—PIP statute does not require demand letter to state exact amount that is ultimately determined to be due or state exact amount owed under fee schedule for each CPT code on each date of service

ISO-DIAGNOSTIC TESTING, a/a/o Ja'Bria Harris, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20008051, Division 61. July 29, 2021. Corey Cawthon, Judge. Counsel: Michael J. Cohen, Cohen Legal Group, P.A., Ft. Lauderdale, for Plaintiff. Dana J. Girardi, Progressive PIP House Counsel, Ft. Lauderdale, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION ON DEFENDANT'S DEMAND LETTER DEFENSE AND DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION REGARDING PRE-SUIT DEMAND LETTER

THIS CAUSE came before the Court on June 23, 2021, for hearing of the Plaintiff's Motion for Summary Disposition on Defendant's Demand Letter Defense, and Defendant's Motion for Summary Disposition Regarding Pre-Suit Demand Letter[1] , and the Court, having reviewed the Motions, the entire Court file, and the relevant legal authorities; having heard argument; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, finds as follows:

1. The Plaintiff, ISO-DIAGNOSTIC TESTING, filed this breach of contract action against PROGRESSIVE SELECT INSURANCE COMPANY for Personal Injury Protection ("PIP") benefits resulting from JA'BRIA HARRIS's motor vehicle accident on July 10, 2017. Plaintiff provided the medical treatment to JA'BRIA HARRIS via a valid Assignment of Benefits.

2. Prior to filing this lawsuit, ISO-DIAGNOSTIC TESTING sent the Defendant a pre-suit demand letter pursuant to Section 627.736(10), Florida Statutes. Said Statute states in pertinent part:

> (10) DEMAND LETTER.—
>
> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).

(b) The notice must state that it is a "demand letter under s. 627.736" and state with specificity:

1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.

2. The claim number or policy number upon which such claim was originally submitted to the insurer.

3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement. . .

3. The demand letter attached a Health Insurance Claim Form (HCFA), satisfying the requirements of paragraph (5)(d), which detailed the treatment rendered to JA'BRIA HARRIS, together with the dates of each treatment, the CPT codes for each treatment, the amount charged for each treatment and the total amount charged for all treatment rendered. The demand letter also specified the amount being demanded, which represented 80% of Plaintiff's reasonable charges, which is in turn the default payment methodology set forth in Section 627.736 (1) (a), Florida Statute. The letter stated, in pertinent part, the following:

Enclosed please find the requisite itemized statement or copies of same in the form of Health Care Finance Administration 1500 form or UB 92 forms previously submitted and specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. To the extent that this demand involves an insurer's withdrawal of payment for future treatment not yet rendered, attached please find a copy of your notice withdrawing such payment, any denials of benefits due and an itemized statement of the type, frequency, and duration of future treatment claimed to be reasonable and medically necessary. Also, enclosed please find a copy of the assignment of benefits executed by the patient. Pursuant to Florida Statute, demand is also hereby made for reimbursement of the postage costs.

See the attached ledger. It reflects the aforementioned dates of service. The total bill is $705.00. Amount paid is $0.00. Please remit payment in the amount of $564.00, which is the amount at issue assuming there is no deductible, no med pay and the bills are paid at 80%. If there is additional coverage then we demand 100% of the difference between the billed amount and the amount paid. We dispute all of the reductions and non payments without exception. If there is a deductible or if the bills are paid at 100% please let us know. If it is your position this insurer can pay based on 200% of Medicare please provide a copy of the policy of insurance. (. . .)

4. With its response, PROGRESSIVE SELECT INSURANCE COMPANY issued payment in an amount less than the amount demanded in the aforementioned demand letter. The response letter further stated that all charges had been paid pursuant to the Medicare Part B Fee Schedule. PROGRESSIVE'S response included language that it reserved the right to chal-lenge the sufficiency of the demand letter; however, it failed to delineate any specific ways in which it believed that the demand letter was deficient.

5. In its Answer to the Complaint, Defendant alleged as an affirmative defense that Plaintiff's pre-suit demand letter did not comply with Section 627.736(10), Florida Statute. Specifically, the Defendant asserted that Plaintiff failed to meet the strict demand letter requirements of section 627.736(10), Florida Statutes, and that the failure to do so did not satisfy the demand letter condition precedent set forth in the Statute.

6. Both parties filed their Motions for Summary Disposition. ISO-DIAGNOSTIC TESTING maintained that its demand letter strictly complied with F.S. 637.736(10). PROGRESSIVE alleged that, in order to comply with section 627.736(10), the demand letter must provide the exact information listed in the statute and that, failure to include an itemized statement specifying the "exact amount due", renders a demand letter deficient. Essentially, it was PROGRESSIVE'S position that the demand letter must, for each CPT code on each specific date of service, calculate the exact amount owed, after the contractual fee schedule calculations.

7. To support this position, Defendant cites to *Rivera v. State Farm Mut. Auto Inc. Co.*, No. 3D21-27, 2021 WL 710194, (Fla. 3d Dist. Ct. App. Feb. 24, 2021) [46 Fla. L. Weekly D447a]. However, the court in *Rivera* dealt with a different factual pattern, rendering it inapplicable to the case at bar.

8. In the instant matter, Plaintiff included such itemized statement, which means it complied with subsection 627.736(10)(b)3 under the *Rivera* standards. Nowhere in the PIP Stat-ute is there a requirement that a pre-suit demand letter include a calculation of the amount ultimately owed for each CPT code on each specific date of service. In fact, such a holding would be in direct contradiction with subsection 627.736(10)(b)(3) which allows a CMS 1500 form to be used as the "itemized statement specifying each exact amount, the date of treatment, service or accommodation, and the type of benefit claimed to be due.".

9. Defendant further alleged that courts across the State of Florida have repeatedly held that the language of Section 627.736 requires strict compliance in specifying both the amounts previously paid and amounts due and owed, and that ISO-DIAGNOSTIC TESTING did not comply with these requirements, as it had ***sent a generalized demand letter that did "not properly take into account prior payments***", it did ***"not identify any particular codes at is-sue***", and essentially left PROGRESSIVE in the dark as to what amounts can be paid in order to avoid subsequent litigation. However, the evidence presented by the parties did not support these allegations, as PROGRESSIVE SELECT INSURANCE COMPANY had not issued any pay-ments prior to the demand letter being sent.

10. In this case, Plaintiff's demand letter strictly complied with all mandates of Florida Statutes s.627.736(10)(b)(3). It clearly stated that it is a demand letter under 627.736. It identi-fied the provider. It identified the name of the insured upon which benefits were being sought. It included the claim number. It included an assignment of benefits and a billing ledger which specified each date of service, the service provided, and the amount billed. Plaintiff went further and specified the amount due, pursuant to the default payment methodology in the PIP Statute. Thus, Plaintiff has strictly complied with F.S. 627.736(10) and satisfied the condition precedent to filing this lawsuit.

11. Nowhere in Section 627.736(10), Florida Statute, does it state that the demand letter must state the exact amount that is ultimately determined to be due, despite the Defendant's contentions noted above. Further, the statute does not require the specific amount due for each CPT code on each separate date of service.

12. Plaintiff further contended that PROGRESSIVE waived its right to contest the va-lidity of the demand letter as it failed to delineate in its response any specific information missing from the demand letter. This Court finds that PROGRESSIVE did not waive its right to contest the validity of the demand letter.

13. As a result, the Plaintiff in this case is entitled to prevail on this issue. Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff's Motion for Partial Summary Disposition is GRANTED and Defendant's Motion for Summary Disposition is hereby DENIED.

[1]Pursuant to Administrative Order 2020-33-CO regarding the automatic invocation of the Rules of Civil Procedure, this Court reserved Small Claims Rule 7.135 allowing for summary disposition. The issue raised in this Order, however, does not rise or fall on the distinction between summary judgment and summary disposition.

* * *

Insurance—Automobile—Windshield repair—Appraisal— Disinterested appraiser—Insurer confessed judgment in action seeking declaration that insurer's chosen appraiser was not qualified to serve as "disinterested appraiser" by withdrawing appraiser at issue

AR&C RESOLUTIONS, LLC, a/a/o Jennifer Smith, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20031574, Division 53. July 21, 2021. Robert W. Lee, Judge. Counsel: Emilio R. Stillo and Andrew B. Davis-Henrichs, Davie; and Joseph R. Dawson and Rowena Racca, Fort Lauderdale, for Plaintiff. Chelsea Cangiano, Miami; Crystal Urquiza, Tampa; Allison C. Heim, Orlando; and Kansas R. Gooden, Miami, for Defendant.

FINAL JUDGMENT FOR PLAINTIFF

THIS CAUSE having come on to be heard on June 30, 2021, in an omnibus hearing along with *Auto Glass America, LLC (a/a/o Terry Tennant) v. Allstate Fire and Casualty Insurance Company*, COCE 19-017635, and *AR&C Resolutions, LLC (a/a/o Jeff Waterman) v. Allstate Insurance Company*, Case No. COCE20-031570, on Plaintiff's Motion for Entry of Final Judgment, on an action for Declaratory Relief, and the Court having reviewed the filings, received argument of counsel and having been duly advised in the Premises, it is hereupon, finds as follows:

1. On June 30, 2021, this Court conducted an omnibus hearing on Plaintiff's Motion for Entry of Final Judgment; each case involves an Allstate insured who suffered windshield damage and sought replacement from Auto Glass America (AGA).

2. The insured assigned to AGA the right to collect the costs of windshield replacement directly from Allstate

3. AGA billed Allstate, but did not receive the full amount it believed was due.

4. Upon tender of the reduced payment, Allstate notified AGA that it is invoking the appraisal provision in the policy to resolve any disagreement as to the amount of the loss and that Auto Glass Inspection Services ("AGIS") was its appointed appraiser.

5. The appraisal clause in the policy requires an appointment of a "competent and disinterested" appraiser.

6. Presuit, AGA sought withdrawal of AGIS serving as an appraiser on any AGA claims on the basis that AGIS is anything but disinterested.

7. On October 14, 2020, Plaintiff, AR&C Resolutions, LLC, a subsequent assignee of AGA and insured, sent a pre-suit letter to Allstate expressing its objection to AGIS serving as an appraiser in the subject claim.

8. Without a response from Allstate withdrawing AGIS, on November 9, 2020, Plaintiff filed this action originally sounded in four declaratory counts. The only remaining count seeks a judicial determination that AGIS is not qualified to serve as a "disinterested appraiser" for Allstate.

9. Subsequent to the filing of this action, Allstate voluntarily withdrew AGIS and switched to a new appraiser.

10. On June 23, 2021, the Court informed the parties that the issue regarding the the determination of whether the Plaintiff would be entitled to a final judgment where, after an action for declaratory relief is filed to determine that Allstate's chosen appraiser was not "disinterested, Allstate subsequently withdraws the appraiser who was the subject of the cause of action.

11. Following the hearing on June 30, 2021, this Court entered a detailed order in the case of Auto Glass America, LLC (a/a/o Terry Tennant), which rejected the same argument by Allstate 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).

12. Just like in Tennant, the Court finds that 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' "). As such, it is hereupon,

ORDERED and ADJUDGED that Plaintiff, AR&C Resolutions, LLC (a/a/o Jennifer Smith) is entitled to a Final Judgment for Declaratory Relief in its favor filed against Defendant, Allstate Fire and Casualty Insurance Company, due to the confession of judgment and the Court finds that the Defendant's chosen appraiser, who was Auto Glass Inspection Services, "AGIS," did not meet the policy requirements of being a disinterested appraiser. The Court reserves jurisdiction to determine Plaintiff's entitlement to attorneys' fees and costs and the reasonable amount of each, upon timely motion.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where injection provided by urgent care center is not reimbursable under participating physician fee schedule of Medicare Part B, insurer was required to calculate reimbursement for injection under workers' compensation fee schedule, not Medicare Part B Drug Average Sales Price

MD NOW MEDICAL CENTERS, INC., a/a/o Arif Spencer, Plaintiff,v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO18014153, Division 70. June 21, 2021. John D. Fry, Judge. Counsel: Chad L. Christensen, Ged Lawyers, LLP, Boca Raton, for Plaintiff. William Foman, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court, on June 14, 2021, on Plaintiff's Motion for Summary Disposition and Defendant's Motion for Summary Judgment as to the Application of Statutory Fee Schedules (proper payment of CPT Code J1885), and the Court having reviewed the Motions, the legal authority, having reviewed the matters filed of record, having heard argument of counsel, and having been sufficiently advised in the premises, the Court finds as follows:

The sole issue before this Court is whether State Farm paid CPT Code J1885 (Toradol/Ketorolac injection) in accordance with the "schedule of maximum charges" referenced in F.S. 627.736.

Findings of Fact

1. Plaintiff filed the instant action alleging breach of contract for failure to pay personal injury protection benefits.

2. Plaintiff is an urgent care center that provided treatment to the patient on 05/02/2018 and billed CPT code J1885. Defendant allowed $1.20 based upon 200% of the Medicare Part B Drug Average Sales Price (ASP).

3. CPT code J1885 is reimbursable under the Florida Workers Compensation fee schedule in the amount of $7.00 at the time services were rendered.

4. CPT Code J1885 is not priced under the participating physician fee schedule of Medicare Part B.

5. Plaintiff contends that State Farm was required to reimburse CPT Code J1885 pursuant to the Florida Workers Compensation fee schedule.

6. State Farm contends that payment was proper because it utilized a payment methodology under Medicare.

Conclusions of Law

This issue in this case involves the interpretation of F.S. 627.736(5)(a)1.f. "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Sunrise Chiropractic and Rehabilitation Center, Inc. v. Security National Insurance Company,* 2021 WL 1991674 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a]; *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984).

The pertinent language is as follows:

F.S. 627.736(5)(a)1 states:

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

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

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

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

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

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

There is a straightforward two-step analysis to determine which specific fee schedule under the "schedule of maximum charges" is to be utilized for the injection billed by Plaintiff in this case.

Step 1- Determine which sub-subparagraph the medical service falls under within the "schedule of maximum charges" referenced in F.S. 627.736;

Step 2- Determine whether the medical service, supply, or care billed by plaintiff is reimbursable under sub-sub-subparagraphs (I), (II), or (III);

If the medical service, supply or care billed:

a. is not covered under the participating physician fee schedule of Medicare Part B;

b. is not provided by a clinical laboratory or an ambulatory surgical center; and

c. is not under the DME fee schedule,

then the insurer is required to limit reimbursement to 80% of the maximum reimbursement allowance under the Florida's workers compensation fee schedule.

In this case, there is no dispute that the CPT Code J1885 falls within 627.736(5)(a)1.f. as it is "all other medical services, supplies, and care. Under sub-subparagraph "f", sub-sub-subparagraphs (I), (II), (III) do not apply to CPT Code J1885.

First, sub-sub-subparagraph (I) does not apply as CPT code J1885 is not reimbursable under participating physicians fee schedule of Medicare Part B. The Medicare Part B Drug Average Sales Price (ASP) is separate and distinct from the participating physician fee schedule of Medicare Part B. There is a different federal statute that establishes the participating physician fee schedule of Medicare Part B and different formula for calculating reimbursement under the participating physician fee schedule compared to the Medicare Drug ASP. The federal statute establishing the participating physicians schedule is *42 U.S.C. § 1395w-4.* Subsection (b)(1) of that statute instructs the Secretary of the Department of Health and Human Services to establish the fee schedule based on a variety of factors. *42 U.S.C. § 1395w(b)(1).*

The reimbursement value for services under the participating physicians fee schedule of Medicare Part B is calculated by:

> multiplying (1) the relative value of a service; (2) the conversion factor for the particular year; and (3) the geographic adjustment factor applicable to the locality in which the service was provided. *See* 42 U.S.C. § 1395w-4(b)(1). Therefore, using simple arithmetic (addition and multiplication), the reimbursement value for any service, in any part of the United States, for any given year can be easily ascertained by the Defendant using the Medicare Part B Physicians Fee Schedule. The tables of values for the cost factors are published each year in the annual Medicare Physicians Fee Schedule Final Rule and are readily available and easily accessible on the Centers for Medicare and Medicaid ("CMS") website.

See, *Sunrise chiropractic and Rehabilitation Center, Inc. v. Security National Insurance Company,* 2021 WL 1991674 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a]

By contrast, Section 303(c) of the Medicare Modernization Act of 2003 (MMA) amended Title XVIII of the act by adding 1847A, which established the new average sales price drug payment system. Beginning January 1, 2005, drugs not paid on a cost or prospective payment basis will be paid based on the ASP methodology, and payment is 106 percent of ASP. The ASP is calculated by quarterly drug pricing data submitted to CMS by drug manufacturers. See 42 USCA 1395w-3a. Further, the table for the payment allowance limits states:

> The absence or presence of a HCPCS code and the payment allowable limits in this table does not indicate Medicare coverage of the drug. Similarly, the inclusion of a payment allowance limit within a specific column does not indicate Medicare coverage of the drug in that specific category. These determinations shall be made by the local Medicare contractor processing the claim.

The participating physician fee schedule of Medicare Part B is independent from the Medicare Part B Drug ASP and is not a permitted Medicare payment methodology under F.S. 627.736. Accordingly, State Farm's payment for CPT Code J1885 was improper.

Next, Sub-sub-subparagraph (II) does not apply as Plaintiff is neither a clinical laboratory or ambulatory surgical center. Sub-sub-subparagraph (III) does not apply as CPT Code J1885 is not "durable medical equipment".

Since sub-sub-subparagraphs (I), (II), (III) are not applicable, Defendant was required pursuant to the PIP statute and the insurance policy to look to the Florida Workers Compensation Fee Schedule to calculate the correct allowable amount for CPT Code J1885. Defendant's use of the Medicare Part B Drug ASP is contradicted by the clear plain language of F.S. 627.736(5)(a)1.f. If the legislature required or authorized payment utilizing the ASP, then it would have stated it. Courts are not at liberty "to add words that were not placed there originally." *Pleus v. Crist,* 14 So.3d 941, 945 (Fla. 2009) [34 Fla. L. Weekly S389a]. Because the Florida Workers Compensation Fee schedule is correct, the Medicare payment methodologies referenced in F.S. 627.736(5)(a)3 are not applicable.

Based upon the foregoing, Plaintiff's Motion for Summary Disposition is GRANTED. Defendant's Motion for Summary Judgment is DENIED

* * *

Garnishment—Exemption—Defendant is entitled to exemption of all bank account funds traceable to unemployment compensation—Defendant who does not claim homestead exemption is entitled to both $4,000 wildcard personal property exemption under section 222.25(4) and $1,000 personal property exemption under section 4, Article X of Florida Constitution—Writ of garnishment directed to bank is dissolved

GOTHAM COLLECTION SERVICES, CORP., Plaintiff, v. JACOB EITTSON, Defendant, and BANK OF AMERICA, N.A., Garnishee. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019-CC-004352. July 19, 2021. James J. DeKleva, Judge. Counsel: Joshua Moore, Law Offices of Daniel C. Consuegra, P.L., Tampa, for Plaintiff. Alex McClure, Law Office of Alex McClure, Lake Mary, for Defendant. Joseph A. Noa, Jr., Miami, for Garnishee.

ORDER ON DEFENDANT'S CLAIM OF EXEMPTION

This cause came to be heard on May 10, 2021 on Defendant Jacob Eittson's Claim of Exemption and Request for Hearing and Plaintiff's Objection to Defendant's Claim of Exemption and Request for Hearing.

Having received the testimony of Defendant Jacob Eittson, having reviewed and considered all of the evidence submitted to the Court and having the heard the argument of Counsel for Defendant (Counsel for Plaintiff was not present at the scheduled hearing despite having set and noticed the same), the Court finds that:

1.) On October 27, 2020, a Writ of Garnishment was issued, directed toward Bank of America, N.A. Said Writ was answered indicating that a total of $6,694.43 had been withheld from two (2) separate accounts pursuant to the Writ of Garnishment.

2.) On November 19, 2020, Defendant filed a Claim of Exemption and Request for Hearing stating that she was entitled to the following exemptions under Florida and federal law:

a. $4,000 wildcard personal property wildcard exemption pursuant to Florida Statute §222.25(4).

b. $1,000 personal property exemption pursuant to Article X Section 4 of the Florida Constitution.

c. An absolute exemption of all funds on deposit in the account traceable to Unemployment Compensation pursuant to §443.051 Fla. Stat.

3.) Defendant testified that he does not claim or receive the benefits of a homestead exemption.

4.) Defendant testified that in his bank accounts at the time the Writ was served was the remainder of at least $2,000.00 in Unemployment Compensation.

Upon consideration of the foregoing, **it is ORDERED that:**

1.) Defendant is entitled to an exemption of all funds in his Bank of America Account which are traceable to Unemployment compensation pursuant to §443.051 Fla. Stat.

2.) Defendant is entitled to a $4,000 wildcard personal property wildcard exemption pursuant to Florida Statute §222.25(4) and he is also entitled to a $1,000 personal property exemption pursuant to Article X Section 4 of the Florida Constitution. *See in Re Motosammy,* 387 B.R. 291, 297 (Bankr. N.D. Fla. 2008).

3.) The exemptions claimed by Defendant may be combined and stacked to produce an aggregate exemption of $7,000.00 based on the findings of fact in this case. *See in Re Bezares,* 383 B.R. 796, 798 (Bankr. M.D. Fla. 2007) [21 Fla. L. Weekly Fed. B247a].

4.) The Writ of Garnishment directed to Garnishee, Bank of America, N.A., is dissolved in its entirety.

5.) The entirety of Defendant's currently held by Garnishee Bank of America, N.A. pursuant to the Writ of Garnishment shall be released to Defendant Jacob Eittson, immediately.

* * *

Volume 29, Number 6
October 29, 2021
Cite as 29 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Bar associations and organizations—Judge may appear in a video sponsored by local bar foundation which outlines the services provided by and through local legal aid society and pro-bono legal services organization

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-09. Date of Issue: July 22, 2021.

ISSUE

May a judge appear in a video sponsored by a local bar foundation which outlines the services provided by and through the local legal aid society and another pro-bono legal services organization?

ANSWER: Yes.

FACTS

A judge inquires whether it is permissible for the judge to appear in video sponsored by a local bar foundation, which outlines the services provided by and through the local legal aid society and another pro-bono legal services organization. The proposed script for the video is informational. It does not solicit contributions for either organization. Nor does the script for the video solicit lawyers to join either organization or to perform pro bono work or to pay an assessment in lieu of pro bono work. *See* Fla. JEAC Op. 2000-06.

The local bar foundation focuses on community education relating to the law and the legal system. The foundation helps citizens gain a better understanding of the judicial system, including knowledge of how the judicial system works and teaching school students about our system of government and the basic principles underlying our constitutional institutions and structures.

DISCUSSION

In 2003, Canon 4B was clarified by the Florida Supreme Court "to encourage judges to engage in activities to improve the law, the legal system, and the administration of justice." *Code of Judicial Conduct,* 840 So. 2d 1023, 1031 (Fla. 2003) [28 Fla. L. Weekly S150a]. The Court also noted:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including, but not limited to, the improvement of the role of the judiciary as an independent branch of government, the revision of substantive and procedural law, the improvement of criminal and juvenile justice, and the improvement of justice in the areas of civil, criminal, family, domestic violence, juvenile delinquency, juvenile dependency, probate and motor vehicle law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.

Id. See also Commentary to Canon 4B.

REFERENCES

Code of Judicial Conduct, 840 So. 2d 1023 (Fla. 2003)
Fla. Code of Judicial Conduct, Canon 4B and Commentary to Canon 4B.
Fla. JEAC Op. 2000-06

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Elections—Judge who regularly made non-compensated appearances on local radio show that were informative in nature, and which did not involve legal advice, questions from the public, or promotion of judge's appearance, may continue to appear to discuss law-related activities in the community during contested election

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-10. Date of Issue: July 23, 2021.

ISSUE

Whether a judge who is now in a contested election may continue to appear on a public radio station's local news talk show to discuss law-related activities in the community.

ANSWER: Yes, under the facts reported.

FACTS

The inquiring judge has, for many years, been a somewhat regular guest on a local public radio station's talk show. According to the inquiring judge, the discussions during these appearances revolve around courthouse administration and law-related issues that affect the community. The appearances typically last about five minutes, are informative in nature, and no questions are taken from the public. The radio station does not promote the inquiring judge's appearances. The inquiring judge states that no legal advice is given, no discussion is ever had concerning pending cases, and no financial compensation is provided for any of the judge's appearances.

The inquiring judge is presently in a contested election (for the 2022 cycle). The judge wishes to know whether the judge may continue to appear on this radio program. We have been assured that the judge will not mention the election in any way during any program appearance.

DISCUSSION

This Committee has addressed the issue of judicial officers' appearances in television and radio programs on several occasions, and a few guideposts can be discerned. First, compensated appearances on such programs, insofar as they feature the judge because of his or her judicial position, are often problematic. So, for example, when an inquiring judge wished to know whether it was permissible to appear as a paid commentator on a television show to "comment about, explain to, and educate the public concerning diverse legal matters . . . such as the O.J. Simpson civil trial," this Committee opined that such an activity would implicate several judicial canons. *See* Fla. JEAC Op. 96-25. As we explained,

> [t]his inquiry implicates, at least, Canon 2B, Canon 3B(8), and Canon 5A. Canon 2B is a general prohibition against a judge from lending the prestige of judicial office to advance the private interests of the judge or others. Under Canon 3D(8), a judge shall not, while a proceeding is pending or impending in any court, make public comment that might reasonably be expected to affect its outcome or impair it fairness. Canon 5A provides that a judge's extrajudicial activities must be conducted in such a manner so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.

We concluded that the inquiring judge was ethically prohibited from entering into such an arrangement with a television station.[1] In so opining, the Committee also cited favorably to a New Jersey Supreme Court opinion construing Canon 2B and Canon 3B(8), *In re Inquiry of Broadbelt*, 683 A.2d 543 (N.J. 1996). In particular, we recited a remark in *Broadbelt* that, due to the frequency of an inquiring judge's appearances, the judge "became regularly identified with the program, thereby lending it the prestige of his judicial office." Fla. JEAC Op. 96-25 (quoting *Broadbelt*, 683 A.2d at 550).

Thus, a second guidepost this Committee has identified in these circumstances concerns the regularity or frequency of media appearances by judicial officers. So it was that in Fla. JEAC Op. 00-16 [7 Fla.

L. Weekly Supp. 818a], the Committee advised a state legislator who had become a judicial candidate to refrain from continuing to host a weekly radio talk show characterized as "informative in nature," in which the candidate would select topics, invite experts in the field onto the show for discussion, and field phone calls from the general public. We concluded that "the inquiring judicial candidate may not host *a regular commercial radio talk show* that focuses upon comments concerning current legal issues." *Id.* (emphasis supplied). Interestingly, though, in Fla. JEAC Op. 14-03 [21 Fla. L. Weekly Supp. 458a], the Committee concluded that a newly appointed judge could continue to host a weekend radio program that played classic songs for a commercial radio station (as long as the judge ensured that the hosting duties would not otherwise violate any of the judicial canons).

As is clear from this inquiring judge, financial compensation is not an issue. Nor do we believe the pendency of a contested election, in and of itself, would render the judge's continued appearance on this radio program unethical.[2] However, we recognize that our prior guidance concerning the frequency of appearances in public media may need clarifying. We will endeavor to do so now.

When this Committee issues advisory opinions, we do so based upon our understanding of the facts that are reported to us and our construction of the text of the canons, since the text of the judicial canons is ultimately what judicial officers must familiarize themselves with and abide by. *Cf. In re Inquiry Concerning Ward*, 654 So. 2d 549, 551 (Fla. 1995) [20 Fla. L. Weekly S225a] (observing that "under the plain language of the Code of Judicial Conduct and the various advisory opinions on the issue, Judge Ward . . . should have known that it was improper to write a character reference to the judge presiding over Allsworth's sentencing"). In the context of our judicial canons, that can sometimes pose a challenge because some canons purposely utilize broad language that must be applied in fact-specific contexts.

Canon 2B is a good example. The part of that canon with which we are concerned—"A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others"—requires consideration and reflection upon whether the facts presented by an inquiring judge could be said to "lend the prestige of judicial office" in some way that "advances" private interests. When judicial officers accept financial remuneration in exchange for their appearance on a commercial program (and that appearance is directly tied to their position as a judge), it takes little interpretive energy to conclude that that judge is lending his or her "prestige of judicial office" to advance his or her financial interests. But what if the judicial officer receives nothing of value? Canon 2B still requires consideration of whether another's private interests (in this case, a public radio station) might be "advanced" if a judge is indeed "lending" the prestige of his or her office by appearing on a program.

Several variables could potentially inform that question's resolution, including how the station receives financial support, whether it advertises the judicial officer's appearance and in what manner, whether the judge's appearance is considered a public service/informative aspect of the station's operation or whether it is a potential source of advertising funding for the station. These (as well as other) facts, and the reasonable inferences that could be drawn from them, will usually have to be considered holistically when inquiries such as these arise. The frequency of a judge's appearance *could*, when considered with other facts, give rise to a concern that a judicial officer *could* be lending the prestige of his or her position to a media company by frequently making appearances on a program, and that that media company's interests *could* be advanced by those frequent appearances. That is something a judicial officer should certainly consider. When we issue advisory guidance in these circumstances, we, too, will consider the frequency of the inquiring judicial officer's anticipated appearances—not as a hidden, didactic point lurking within Canon 2B (i.e., we do not mean to convey, as a categorical construction of Canon 2B, that a once-a-month media appearance would be acceptable, but a once-every-other-week appearance would not), but rather as part of a reasonable, holistic consideration of Canon 2B's text and its application to a set of reported facts.

With that view, under the facts as reported in this inquiry, we conclude that the inquiring judge may continue to appear on this radio program in the manner the inquiring judge has reported.

One member of the Committee dissents. An opinion from the Supreme Court of New Jersey, *Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. 501, 683 A. 2d 543 (1996) cited herein and by the Committee in JEAC Op. 96-25, suggested a number of factors to be taken into account in determining whether Canon 2B's prohibition on lending the prestige of judicial office to advance the private interests of others are triggered. These factors include: "the frequency with which the judge appears on the program, the intended audience, the subject matter, and whether the program is commercial or noncommercial." 146 N.J at 515. In *Broadbelt,* the Court concluded that "Judge Broadbelt's regular appearances on commercial television violated Canon 2B. Because of the frequency of Judge Broadbelt's appearances, Judge Broadbelt became regularly identified with the program, thereby lending it the prestige of his judicial office." *Id.* The Court cautioned that "a judge should avoid appearing on either commercial or non-commercial programs when the judge's association with that program compromises the independence and integrity of the judiciary." *Id*.

The dissenting member would advise the inquiring judge to cease frequent and continuing radio appearances under the facts reported, especially considering that the inquiring judge is presently in a contested election for the 2022 cycle.

REFERENCES

In re Inquiry of Broadbelt, 683 A.2d 543 (N.J. 1996)
In re Inquiry Concerning Ward, 654 So. 2d 549, 551 (Fla. 1995)
Fla. Code Jud. Conduct, Canons 2B; 3B(8); 5A; 7
Fla. JEAC Ops. 96-25; 00-16; 14-03

[1]One Member of the Committee in Fla. JEAC Op. 96-25 commented separately that the Committee ought to leave "an avenue open for judges to educate the public via television or any other media in the 'true spirit' of public service."

[2]That, of course, assumes the inquiring judge would conduct appearances on the program in accordance with all the judicial canons, including Canon 7.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Judge who is member of an association may participate in deliberations regarding a proposed resolution calling for a boycott based upon state legislation—However, judge's continued membership in the association if resolution passes may pose questions regarding judge's impartiality depending on language of resolution and its publication

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-11. Date of Issue: August 5, 2021.

ISSUES

1. Whether a judge who is a member of the National Association of Women Judges may express an opinion among the association's membership as the association deliberates a proposed resolution calling for what appears to be a boycott against States whose laws, according to the resolution, have "voided or repealed protections against discrimination on the basis of sexual orientation, gender identity or gender expression, or have enacted laws that authorize or mandate [such] discrimination."

ANSWER: Yes

2. Whether a judge's continued membership in an organization that issues a resolution calling for a boycott based upon state legislation poses ethical problems under the Florida Judicial Canons.

ANSWER: Depending on the language of the resolution and its publication, possibly yes.

FACTS

The inquiring judge is a longtime member of the National Association of Women Judges ("NAWJ"). According to its website, NAWJ's mission "is to promote the judicial role of protecting the rights of individuals under the rule of law through strong, committed, diverse judicial leadership; fairness and equality in the courts; and equal access to justice." *See* www.nawj.org. NAWJ provides various programs for its members throughout the United States, including judicial education, mentorship, public and community service, and networking.

NAWJ has numerous committees, including an Annual Conference Planning Committee, Domestic Violence Committee, Human Trafficking Committee, Rural Courts Committee, Strategic Planning Committee, and several others. One that was recently created, the LGBTQ+ Committee,[1] has proposed a resolution to be deliberated and potentially adopted by the membership of NAWJ at an upcoming general membership meeting, conference, or vote.

The proposed resolution is entitled "Resolution Regarding Future NAWJ Conferences in Jurisdictions Where LGBTQ Protections Are Repealed or Where Discriminatory LGBTQ Laws are Enacted." The resolution recounts NAWJ's mission, decries the enactment of "laws that void or repeal state or local protections against discrimination on the basis of sexual orientation, gender identity or gender expression, or have enacted laws that authorize or mandate, authorize or condone discrimination on the basis of sexual orientation, gender identity or gender expression, including laws that create exemptions from anti-discrimination laws in order to permit discrimination on the basis of sexual orientation, gender identity or gender expression," and would resolve that the NAWJ not select "any future site for an annual or midyear meeting without first taking into careful consideration" whether the site is located in a jurisdiction that has enacted the aforementioned laws. The language of the resolution does not specify any particular laws that would fall within its description but does provide a list of twelve states that have apparently enacted them (whatever they are). This list, as it presently stands, includes: Alabama, Idaho, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas. The inquiring judge informs us that Florida will likely soon be added to the list.

The inquiring judge poses two questions: can the inquiring judge participate in NAWJ's deliberations and express an opinion on this proposed resolution; and, assuming the resolution is adopted, would that pose any ethical issues for the inquiring judge.

DISCUSSION

Judges are encouraged to be active in civic, bar, and law-related organizations "devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice," *see* Fla. Code Jud. Conduct, Canon 4D, and NAWJ clearly constitutes such a group. Such associations do important work to help advance the rule of law, public confidence in the judicial system, and judicial engagement with the communities judges serve. At times, however, these same groups may assume political positions or advocate for substantive changes in the law. *See, e.g.*, Fla. JEAC Op. 21-01 [29 Fla. L. Weekly Supp. 53a] (advising that a judge should not maintain membership in a voluntary bar association that endorses a candidate for appointment as a U.S. Attorney); Fla. JEAC Op. 01-15 [8 Fla. L. Weekly Supp. 803a] ("Judicial membership in a voluntary bar association that endorses judicial candidates violates Canons 4A(1) and 5(A)(1). Membership would cast reasonable doubt upon the judge's capacity to act impartially as a judge."); Fla. JEAC Op. 98-31 (advising that a judge may maintain membership in the Florida Association of Women Lawyers as it supported a proposed constitutional amendment); Fla. JEAC Op. 84-13 (advising that a judge could serve as chairman of the Family Law Section of The Florida Bar, even though the section actively filed amicus briefs in Florida appellate courts, but cautioned that the judge "avoid direct involvement in any activities of the Family Law Section which could reflect adversely on your impartiality as a judge").

The content of the proposed resolution before NAWJ appears to be another potential instance of a law-related group assuming a political position. The resolution denounces substantive, enacted laws that it deems "discriminatory" towards certain individuals and goes so far as to identify states that apparently have enacted such "discriminatory" laws—it is a political statement concerning an issue of political debate. The resolution's directive to "first tak[e] into careful consideration" whether to schedule future conferences at any of the purportedly offending states appears to be a call for a boycott—which is a widely recognized method of expressing a political view or effectuating a political change. In short, we construe this proposed resolution as what it plainly is: a political statement on a current political issue.[2]

The inquiring judge may discuss and debate the proposed resolution within the confines of NAWJ's membership. There is no ethical prohibition to that kind of activity. Because the inquiring judge assures us that the deliberations and discussion on the resolution's vote will remain within NAWJ and not be disseminated to the public, the judge is free to voice the judge's views and opinions among NAWJ's membership.

The second issue poses a more difficult question. At this time, NAWJ has not actually passed a resolution on this topic, and even if it does in the future, the final resolution may be worded very differently than the one which has been presented to us. Moreover, while we suspect from the tone of the proposed resolution that its proponents intend to publicly disseminate the resolution's passage (assuming it garners sufficient support), that may not be the case. It may be that if the resolution is adopted, it is not publicly promoted but made available to the public (such as NAWJ's bylaws, which are publicized on its website). However, assuming passage and some kind of publicity of or public access to the proposed resolution, and in the interest of providing the most comprehensive response possible, we would offer these observations to the inquiring judge about whether such potential actions by NAWJ could potentially pose issues for a member judge in Florida.

Pertinent to this part of the inquiry are the following canons: Canon 5A ("A judge shall conduct all of the judge's extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality . . . ."); Canon 4A ("A judge shall conduct all of the judge's quasi-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) undermine the judge's independence, integrity, or impartiality . . . ."), and Canon 2A ("A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

We have construed these judicial canons to advise judicial officers that they may maintain membership in nonpolitical, nonpartisan organizations that occasionally espouse political viewpoints. For example, a divided Committee opined in Florida Judicial Ethics Advisory Committee Opinion 95-46 that a judge could maintain membership in the American Board of Trial Advocates (ABOTA), a nonpartisan, nonpolitical organization whose membership is equally

split between civil plaintiff and defense attorneys, even though ABOTA has, on occasion, lobbied state and federal legislatures regarding legislation. Judges may be members of the National Association for the Advancement of Colored People (which we deemed was a nonpolitical organization), *see* Fla. JEAC Op. 20-22 [28 Fla. L. Weekly Supp. 745a], as well as the National Rifle Association, *see* Fla. JEAC Op. 09-13 [16 Fla. L. Weekly Supp. 1003a]. Indeed, we have advised that a judge may continue to be a member of the American Israel Public Affairs Committee, even though we assumed the organization was "primarily a lobbying group." *See* Fla. JEAC Op. 01-13 [8 Fla. L. Weekly Supp. 663a].

On the other hand, in Florida Judicial Ethics Advisory Committee Opinion 95-21 [3 Fla. L. Weekly Supp. 303b] we advised that membership in the Academy of Florida Trial Lawyers, an organization "devoted to the improvement of the law, the legal system, and the administration of justice," was prohibited under Canon 4A, notwithstanding the generalized aspirational goals of the organization. We concluded that it was ethically impermissible because the Academy required certification that less than 40% of a member's practice was devoted to defense work. As one of our members commented, such membership could have attorneys "saying, 'Hey, She's a Plaintiff's judge' or 'He belongs to the Academy.' " *Id*.

What can be synthesized from all these prior opinions is that maintaining the appearance of impartiality is a paramount concern when we examine these membership inquiries. So mere membership in a nonpolitical organization that sometimes professes a political viewpoint will ordinarily not run afoul of the judicial canons—if that membership, in and of itself, would not give rise to an appearance of partiality.

NAWJ is somewhat unique in one respect, though. Although it is obviously not a political organization (that would be subject to Canon 7's strictures), NAWJ is a group organized for *judges*.[3] Thus, unlike civic groups, bar associations, and other law-related groups, when NAWJ publishes a statement, anyone who hears or reads it will associate the statement with a group of judges. We have not had an occasion to address the implications of a judicial organization espousing political statements on current laws. But we would have to believe that NAWJ's statements about legislation on political topics would likely enjoy a special platform of public consideration. The inquiring judge would have to carefully monitor the extent to which NAWJ's resolution, should it pass, becomes a feature of public discussion or awareness, and whether the judge's membership could be construed as evidence of partiality on topics to which that resolution pertains.

Moreover, if the unidentified laws that are the subject of the proposed resolution were ever challenged in a court proceeding, any judge who is a member of a judicial group that has actively advocated against such laws would seem to be in a position where the State may legitimately question the appearance of that judge's impartiality. In such an instance, the member judge would have to consider Canon 3E(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .").

In conclusion, we would repeat our cautionary advice in Florida Judicial Ethics Advisory Committee Opinion 98-31: "the changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to re-examine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation."

REFERENCES

Fla. Code Jud. Conduct, Canons 2A; 3E(1); 4A; 4D; 5A
Fla. JEAC Ops. 84-13; 95-21; 95-46; 98-31; 01-13; 01-15; 09-13; 20-22; 21-01
New York Advisory Committee on Judicial Ethics Op. 21-81

[1]The initials, "LGBTQ," have become a popular shorthand reference to lesbian, gay, bisexual, transgender or transsexual, and "queer" or "questioning." Some iterations of this abbreviation also include an "I" for "intersex," an "A" for "asexual" or "ally," and a "+" symbol that connotes various other concepts of gender and sexuality not encompassed within the other letters.

[2]We recognize that another state's judicial ethics advisory body has reasoned that NAWJ's potential advocacy on this point is simply "intended to improve the law, the legal system or the administration of justice . . . ." *See* New York Advisory Committee on Judicial Ethics Op. 21-81. That premise, however, rests on the tacit assumptions that: (a) the laws in question (whatever their content) are pejorative and discriminatory in their operation and intent; and that, therefore; (b) advocating against such laws would necessarily constitute an improvement in the law or legal system. Framing NAWJ's potential advocacy in that manner seems a tad stilted and, we fear, could lead an advisory committee such as ours into political waters on political questions (where laws with which the committee may happen to disagree are deemed "ethical" to advocate against, while other laws with which the committee agrees become "unethical" for a judicial officer to publicize any disagreement with).

[3]According to NAWJ's website, membership is open to "federal, state, tribal, military and administrative law judges, as well as judicial clerks, attorneys and law students," and includes both men and women. As its name implies, however, NAWJ's focus is clearly on the judiciary.

* * *

Judges—Judicial Ethics Advisory Committee—Gifts—Judge or court administrator may accept unsolicited, one-time gift from bar association to use as incentive gifts in court's problem-solving courts

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-12. Date of Issue: August 10, 2021

ISSUE

May a judge or court administrator accept an unsolicited one-time gift from a bar association to use as incentive gifts in the court's Problem-Solving Courts.

ANSWER: Yes

FACTS

A local bar association approached the inquiring judge and asked whether it could honor the judges of the court's "Problem Solving Courts." Due to the COVID-19 pandemic, the bar association did not hold its annual reception honoring the local judiciary. Instead, the bar association asked the inquiring judge whether it could use the money allocated to that event and make a one-time cash donation to the court to fund "incentive gifts" for participants in the circuit's Problem-Solving Courts.

The inquiring judge asks whether the judge, or the court, can accept the donation and use the funds to purchase gift cards that will be used as incentive gifts in the Problem-Solving Courts. Alternatively, the inquiring judge asks whether the court administrator can accept the funds on behalf of the court.

The inquiring judge states that the inquiring judge did not request the donation.

DISCUSSION

As the inquiring judge notes, the committee already addressed a very similar issue. In **JEAC Op. 2007-05** [14 Fla. L. Weekly Supp. 510a], the committee concluded that "[t]he acceptance of gifts, for any purpose, from lawyers or law firms who are likely to come before the judge may exploit the judge's judicial position, provide grounds to question the judge's impartiality, convey or permit others to convey the impression that they are in a special position to influence the judge and create a potential for disqualification." In support of our conclusion, we cite Canons 2A, 2B, 3E, 5A(1), 5D(1), and 5D(5).

The inquiring judge notes two possible distinctions between the present situation and that discussed in Fla. JEAC Op. 2007-05. First, the inquiring judge in this case is not soliciting the gift. Second, the source of the gift. Unlike in Fla. JEAC Op. 2007-05, the gift at issue here is not given directly by a lawyer or law firm.

These distinctions led other ethics organizations to approve gifts

to specialty courts in similar situations.

First, the American Bar Association issued ABA Formal Op. 08-452. In that opinion, the ABA committee explained that a judge can participate in fundraising to benefit a court, including a specialty court. But, the committee explained, "A judge who participates in fundraising activities on behalf of a court, including a 'therapeutic' or 'problem-solving' court, must limit the participation to activities permitted by Model Code of Judicial Conduct Rule 3.7(A). The judge also must ensure that her conduct does not violate Judicial Code Rules 3.1, 1.2, or 1.3."

Next, in Advisory Opinion JE12-009, the State of Nevada Standing Committee on Judicial Ethics concluded a judge and judicial staff may not solicit cash or other gifts to be used as incentives in a drug court program. But that committee concluded a judge could accept unsolicited donations.

More recently, the Arizona Supreme Court Judicial Ethics Advisory Committee issued Opinion 19-01 [26 Fla. L. Weekly Supp. 919a]. In that opinion, the committee concluded that a court could, "with qualifications," accept unsolicited donations to purchase and distribute incentives such as gift cards to participants in problem-solving courts. The Arizona committee concluded the court could do so (i) if the gift is unsolicited; (ii) if the gift does not involve donations for the personal use or benefit of a judge or judicial employee; (iii) if the gift is not used for funding a statutory mandate; and (iv) if the gift will not mandate frequent disqualification.

Informed by our earlier decision, and the recent decisions from the other jurisdictions, we conclude that the court administrator for the circuit can accept the one-time donation for the purpose of distributing gift-cards as incentives in the Problem-Solving Court. In reaching this conclusion, we do not recede from our opinion in Fla. JEAC Op. 2007-05. The inquiring judge, and the judges of the court, should be mindful of that opinion and the Code of Judicial Conduct when distributing the gift cards.

REFERENCES

Fla. Code of Judicial Conduct, Canons 2A, 2B, 3E, 5A(1), 5D(1), and 5D(5)
Fla. JEAC Op. 2007-05
Arizona Supreme Court JEAC Op. 19-01
Nevada Comm. on Jud. Ethics JE12-009
Am. Bar Ass'n. Formal Op. 08-452

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Judge may provide a sworn statement pursuant to written request from law enforcement investigating the conduct of a police officer that took place in judge's courtroom during a trial—Receipt of written request does not require recusal from future legal proceedings that will occur in same ongoing case—Standard disclosure of the written request should be made to the parties

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-13. Date of Issue: August 23, 2021.

ISSUES

1. May a judge provide a sworn statement pursuant to a written request from law enforcement investigating the conduct of a police officer that took place in the judge's court during trial?

ANSWER: Yes.

2. Would receipt of this written request by the judge require recusal from future legal proceedings that will occur in the same ongoing case?

ANSWER: No, unless the judge determined that the request had created bias on the part of the judge affecting the judge's ability to be impartial in future proceedings of the trial.

3. Does receipt of this written request create an obligation on behalf of the judge to disclose the request to the parties, or trigger a Brady Notification requirement?

ANSWER: Yes, a standard disclosure should be made, but the Committee makes no determination of requirements of a Brady Notification.

FACTS

The inquiring judge has been contacted via email by the Office of Inspector General (OIG) for a law enforcement/public safety department as part of an investigation into the conduct of a police officer that allegedly occurred during a trial before the judge. The exact nature of the conduct was not described, but may involve, at least partially, the testimony or conduct of the officer during the trial. Following a complaint filed by the State Attorney's Office about the officer's conduct, the OIG sought a sworn statement from the judge regarding factual events that took place during the trial proceeding. The judge now seeks guidance as to whether such sworn statement may be given, and whether receipt of the request requires recusal from further proceedings in the ongoing trial. Additionally, the judge asks if there are other ethical implications of this request that may compel disclosure, or an issuance of a Brady Notification to the defense counsel involved in the underlying trial.

DISCUSSION

This Committee has written extensively on the question of when a judge may or may not provide testimony in a variety of proceedings. In nearly all of those opinions, Canon 2B of the Code of Judicial Conduct was cited as it provides that:

> A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

The Commentary to Canon 2B sets forth the reasoning for Canon 2B:

> A judge must not testify voluntarily as a character witness because to do so may lend the prestige of judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Unfortunately, for many years this led to confusion over questions of judges offering testimony for a variety of reasons *other than as a character witness.* As a result, the Committee routinely opined that a judge should be under subpoena whether he or she is testifying as a character witness, or about factual issues. This, in turn, evolved into a general prohibition against a judge voluntarily giving testimonial statements, sworn or otherwise. In Fla. JEAC Opinion 98-15 [5 Fla. L. Weekly Supp. 858a], the inquiring judge asked the Committee whether a judge could provide a non-subpoenaed voluntary statement to authorities conducting a criminal investigation of another. In that case, the authorities contacted the inquiring judge and requested that the judge provide a voluntary statement pertaining to its criminal investigation of the judge's family friend. A majority of the Committee, with three members dissenting, concluded that a judge may only provide a statement to the authorities when properly subpoenaed. Similarly, in Fla. JEAC Opinion 00-07 [7 Fla. L. Weekly Supp. 417a], the inquiring county judge had determined during a criminal suppression hearing that a police officer lied under oath. The officer's supervisor was conducting an internal investigation regarding the hearing in which the officer lied under oath. The inquiring judge asked

whether he or she could voluntarily speak with the supervising investigator absent a proper summons. The Committee relying on Canon 2B opined that the judge should not speak to the investigator without a subpoena.

These decisions, however, led to the concern that such blanket restrictions put judges in the position of potentially obstructing law enforcement. The Committee finally rectified this situation in Fla. JEAC Opinion 03-04 [10 Fla. L. Weekly Supp. 662a] with concise language.

> The Committee at this time elects to overrule its opinions in 98-15 and 00-07. These opinions prevent judges from cooperating with entities such as law enforcement, the Florida Bar, and the Judicial Qualifications Commission when they are investigating matters. The Commentary to Canon 2B allows a judge to give information pursuant to a formal request to a sentencing judge or a probation or corrections officer. There is no difference in a judge giving information to an investigative entity upon a request and a judge giving information to a sentencing judge, a probation officer, or a parole officer upon request. In matters dealing with law enforcement, the judge could be viewed as obstructing justice if the judge refused to cooperate when he or she has relevant information and is requested to give this information. In matters dealing with investigations by the Florida Bar regarding attorney misconduct or the Judicial Qualifications Commission dealing with judicial misconduct, the judge has an ethical obligation to cooperate with these entities. *See* Fla. Code Jud. Conduct, Canon 3D(1), (2).

Given the Committee's retreat from the requirement of subpoenas in all matters, the judge may meet and give a sworn factual statement to the OIG as part of its investigation into the officer's conduct. Moreover, the mere receipt of the request for a statement from the OIG would not appear to necessitate a recusal, unless the judge believes that knowledge of the investigation removes the ability of the judge to be impartial in future proceedings in the case.

Canon 3E requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. However, Canon 3B(1) equally requires the judge to hear and decide matters assigned to the judge, except those in which disqualification is ***required***. [Emphasis supplied.] Thus, each judge has a duty to perform his or her duties without unnecessary disqualification. Canon 3B(1) recognizes the impact upon other litigants and other judges of unnecessary recusals and the danger of judge-shopping.

Finally, the judge asks if receipt of the request must be disclosed to the defense attorney in the underlying trial and future related proceedings. On several occasions, the Committee has opined that even when recusal would not be required by the Code, disclosure would be an appropriate and prudent course of action. As stated in the Commentary, each situation must be evaluated on a case-by-case basis. *See* Fla. JEAC Op. 01-17 [9 Fla. L. Weekly Supp. 345a] (judicial disclosure appropriate when a party represented by a law firm that previously was represented by the law firm of the judge's spouse in legal malpractice action, but recusal not mandated); Fla. JEAC Op. 05-05 [12 Fla. L. Weekly Supp. 507b] (judge required to disclose prior attorney-client relationship with a litigant that appears before the judge); Fla. JEAC Op. 09-01 [16 Fla. L. Weekly Supp. 273a] (recusal not required when judge took weekend trip to Maine nine years earlier, but disclosure was appropriate). Canon 3 provides, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Fla. Code Jud. Conduct, Canon 3E(1). "The test is whether a disinterested person aware of the relevant facts would reasonably question the judge's impartiality." Fla. JEAC Op. 92-39. Under the circumstances presented, the Committee believes disclosure of the interview request would be appropriate.

As part of the judge's last question it was asked if disclosure of the OIG request might trigger an obligation of the judge pursuant to a "Brady Notification." In criminal matters, a Brady Notification requires the State to disclose material information within its possession or control that is favorable to the defense." *Riechmann v. State*, 966 So. 2d 298, 307 (Fla. 2007) [32 Fla. L. Weekly S569a]. As this appears to be a question of criminal law, the Committee makes no suggestion as to the implications or requirements it may impose on a judge, as we are limited to giving advice regarding matters of judicial ethics.

REFERENCES

Canon 2B, 3B(1), 3D(1)(2), 3E(1)
Fla. JEAC Op. 92-39, 98-15, 00-07, 01-17, 03-04, 05-05, and 09-01
Riechmann v. State, 966 So. 2d 298, 307 (Fla. 2007).

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, Organizations and Avocational Activities—A family division judge may 1) participate in a podcast presented by the judge's spouse, for which the spouse receives compensation, to speak on subjects related to family law provided the participation is on a limited basis and the judge's comments are purely informational, do not constitute legal advice, and do not include commentary on pending cases or legal controversies—2) However, a judge may not post a congratulatory message on the web site LinkedIn when a book written by the judge's spouse is released which will likely be seen by attorneys, court staff, judges and other persons and be perceived as an endorsement and promotion of the book

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-14. Date of Issue: September 1, 2021.

ISSUES

1. May a family division judge participate in a podcast presented by the judge's spouse, for which the spouse receives compensation, to speak on subjects related to family law?

ANSWER: Yes, provided the participation is on a limited basis and the judge's comments are purely informational, do not constitute legal advice, and do not include commentary on pending cases or legal controversies.

2. May a judge post a congratulatory message on the web site LinkedIn when a book written by the judge's spouse is released?

ANSWER: No.

FACTS

The inquiring judge is currently assigned to a family law division. The judge's spouse is an author with a book due to be released in the near future,[1] and also hosts a podcast. The podcast is free for listeners but the spouse is compensated by a sponsor. The judge asks whether it is permissible to make appearances on the podcast to speak about family law issues. In particular, the judge anticipates providing "explanations of current Florida statutes pertaining to the dissolution process." The judge understands that legal *advice* may not be given. It is anticipated that the judge, if permitted to do so, will appear on the podcast no more than once or twice per year. The podcasts are prerecorded, without audience participation or call-ins. The judge also asks if it is appropriate, once the spouse's book is released, to post a congratulatory message on the web site LinkedIn.

DISCUSSION

Issue 1

The first question raised in this inquiry falls squarely at the intersection of two provisions in the Code of Judicial Conduct that may seem to point in different directions. Canon 4 encourages

Florida's judges to "engage in activities to improve the law, the legal system, and the administration of justice." More specifically, Canon 4B permits judges to "speak, write, lecture [and] teach" about these subjects as well as on "the role of the judiciary as an independent branch within our system of government."

The activities authorized in general terms by Canon 4 are, however, circumscribed by Canon 4A. For example, they must not be of such a nature as to cast reasonable doubt upon the judge's capability of ruling impartially, demean the judge's office, lead to frequent disqualification, or interfere with the performance of the judge's duties—that is, consume an inordinate amount of the judge's time. In Fla. JEAC Op. 2019-02 [26 Fla. L. Weekly Supp. 919b], this Committee provided a "laundry list" of eight factors that a judge should consider before agreeing to speak publicly:

1. **Whether the activity will detract from full time duties**. Since this judge contemplates infrequent appearances on the podcast, there should be no likelihood that the judge's professional duties will be overlooked.

2. **Whether the activity will call into question the judge's impartiality, either because of comments reflecting on a pending matter or comments construed as legal advice**. The inquiring judge clearly understands this restriction, and does not plan to comment on pending cases or offer legal advice.

3. **Whether the activity will appear to trade on judicial office for the judge's personal advantage**. The judge does not plan to receive compensation for the proposed appearances on the podcast, nor are the appearances connected in any way with a campaign for re-election or other efforts to advance the judge's career. While it is certainly possible that listeners may come away with a favorable opinion of the judge, this is inherent in any situation wherein a judge's talents are exposed to members of the public at large. It is an inescapable fact that judges can do well when they do good;

4. **Whether the activity will appear to place the judge in a position to wield or succumb to undue influence in judicial matters**. If the judge merely provides neutral, factual, non-case specific information there should arise no danger of other judges being improperly influenced by it, nor should it open the judge to possible undue influence in cases the judge will be handling.

5. **Whether the activity will lend the prestige of judicial office to the gain of another with whom the judge is involved or from whom the judge is receiving compensation**. We discuss this question in greater detail below.

6. **Whether the activity will create any other conflict of interest for the judge**. Given the judge's understanding of the limitations upon what can be discussed in the podcast, there appears to be no potential for meaningful conflicts of interest. The judge could not oversee legal matters involving the spouse in any event, and the potential for litigation involving the sponsor of the podcast should be minimal, particularly if the judge remains assigned to the family law division.

7. **Whether the activity will cause an entanglement with an entity or enterprise that appears frequently before the court**. The inquiry does not lead the Committee to suspect that the sponsor engages in, or is potentially likely to engage in, frequent litigation. Further, since the judge plans to speak only on factual matters, and neutrally, we see no chance of the judge's remarks being parroted back to the judge in some future family law setting.

8. **Whether the activity will lack dignity or demean judicial office in any way**. This consideration should not be implicated by discussing the nuts and bolts of family law. Again, as noted, the judge does not plan to discuss specific cases that might involve salacious details.

In sum, the *subject matter* about which the judge envisions speaking appears to be purely informative, so long as the judge does not go beyond explaining statutory family law procedures by attempting to apply those procedures to specific factual situations. Were the judge to do so, this might to intrude into giving legal advice, which judges are not permitted to do. *See* Canon 5G. *Cf.* Fla. JEAC Op. 2018-23 [26 Fla. L. Weekly Supp. 608a], which approved a judge's plan to write "an informative article about the divorce process" to be published on a for-profit web site, so long as the judge did not "comment on pending cases . . . answer hypothetical questions in a way that appears to commit to a particular position, [or] make any other remarks that could lead to the Judge's disqualification, or be construed as an indication as to how the Judge would rule in a particular case."

We now turn to the second provision of the Code that could impact the judge's ability to appear on the podcasts. Canon 2B prohibits judges from "lend[ing] the prestige of judicial office to advance the private interests of the judge or others." In the context of personal media appearances, we addressed this provision most recently in Fla. JEAC Op. 2021-10 [29 Fla. L. Weekly Supp. 485b], in which the inquiring judge was a regular guest on a local public radio station's talk show. The judge's appearances were brief and informative in nature, and involved neither questions from the public, pending cases, nor the giving of legal advice. Additionally, the judge did not receive compensation for these appearances, an area the Committee described as "often problematic."

Having dispensed with any significant concern that the judge's personal interests were advanced by the radio appearances, the Committee then turned to the potential effect of the Canon 2B language "or others." In the context of Fla. JEAC Op. 2021-10, the "other" was the radio station that frequently hosted the inquiring judge. In the present case, the judge's proposed conduct would implicate not only the broadcaster, but the judge's spouse as well.

With regard to the radio station, the Committee found that "[s]everal variables could potentially inform that question's resolution, including how the station receives financial support, whether it advertises the judicial officer's appearance and in what manner [and] whether the judge's appearance is considered a public service/informative aspect of the station's operation or whether it is a potential source of advertising funding for the station." Fla. JEAC Op. 2021-10 was not unanimous in concluding that the judge's continued radio appearances were not violative of Canon 2B. The dissent relied upon Fla. JEAC Op. 1996-25, which in turn placed great reliance upon *In re the Inquiry of Evan W. Broadbelt, J.M.C.,* 146 N.J. 501, 683 A. 2d 543 (1996), *cert. denied,* 520 U.S. 1118 (1997).[2]

The judge's activities in *Broadbelt* would certainly have caused concern if they had involved a Florida judge. Judge Broadbelt regularly appeared on commercial television programs such as *Geraldo Live* and *Court TV* to provide "guest commentary" on high-profile cases, even though, more innocently, he also appeared on a local program "to discuss generally the jurisdiction and procedures of the municipal courts." He did not receive compensation for any of these appearances. Even so, Judge Broadbelt was found in violation of several canons, the language of which is similar to Florida's Code of Judicial Conduct. First, the New Jersey court found that judges should not comment on cases in *any* jurisdiction, and not solely those likely to come before their courts. Second, and more to the point of our discussion, the judge's regular television appearances "allowed the prestige of his judicial office to advance the private interests of commercial television."

Broadbelt discussed in some detail two 1961 opinions by the American Bar Association, the first of which "barr[ed] judges from appearing on commercial television programs that simulate or recreate judicial proceedings," but "did not consider whether other programs such as panel discussions or interviews would be improper."

The second opinion "approved of a judge's appearance on *Meet the Press* because it was 'distinctly . . . a public service type [of show]' similar to a news report dealing with matters of general public interest." Notably, in the second opinion the ABA committee stated that "the nature of the program and the nature of the appearance of the lawyer or judge on it is the important thing and whether or not it is commercially sponsored is secondary." This suggests that purely informational, neutral contributions by judges are likely to satisfy ethical standards even if delivered *via* a commercial medium.[3]

Fla. JEAC Op. 96-25, which cites other authorities in addition to *Broadbelt,* offered several explanations why a judge's *regular* participation in a commercial talk show could run afoul of the Code of Judicial Conduct. Canon 5A concerns itself directly with extrajudicial activities. Under this rule, "a judge's extrajudicial activities must be conducted in such a manner so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties." The Committee finds reason for concern that each of these considerations under Canon 5A is implicated by the present inquiry.

"A judge must ensure that extrajudicial activities do not cast reasonable doubt on the judge's capacity to act impartially as a judge. Here the inquiring judge proposes to comment extensively on issues arising, and have actually arisen in other courts around the United States. In this context, it would be nearly impossible for the judge to avoid injecting his own legal opinion or foreshadowing how he might rule on a contested legal issue. On the question of demeaning the judicial office, the Committee recognizes that, in view of many, television news is largely a commercial endeavor. As recent experience with several high publicity legal proceedings has demonstrated, issues that come before courts are often not conducive to exposition in the 'soundbyte' format of television news. Unfortunately, the extremely limited time available to a commentator on a television news show is not conducive to full and fair explanation of complex legal proceedings. Accordingly, the Committee has serious concerns that the commercial and entertainment aspects of a regular judicial appearance on a television news show might well outweigh the legitimate public information aspects.

"Finally, with regard to the third consideration under Canon 5A, an extrajudicial activity must not interfere with the proper performance of judicial duties. Here, the judge proposes regular appearances on a local television news broadcast. Such an arrangement could well lead to a public perception that the judge has priorities other than proper performance of judicial duties. Moreover, Article V, Section 13 of the Florida Constitution mandates that all judges shall devote full time to their judicial duties. Again, the very real risk is the perception that the inquiring judge would be viewed as devoting a substantial amount of their productive time to a very public commercial endeavor unrelated to judicial duties."

"In addition to the canons discussed above, Canon 5D(1)(b) may well be implicated. Members of the electronic media are frequently litigants in the courts of this state. Under this portion of the Code of Judicial Conduct a judge must avoid engaging in continuing business relationships with persons likely to come before the court."

Our impression is that a judge's infrequent appearances on a podcast, limited to providing nonjudgmental information about the family court system, is a situation qualitatively different than the practices engaged in by the judge in *Broadbelt* and contemplated by the inquiring judge in Fla JEAC Op. 96-25. However, this does not end the inquiry. While it may be that sporadic appearances on the podcast may have little effect on the broadcaster's bottom line, we must not overlook the fact that the inquiring judge's proposal will necessarily provide *some* benefit to the judge's spouse, who, as noted, receives compensation for the podcasts. "A judge shall not allow *family* . . . relationships to influence the judge's judicial conduct" (*emphasis added*). The Commentary to Canon 2B provides only a single example of what this provision seeks to avoid: "[A] judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family." In addition to making rulings that might benefit a family member, other examples would include judges hiring a relative or lobbying law firms or court administration to do so.[4]

The question posed in the current inquiry appears to be unique in this Committee's history. For one thing, podcasts are a recent innovation, though it would not surprise us to learn of judges whose spouses may have performed on radio talk shows or worked as reporters seeking an interesting story for the newspapers or magazines that employed them. We just have not been asked, until now, to consider whether or to what extent judges may lend their time and experience when it is a spouse, and not a stranger, who wishes to elicit comment that a judge otherwise would be within the graces of the Canons to furnish.

An analogy perhaps may be drawn to books, articles, and scholarly papers written by judges. While this Committee has often written on such questions as the content of writings and how extensively their judicial authors may promote them, even though writing is often a collaborative effort we have less frequently addressed the question whether a judge may partner with someone else—colleague, fellow lawyer, friend—to write something and then advertise it. To do so inures to the benefit of not only the judge, but the other author as well. Fla. JEAC Op. 1998-1 is not directly on point—it involved a judge who wished to write a crime novel with assistance from an Assistant State Attorney, but did not contemplate co-authorship—but the opinion also includes a review of earlier opinions including some wherein judges contemplated joint projects. While the trend is generally favorable to co-authorships, many of our prior opinions focus on disqualification/disclosure more so than lending judicial prestige to the co-authors. Most directly on point is Fla. JEAC Op. 1978-12, in which three Committee members dissented, believing the proposal to co-author a procedure manual with a lawyer would intrude into lending judicial prestige, while the majority concluded the joint authorship was ethically permissible.

Though the distinction may be a fine one, the Committee finds it relevant that the judge's spouse is already involved in the process of recording and airing the podcasts, and would continue to do so regardless of whether the judge made an occasional contribution—that is, we are not dealing with the situation where the judge is intervening with a broadcaster in order to obtain a position, contract, or extra compensation for the spouse. Thus, we do not believe the inquiring judge would run afoul of the Code by occasionally appearing on the podcast to provide non-case-specific information about the family court system.

It must be noted that two members of the Committee dissent from this conclusion, expressing their belief that the judge's proposed activity would lend the prestige of office to the podcast.

Issue 2

As for the inquiring judge's second question, we begin our discussion by excerpting the following information from the web site LinkedIn.com itself: LinkedIn is "the world's largest professional network with 756 million members in more than 200 countries and territories worldwide." Its vision is to "[c]reate economic opportunity for every member of the global workforce" by "connect[ing] the world's professionals to make them more productive and successful." The site, which is a subsidiary of Microsoft, "leads a diversified business with revenues from membership subscriptions, advertising sales and recruitment solutions."[5]

As indicated above, this Committee has received many inquiries

from judges who have written books. In Fla. JEAC Op. 2020-21 [28 Fla. L. Weekly Supp. 562a], we acknowledged that a judge who had written a biography of a noted attorney should be allowed to promote the book, including on web sites like Facebook, provided the judge operated within guidelines established by the Code of Judicial Conduct (essentially those discussed in this opinion under Issue 1). *But see* Fla. JEAC Op. 2019-18 [27 Fla. L. Weekly Supp. 336a], cautioning against "endorsement of any products, persons, services, or materials." The Committee has not addressed such issues as whether a judge may publish a review of a book written by someone else, even if intended as a scholarly criticism.

Similar to the position this Committee has taken on vetting judicial candidates' campaign literature, we have not asked the inquiring judge to provide the exact language of the proposed congratulatory message. We believe that it is enough that the message will draw readers' attention to the book's publication, which is likely to be perceived as an endorsement and promotion of the book. Moreover, there is a substantial likelihood that the judge's posting will come to the attention of attorneys, court staff, fellow judges, and other persons whom the judge is in a position to influence. There is also potential for persons desirous of currying favor with the judge to purchase the book and make it known that they did so. This is particularly so given the nature of the LinkedIn web site—designed for networking among professional people such as lawyers—and the uses to which it is put. We conclude that the judge should err on the side of caution and let the book—and its author—speak for themselves. We trust that the judge's spouse is already aware of the judge's pride in this achievement.

One member of the Committee disagrees with this conclusion, having the opinion that the proposed activity is permissible under the Code.

REFERENCES

Fla. Code Jud. Conduct, Canons 2B, 4, 4A, 4B, 5A, 5D(1)(b), and 5G
Inquiry of Evan W. Broadbelt, J.M.C., 146 N.J. 501, 683 A. 2d 543 (1996), *cert. denied,* 520 U.S. 1118 (1997)
Fla. JEAC Ops. 1978-12, 1996-25, 1998-1, 2012-12, 2018-23, 2019-02, 2019-18, 2020-21, and 2021-10

[1]The book will provide advice, particularly to women, on coping with divorce, co-parenting, and similar issues.

[2]The dissent also noted that the inquiring judge was facing a contested election in the 2022 cycle, which the Committee member saw as an additional, but not dispositive, reason to forego future radio appearances.

[3]The *Broadbelt* court declined to attempt a more precise formula. "Not every television appearance by a judge on commercial television will be improper, or will create the appearance of impropriety. For example, it might be permissible for a municipal court judge to make an isolated appearance on public television to comment on the role of municipal court judges in the judiciary. Similarly, a one-time appearance by a Superior Court judge on a commercial television program dealing with the benefits and disadvantages of televising civil trials might be permissible. However, a judge's regular weekly appearance on a television program, whether the program was commercial or non-commercial, to comment on recent court decisions in New Jersey clearly would be improper. Because our experience is evolving, we need not now attempt to prescribe precise limits for judicial appearances on television programs. We note only that exceptional caution and discretion are essential."

[4]Yet a judge may serve as a reference or provide a letter of recommendation.

[5]This Committee has written about LinkedIn at least once in the past, albeit in a different context. In Fla. JEAC Op. 2012-12 [19 Fla. L. Weekly Supp. 753a], we disapproved of judges listing lawyers as "connections" on the site and *vice versa.* In so doing the Committee distinguished Facebook, which is utilized primarily on a personal rather than professional level.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—A judge may serve as a member of the Judicial System Workgroup which is a subcommittee of the National Substance Use Disorder Strategic Advisory Panel

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-15. Date of Issue: September 17, 2021.

ISSUE

May the inquiring judge serve as a member of the Judicial System Workgroup, which is a subcommittee of the National Substance Use Disorder Strategic Advisory Panel?

ANSWER: Yes.

FACTS

The inquiring judge has been invited to serve as a member of the National Substance Use Disorder Strategic Advisory Panel (NSUDSAP). The specific purpose of the NSUDSAP is defined as follows:

> Identify and define evidence-based public health recommendations for the prevention and treatment of and recovery from substance use disorder (SUD) in the United States. This will be accomplished through the formation of an independent expert task force that will present current best practices and guidance to support substance use abatement efforts of Federal agencies, State, local and Tribal governments, and those related to opioid lawsuit settlement funds.

If the inquiring judge accepts the invitation, the judge will be assigned to the Justice System Workgroup. It was explained to the judge that the Judicial System Workgroup will be diverse and will cover both civil and criminal matters and its focus will include, but is not limited to:

> Expanding access to evidence-based treatment for incarcerated individuals; promoting best practices in service delivery models for care to address the needs of adolescents in juvenile justice programs; and expanding access to recovery support services.

The judge's role on the committee will be to assist in identifying supportive policies within the judicial system, addressing both criminal and civil legal problems for individuals with substance use disorders and their families. The judge will not be asked to participate in political activities or fundraising and neither the judge's name nor title will not be used in connection with any such activities.

DISCUSSION

Judges are encouraged to engage in activities to improve the law, the legal system, and the administration of Justice. *See* Canon 4. Judges are also encouraged to serve as a member, officer, director, trustee or non-legal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice. *See* Canon 4D. Any extra judicial activities must be conducted in a way that does not cast reasonable doubt on the judge's capacity to act impartially as a judge; undermine the judge's independence, integrity, or impartiality; demean the judicial office; interfere with the proper performance of judicial duties; lead to frequent disqualification of the judge; or appear to a reasonable person to be coercive. *See* Canon 4A(1)-(6)

We have addressed whether judges may serve on committees or councils related to substance abuse several times in the past. Since at least 1988, we have found that a judge's service on boards or councils whose purpose is to address the pervasiveness of substance use disorders is permissible. *See* Fla. JEAC Op. 88-24 (a judge's service on the District IV Alcohol, Drug Abuse and Mental Health Planning Council does not violate the Canons of Ethics); Fla. JEAC Op 89-14 (a judge may serve as the chair of a task force or committee, composed of business and civic leaders, intended to enhance community effort to fight drugs and crime); Fla. JEAC Op. 93-23 (a judge may serve as a member of the board of directors of a DUI countermeasure school); Fla. JEAC Op. 95-36 [3 Fla. L. Weekly Supp. 526a] (a judge may serve as a member of the Broward County Committee on Alcoholism, which oversees the drug and alcohol abuse program in Broward County); Fla. JEAC Op. 99-07 (a judge may serve on the Board of Directors of a County Commission on Substance Abuse).

Here, the inquiring judge's involvement as a member of the Judicial System Workgroup will serve the dual purpose of engaging in an activity designed to improve the law, the legal system, and the administration of justice while at the same time addressing how to best deliver substance abuse services to children and adults who have contact with the legal system. We see no impediment to the judge's service on the Judicial System Workgroup.

REFERENCES

Canons 4, 4A(1)-(6), 4D
Fla. JEAC Ops. 88-24; 89-14; 93-23; 95-36; and 99-07.

* * *