Volume 29, Number 7, November 30, 2021

FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 495-564

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.

- **MUNICIPAL CORPORATIONS—ORDINANCES—FOOD TRUCKS—CONSTITUTIONALITY. A city which previously did not allow for the operation of food trucks in any zone or location within the city adopted an ordinance which complied with Chapter 2020-160, Laws of Florida, that, with certain exceptions, preempted to the state the regulation of mobile food dispensing vehicles. The ordinance allowed primary business owners (i.e., a "brick-and-mortar" restaurant) to locate and operate a food truck as an accessory use to the primary business, so long as its signage noted that it was part of the primary business and otherwise complied with the city code. Food trucks that were not being operated as an accessory use by a primary restaurant at the restaurant's locations were confined to operating in specified city zones. Plaintiffs, who operated independent food truck businesses, challenged the constitutionality of the ordinance and sought a temporary injunction prohibiting enforcement of the challenged provisions pending resolution of their constitutional challenges. The circuit court denied the injunction, finding, among other things, that the plaintiffs' alleged claims for loss of enhanced revenues, additional business opportunities, and added reputational exposure did not constitute an irreparable injury that could not be quantified. Moreover, the court found that, although the plaintiffs alleged state constitutional issues, an adequate remedy at law existed through a federal section 1983 civil rights action; that the plaintiffs did not establish a substantial likelihood of success on their claims; and that the public interest would not be served by enjoining enforcement of the ordinance, which was presumptively valid. The court's order included a detailed discussion of the claims raised by the plaintiffs, including due process and equal protection challenges, and a claim that the ordinance violated the plaintiffs' right to be rewarded for their industry. In a separate action, the plaintiffs sought a declaration that the provision of the ordinance allowing a restaurant owner to host a food truck onsite as an accessory use so long as the truck displays signage that confirms that it is a part of the restaurant violated the plaintiffs' free speech rights. The court found that the plaintiffs lacked standing and that amendment of the complaint would be futile.** *DURHAM v. CITY OF TARPON SPRINGS. Circuit Court, Sixth Judicial Circuit in and for Pinellas County. Filed August 26 and August 31, 2021. Full Orders at Circuit Courts-Original Section, pages 513a and 527a.*

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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:

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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.

INSURANCE

INSURANCE (continued)

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CIRCUIT COURTS—APPELLATE

Criminal law—Driving under influence—Evidence—Blood draw—Consent—Voluntariness—Where defendant was transported to hospital after he began to experience heart attack symptoms while awaiting breath test at jail, and breath test was not impractical or impossible, results of blood test obtained at hospital may not be admitted pursuant to implied consent statute—Consent to blood draw was involuntary where consent was given after defendant was given implied consent warning advising him that refusal would result in license suspension, which warning was not applicable under circumstances—Order granting motion to suppress is affirmed

STATE OF FLORIDA, Appellant, v. JUAN JOSE HERNANDEZ, Appellee. Circuit Court, 4th Judicial Circuit (Appellate) in and for Nassau County. Case No. 45-2019-AP-1, Division B. L.T. Case No. 45-2018-CT-784. January 23, 2020. On appeal from the County Court, in and for Nassau County: The Honorable Wesley R. Poole, Judge. Catherine Ann Lockhart, Office of the State Attorney, Yulee, for Appellant. Diana L. Johnson, Johnson and Lufrano, P.A., Jacksonville, for Appellee.

[Lower court order published at FLWSUPP 2907HERN; 29 Fla. L. Weekly Supp. 547a.]

OPINION

(JAMES H. DANIEL, J.) This is an appeal of the County Court's order granting Hernandez's motion to suppress the results of a warrantless blood test. For the reasons set forth below, this Court affirms the County Court's order.

Procedural Summary

On July 18, 2018, officers from the Fernandina Beach Police Department arrested Hernandez for driving under the influence ("DUI"). After conducting various field sobriety tests, officers transported Hernandez to the department's headquarters. While at the police station, Hernandez began to exhibit symptoms of a possible heart attack. Officers then transported Hernandez to Baptist Medical Center—Nassau, a hospital located approximately 400 yards from the police station.

While at the hospital, officers asked Hernandez to sign a form authorizing them to test his blood for alcohol. After three to four minutes in which Hernandez hesitated and asked questions of police, including whether he could consult with an attorney, Hernandez signed the form entitled "Fernandina Beach Police Department Blood Test Implied Consent Warning." *Inter alia,* the implied consent form stated that Hernandez's driver's license would be suspended for one year if he refused to consent to a blood draw. Officers did not offer to give Hernandez a breath test in lieu of a blood test. Ultimately, officers drew Hernandez's blood and the State charged him with DUI.

Hernandez filed an amended motion to suppress, in which he urged the trial court to exclude the results of the blood test from evidence. Hernandez argued that officers violated Florida's implied consent statute and that no exigent circumstances were present to justify a warrantless blood draw. The trial court held a hearing on Hernandez's motion and later entered an order suppressing the results of his blood test. This appeal followed.

Standard of Review

"A motion to suppress involves mixed questions of law and fact. In reviewing the trial court's ruling on such a motion, an appellate court must determine whether competent, substantial evidence supports the lower court's factual findings, but the trial court's application of the law to the facts is reviewed *de novo*." *State v. Murray,* 51 So. 3d 593, 594 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b] (internal citations omitted). The trial court's ruling on a motion to suppress comes to the appellate court "clothed with a presumption of correctness" and this Court "must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling." *Owen v. State,* 560 So. 2d 207, 211 (Fla. 1990).

Analysis: Implied Consent

In pertinent part, the implied consent statute reads as follows:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible.

§ 316.1932(1)(c), Fla. Stat. (2018).

Applying the plain language of the statute, law enforcement officers may conduct a blood test under the implied consent law when three elements are met: (1) reasonable cause exists to believe the suspect was driving a motor vehicle while under the influence of alcohol or a controlled substance, (2) the suspect appears for treatment at a medical facility, and (3) administering a breath or urine test is impractical or impossible. *State v. Serrago,* 875 So. 2d 815, 819 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1571a]. Here, there is no dispute regarding the first two elements. The dispositive question is whether it would have been impractical or impossible for officers to administer a breath or urine test to Hernandez in lieu of a blood test.

Officer Steven Merino of the Fernandina Beach Police Department testified during the trial court's hearing on Hernandez's motion to suppress. Officer Merino testified that, at the time of Hernandez's arrest, the department did not have a portable breathalyzer instrument. However, Officer Merino also reported that Trooper Healey from the Florida Highway Patrol assisted him that evening in conducting field sobriety assessments of Hernandez. Officer Merino was aware that Trooper Healey had a breathalyzer machine, the Intoxilyzer 8000, in his vehicle. Significantly, Officer Merino conceded that if he had wanted to administer a breath test to Hernandez at the scene, he could have done so. Officer Merino also testified that it never occurred to him to have the breathalyzer machine delivered to the hospital and agreed that there was at least a "reasonable probability" that he could have administered a breath test at 4:00 AM (i.e., at the time of Hernandez's blood draw).

Thus, there was competent, substantial evidence before the trial court to support its finding that a breath test was neither impossible nor impractical under the circumstances. *See Bedell v. State,* 250 So. 3d 146, 150 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1216a] ("the trial court's determination [of] whether the administration of a breath or urine test is impractical or impossible is a finding of fact. [And] [a] trial court's determinations of factual questions must be accepted by the appellate court if the record supports that finding.") (internal citation and quotation omitted). Indeed, Officer Joshua Pesh testified during the hearing that he and Officer Merino were not proceeding under the implied consent statute in order to obtain a sample of Hernandez's blood. Instead, Officer Pesh testified that he and Officer Merino tested Hernandez's blood because Hernandez voluntarily consented to such testing.

Because it was neither impossible nor impractical for officers to administer a breath test to Hernandez in lieu of a blood test, the blood test results may not be admitted pursuant to the implied consent statute.

Analysis: Express Consent

With it established that Hernandez's blood test is not admissible under the implied consent statute, this Court next turns to whether Hernandez expressly and voluntarily consented to the test.

It is uncontroverted that Hernandez consented, both verbally and in writing, to the blood test. Hernandez signed a form produced by the Fernandina Beach Police Department. The form was entitled "Fernandina Beach Police Department Blood Test Implied Consent Warning," and stated:

> If you fail to submit to the [blood] test I have requested of you, your privilege to operate a motor vehicle will be suspended for a period of one (1) year for a first refusal or eighteen (18) months if your privilege has been previously suspended as a result of a refusal to the test of your breath, urine or blood. Refusal to submit to the test I have requested of you is admissible in any criminal proceeding.

Even though Hernandez consented to the blood draw, it is axiomatic that such consent is invalid if given as a result of coercion. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 228 (1973) ("the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force."); *Bumper v. North Carolina,* 391 U.S. 543, 550 (1968) ("Where there is coercion there cannot be consent.").

In *Montes-Valeton v. State,* 216 So. 3d 475 (Fla. 2017) [42 Fla. L. Weekly S210a], the Florida Supreme Court considered whether a DUI defendant's consent to a blood draw was voluntary when police officers had erroneously given the defendant warnings associated with the implied consent statute. As with the instant case, officers warned the defendant that refusing to consent to a blood test would result in the suspension of his license:

> After asking Montes-Valeton to consent to a blood draw, Trooper Molina read the implied consent warnings that came with the blood draw kit to Montes-Valeton. The warnings threatened that a refusal would result in the suspension of his driver license. Trooper Molina further explained Florida's "implied consent law" to him.

Id. at 480.

However, also like the instant case, all the required elements of the implied consent statute were not present. *Id.* As such, "neither the implied consent warnings nor Florida's implied consent law applied to Montes-Valeton" and "Montes-Valeton was thus improperly threatened with punishment." *Id*. at 480-81. Accordingly, the Court held that Montes-Valeton's consent was involuntary. *Id*. at 481 ("The fact that Trooper Molina improperly threatened Montes-Valeton with the suspension of his driver license for refusing to give consent to the blood draw renders his consent involuntary.").

Here, because the implied consent statute was inapplicable to Hernandez's case, it was coercive to threaten Hernandez with the suspension of his license if he refused to consent to a blood draw. Accordingly, the express "consent" to the blood test that Hernandez gave was involuntary and may not be used to render the test results admissible. *See also State v. Slaney,* 653 So. 2d 422, 430 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D717b] ("Moreover, it has been held that where, as here, a DUI arrestee consents to a blood withdrawal after being improperly advised that he will lose his driver's license if he fails to give such consent, the ensuing consent is involuntary in nature because it was induced by a misrepresentation.").

In view of the above, it is **ORDERED** that:

The trial court's "Order Granting Amended Motion to Suppress," entered on December 28, 2018, is **AFFIRMED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to blood test—Where arresting officer failed to include any information in arrest affidavit indicating that it would have been impractical or impossible to administer breath or urine test to licensee transported to hospital following crash, there was no competent substantial evidence to support hearing officer's finding that licensee refused to submit to lawfully requested blood test—Petition for writ of certiorari is granted

PEDRO J. MARRERO ASTACIO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2020-CA-008603-O. September 1, 2021. Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles, Craig P. Rogers, Hearing Officer. Counsel: Michael D. Barber, Law Office of Michael D. Barber, Orlando, for Petitioner. Christie S. Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(Before STROWBRIDGE, HARRIS, and CALDERON, JJ.)

(PER CURIAM.) Petitioner Pedro J. Marrero Astacio seeks certiorari review of the hearing officer's final order, which upheld the Department of Highway Safety and Motor Vehicles' administrative suspension of his driver's license for driving a motor vehicle after Petitioner refused a request for a blood draw. Because the final order was not supported by competent substantial evidence, we grant the petition for writ of certiorari.

According to the arrest affidavit, at 3:00 a.m. on June 13, 2020, Officer Jerrell Ogletree of the Windermere Police Department observed a dark SUV traveling 52 mph in a 30 mph zone. Officer Ogletree initiated a traffic stop on the SUV by activating the emergency lights of his patrol vehicle. However, the SUV made a sudden right turn and sped up. Officer Ogletree saw the SUV crash into a tree. Shortly thereafter, Officer Ogletree observed a female occupant exit the SUV from the passenger door, followed by a male occupant. The female occupant fled the scene. The male occupant initially hesitated, but then followed Officer Ogletree's commands to get on the ground.

Officer Ogletree asked the male where the female was going, but instead of answering the question, the male spontaneously stated that he had not been driving the SUV. The female later returned to the scene. The male was identified by his driver's license as Petitioner.

Officer Ogletree observed damage to the driver's side of the SUV. The driver's side airbags had been deployed. After observing visible injuries to Petitioner's hands, Officer Ogletree requested medical services. Though Officer Ogletree detected the odor of alcohol on Petitioner's breath, no field sobriety exercises were performed due to Petitioner's injuries. Petitioner was transported to Health Central Ocoee for medical evaluation.

At Health Central Ocoee, Officer Ogletree conducted a DUI investigation and read Petitioner his *Miranda* rights. Petitioner indicated that he understood those rights, and requested counsel. Officer Ogletree then requested Petitioner to submit to a blood draw, explaining to Petitioner his implied consent for a blood draw under Florida law. However, there is no indication in the arrest affidavit that Officer Ogletree offered Petitioner an opportunity to submit to a breath or urine test, or that the administration of a breath or urine test would have been impractical or impossible. Petitioner refused to submit to a blood draw. Officer Ogletree executed an affidavit of refusal and issued a DUI traffic citation. As a result, Petitioner's driver's license was then suspended.

Petitioner requested an administrative hearing to challenge his driver's license suspension. *See* § 322.2615, Fla. Stat. At the administrative hearing, the hearing officer admitted documentary evidence including Officer Ogletree's arrest affidavit, the affidavit of refusal, and the DUI traffic citation. Neither party presented sworn testimony. Petitioner's counsel moved to invalidate his driver's license suspension, arguing among other things that under the circumstances, there

was no evidence that Officer Ogletree was entitled to request Petitioner to submit to a blood test. For support, counsel pointed out that there was nothing in the arrest affidavit to indicate that Officer Ogletree initially offered Petitioner an opportunity to submit to a breath or urine test, or that the administration of a breath or urine test would have been impractical or impossible. Rather, the arrest affidavit reflected that Petitioner was not unconscious, and was in fact sufficiently lucid to understand and exercise his *Miranda* rights.

After the administrative hearing, the hearing officer issued his final order, which sustained the suspension of Petitioner's driver's license. The final order specifically rejected counsel's challenge to Officer Ogletree's request for a blood test. Petitioner now seeks certiorari review of the hearing officer's final order.

In the instant Petition, Petitioner argues that there was no competent substantial evidence for the hearing officer to find that he refused to submit to a lawful blood test. In Petitioner's view, Officer Ogletree was not entitled to request Petitioner to submit to a blood test in the first place, since Officer Ogletree failed to observe the statutory requirements for implied consent to a blood test, as set forth in section 316.1932(1)(c), Florida Statutes.

For factual support, Petitioner asserts that Officer Ogletree failed to include any information in the arrest affidavit indicating that it would have been impossible or impractical to administer a breath or a urine test prior to requesting a blood sample. For legal support, he cites to case law including *Smiley v. Dep't of Highway Safety & Motor Vehicles,* 27 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. Dec. 20, 2019); *Mejia v. Dep't of Highway Safety & Motor Vehicles,* 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. Nov. 28, 2017); and *Gracia v. State,* 21 Fla. L. Weekly Supp. 875a (Fla. 15th Cir. Ct. May 8, 2014).

Section 316.1932(1)(c), Florida Statutes, which is part of the Florida implied consent law, provides as follows:

> A person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible.

According to *State v. Serrago,* 875 So. 2d 815, 819 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1571a], this statute

> authorizes blood draws but only under the following circumstances: (1) where there is reasonable cause to believe the person was driving a vehicle while under the influence of alcohol, chemicals, or controlled substances; (2) where the person appears for treatment at a medical facility; and (3) where the administration of a breath or urine test is impractical or impossible.

See also Bedell v. State, 250 So. 3d 146, 150 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1216a] (citing and quoting, *Serrago*). Thus, under the statute and the case law construing it, one of the requirements for implied consent to a blood test is that the "administration of a breath or urine test is impractical or impossible."

In the instant case, Petitioner correctly asserts that Officer Ogletree failed to include any information in the arrest affidavit indicating that it would have been "impractical or impossible" to administer a breath or a urine test, as required by section 316.1932(1)(c), Florida Statutes. *See Serrago,* 875 So. 2d at 819. *See also Bedell,* 250 So. 3d at 150. Absent such a statement or determination, the Court determines that there was no competent substantial evidence for the hearing officer to find that a breath or a urine test be impractical or impossible in deciding whether Petitioner refused to submit to a lawful blood test. *See Bedell,* 250 So. 3d at 150 (whether the administration of a breath or urine test is impractical or impossible "is a finding of fact" for the lower tribunal).

The Court also determines that the case law cited by Petitioner is persuasive. Under circumstances similar to those in the instant case, the court in *Smiley v. Dep't of Highway Safety & Motor Vehicles,* 27 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. Dec. 20, 2019) granted certiorari to quash an order sustaining a driver's license suspension. As in the instant case, in *Smiley* there was "nothing in the record to suggest that the officer requested a breath or a urine test or that a breath or urine test was impractical or impossible before requesting a blood test from Petitioner." Therefore, *Smiley* determined that the order was "not supported by competent, substantial evidence because one of the legal requirements for requesting a blood test—that a breath or urine test was impossible or impractical when the officer requested that Petitioner submit to a blood draw—was not satisfied." *See also Mejia v. Dep't of Highway Safety & Motor Vehicles,* 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. Nov. 28, 2017); *Gracia v. State,* 21 Fla. L. Weekly Supp. 875a (Fla. 15th Cir. Ct. May 8, 2014).

On the other hand, *State v. Dubiel,* 958 So. 2d 486, 487 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1338a] and *Dep't of Highway Safety & Motor Vehicles v. Davis,* 264 So. 3d 965, 966 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D450a], *review denied,* No. SC19-629 (Sept. 3, 2019), cited by Respondent, are both factually distinguishable and do not otherwise call for a different result. In contrast to the facts in the instant case, in both *Dubiel* and *Davis,* the motorist consented to a blood draw, and there was no issue whether the administration of a breath or urine test would have been impractical or impossible.

In *Dubiel,* a criminal proceeding, the motorist was a hospital patient who had been involved in an accident. 958 So. 2d at 487. After the officer read the motorist his *Miranda* rights, the motorist consented to a blood draw. *Id.* The officer conceded that he had failed to advise the motorist of the consequences of refusing to submit to a blood test under section 316.1932(1)(c), Florida Statutes. *Id.* The trial court suppressed the blood test results. *Id.* On appeal, *Dubiel* held that the failure to advise a motorist of the consequences of refusing to submit to a blood test pursuant to section 316.1932(1)(c) did not warrant the suppression of the blood test results in a criminal proceeding. *Id.* at 488. *Dubiel* distinguished *Chu v. State,* 521 So. 2d 330 (Fla. 4th DCA 1988), which had been relied on by the trial court, on the basis that *Chu* "involved a blood test administered outside of a hospital or other medical facility" and was not "legislatively authorized." *Id.*

The fact pattern in *Davis* is similar to that in *Dubiel,* except that *Davis* was a driver's license suspension proceeding. As in *Dubiel,* the motorist in *Davis* was a hospital patient who had been involved in an accident. 264 So. 3d at 966. Also as in *Dubiel,* the motorist consented to a blood draw. *Id.* Testing yielded a 0.412 blood alcohol content. *Id.* The motorist's driver's license was suspended and the hearing officer upheld the suspension. *Id.* However, the circuit court in its appellate capacity granted certiorari. *Id.* at 967. In so doing the circuit court, while acknowledging *Dubiel,* nonetheless relied on *Chu v. State,* 521 So. 2d 330 (Fla. 4th DCA 1988) "for the proposition that the blood draw at issue was not legislatively authorized under Florida's implied consent law because nothing in the record suggested that a breath or urine test was impossible or impractical." *Id.*

On certiorari review, *Davis* quashed the decision of the circuit court, determining that *Dubiel* rather *Chu* was controlling under the factual circumstances. *Id.* at 968. *Davis* explained that *Dubiel* itself distinguished *Chu* on the basis that the blood test in *Chu* was not

legislatively authorized, as it involved a blood draw and test administered outside of a hospital or other medical facility. *Id.* at 967. *Davis* further explained that like the defendant in *Dubiel,* the motorist was in the hospital when the officer requested a blood draw and he voluntarily consented. *Id.*

To be sure, Respondent seizes upon language in *Dubiel* and *Davis* indicating that a request for a blood test at a hospital or medical facility is "legislatively authorized." In Respondent's view, it is of no moment that the drivers in *Dubiel* and *Davis* consented to the requested blood draw because both cases "held that requests for a blood test are legislatively authorized when law enforcement has probable cause of DUI and requests such a test at a hospital or other medical facility."

The Court does not agree. Contrary to Respondent's position, *Dubiel* and *Davis* turned largely on the fact that the respective motorists in the two cases consented to a blood draw. Respondent overlooks that *Davis* flatly stated, "In *Dubiel,* we held that a blood draw is legislatively authorized when a suspect is in a hospital *and voluntarily consents*." 264 So. 3d at 967 (emphasis added). Respondent also overlooks that *Davis* further stated that the "implied consent law does not apply when a suspect *voluntarily consents* to a blood draw while in a hospital." *Id.* (emphasis added) (citing *State v. Meyers,* 261 So. 3d 573, 574 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2647b]). According to *Davis,* in that instance, the impracticality of a breath or urine test is not a necessary precondition for obtaining a blood draw." *Id.* at 967-68 (citing *Meyers,* 261 So. 3d at 574).

In contrast to *Dubiel* and *Davis,* Petitioner did not give his consent to a blood test. Therefore, the implied consent law did apply in the instant case. *Compare Davis,* 264 So. 3d at 967; *Meyers,* 261 So. 3d at 574. As indicated, under section 316.1932(1)(c), Florida Statutes of the implied consent law, impracticality of a breath or urine test was a necessary precondition to a blood test. *See Serrago,* 875 So. 2d at 819. *See also Bedell,* 250 So. 3d at 150. However, as also indicated, there was no competent substantial evidence to support a finding that a breath or urine test would have been impractical or impossible.

In the absence of such competent substantial evidence, the hearing officer's final order cannot stand.[1] *See Fla. Power & Light Co. v. City of Dania,* 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a] (lower tribunal's decision must be supported by competent substantial evidence). Therefore, the Court grants certiorari and quashes the hearing officer's final order.

PETITION GRANTED; ORDER QUASHED. (HARRIS and CALDERON, JJ., concur.)

[1]In view of our disposition on this basis, we need not address Petitioner's remaining arguments.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Where licensee was observed straddling double yellow line and failing to maintain single lane, stop was lawful—Petitioner not entitled to relief on claim that hearing officer erroneously excluded results of horizontal gaze nystagmus where results were not factor in hearing offier's decision—Hearing officers—Departure from neutrality—Hearing officer did not display partiality or deny due process by recessing hearing to locate licensee's case file upon learning that he had been provided with case file of another licensee with same surname—Petition for writ of certiorari is denied

ROBERTO RODRIGUEZ, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County. Case No. 21-CA-296, Division G. August 3, 2021. Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Christie S. Utt, General Counsel, and Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHRISTOPHER NASH, J.) This case is before the court on Roberto Rodriguez's Petition for Writ of Certiorari filed January 12, 2021, as amended January 29, 2021. The petition, which seeks review of the Department's December 14, 2020, final order, is timely, and this court has jurisdiction. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. Petitioner advances three arguments in support of the petition: 1) that the hearing officer departed from the essential requirements of law when he did not exclude the results of the horizontal gaze nystagmus (HGN) test; 2) that the record lacked competent, substantial evidence of reasonable suspicion to justify the traffic stop; and 3) that the hearing officer displayed partiality toward the Department and violated Petitioner's right to due process when he recessed the hearing to locate Petitioner's file. The court agrees that the results of the HGN test were improperly admitted where no evidence suggests that the officer conducting it is a certified drug recognition expert as required by law. But where Petitioner was observed straddling the double yellow line and unable to maintain a single lane while driving, competent, substantial evidence supports the traffic stop. In addition, where the hearing officer was inadvertently provided with a case file of another driver bearing the same surname as that of Petitioner, the hearing officer's recess to locate the correct case file did not violate Petitioner's right to due process. Case law advanced by Petitioner are distinguishable. Accordingly, the petition is denied.

JURISDICTION

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

STANDARD OF REVIEW

When, as here, a person's driving privileges are suspended for refusing to submit to a breath test to determine whether he is driving under the influence, the administrative hearing officer is to determine whether the following elements have been established by a preponderance of the evidence: 1) whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; 2) whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer; and 3) whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. . *See* §322.2615(7)(b)1-3, Fla. Stat.

This court's review of an administrative decision upholding the suspension is not de novo. §322.2615(13), Fla. Stat. Rather, this court must determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). In so doing, the court may not reweigh evidence or substitute its judgment for that of the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

FACTS AND PROCEDURAL HISTORY

On November 2, 2020 at 8:47 p.m. Deputy Miceli of the Hillsborough County Sheriff's Office was dispatched to a reckless

driving call in her area. She positioned her vehicle to view traffic. There she observed Petitioner's vehicle, the subject of the call, cross through the intersection of Fissore Boulevard and Highway 672. Thereafter, she observed Petitioner straddle the center double-yellow line. She also observed Petitioner fail to maintain his lane and make quick over-correcting movements to return to his lane of travel. At this point, Deputy Miceli effected a traffic stop.

Upon making contact with Petitioner, Deputy Miceli noted that Petitioner's speech was slurred, and she detected an odor of alcohol about him. Petitioner admitted he had been at a sports bar and was close to home at the time of the stop. He said he was driving poorly because he was attempting to call his girlfriend. Deputy Miceli requested a DUI investigator. Deputy Thorne responded to the call. Upon making contact with Petitioner Deputy Thorne detected the odor of alcohol and bloodshot eyes. He Mirandized Petitioner before proceeding. Thereafter, Petitioner agreed to perform field sobriety exercises, which he performed poorly. In addition, Deputy Thorne's notes of Petitioner's performance indicate that Petitioner admitted to consuming four beers before the stop. Petitioner refused to submit to a breath test to determine his blood alcohol level, and, as a result, his driving privileges were administratively suspended. Thereafter, Petitioner sought formal review of the suspension in accordance with section 322.2615, Florida Statutes.

The formal review hearing was held December 8, 2020. From the start of the hearing, it became apparent that the hearing officer was referring to information concerning another driver who happened to have the same surname as Petitioner. Upon being alerted to the issue, the hearing officer took a brief recess to locate the correct file and resumed the hearing over strenuous objection by Petitioner's counsel. At the close of the hearing, Petitioner made a number of motions, three of which form the issues before the court in the petition: to exclude the HGN test, that a lack of evidence supported the traffic stop, and to exclude law enforcements' exhibits because the hearing officer's recess violated Petitioner's due process rights. The motions were denied, and the suspension was upheld. Petitioner filed this timely petition to challenge the order upholding the suspension.

DISCUSSION

Petitioner first contends that the hearing officer's refusal to exclude the results of the HGN test departed from the essential requirements of law in the absence of evidence that the law enforcement officer conducting the test is a certified drug recognition expert as required by law. Petitioner cites *Department of Highway Safety and Motor Vehicles v. Rose*, 105 So.3d 22, 24 fn 1 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a] in support of this argument.[1] Although the footnote in *Rose* indicates that results of the HGN were properly excluded, it does not say why. Accordingly, this authority does not provide a legal basis for relief. The court notes that the hearing officer did not rely on the results of the test. Whether the hearing officer formally granted the motion to exclude the results or denied the motion but did not consider the evidence, the result is the same: the results were not a factor in the decision.

Petitioner next argues that no competent, substantial evidence provided probable cause for the traffic stop, citing *Peterson v. State*, 264 So.3d 1183, 1188 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a] in support of that contention. Reasonable suspicion, rather than probable cause, is applicable to a traffic stop. *State, Dept. of Highway Safety and Motor Vehicles v. Deshong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (to effect a valid stop for DUI, the officer need only have a "founded suspicion" of criminal activity. . .driving need not rise to level of infraction to justify stop for DUI. . .probable cause needed to arrest or to suspend a license for DUI may be based upon evidence obtained during standard procedures following a valid traffic stop); *State, Dept. of Highway Safety and Motor Vehicles v. Maggert,* 941 So. 2d 431, 432 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2530a] (probable cause that motorist was impaired existed where officer observed the vehicle weaving in and out of its lane); *Roberts v. State*, 732 So.2d 1127, 1128 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1475c] (weaving several times within a single lane held sufficient to justify a stop where there was no evidence to show endangerment to others and where no traffic violation had occurred). *Cf. Peterson,* 264 So. 3d at 1189 (police can stop and briefly detain a person for investigative purposes if the officer has a *reasonable suspicion* supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause (internal citations omitted)). Here, where law enforcement observed Petitioner straddle the center double-yellow line, fail to maintain his lane, and make rapid over-corrections to return to his lane, law enforcement had reasonable suspicion to justify an investigatory stop.

Finally, Petitioner argues that he was denied due process when the hearing officer recessed the hearing to locate Petitioner's case file upon learning he had obtained the file of another driver with the same surname. Petitioner contends the hearing officer's actions deviated from his role as an impartial magistrate. In addition to the requirements of notice and a meaningful opportunity to be heard, due process requires that a hearing officer remain neutral. *See Dep't of Highway Safety & Motor Vehicles v. Griffin*, 909 So.2d 538, 542-43 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2065a]. Petitioner contends that in *Griffin,* the hearing officer recessed the formal review hearing for 10 minutes, searched for a missing document, found the missing document, returned to continue presiding over the hearing, and admitted the document as evidence in order to sustain the Griffin's driver's license suspension. The fourth district court of appeal agreed and affirmed the circuit court's ruling that the hearing officer departed from his neutrality and impartiality and as such violated Griffin's due process rights. *Id*. This court finds *Griffin* to be distinguishable from the instant case, however. In *Griffin,* a witness had been subpoenaed to bring a copy of a specific document—the registration certificate for the Intoxilyzer machine used to conduct the breath test for Griffin. While on the stand, the witness indicated that he did not have the certificate with him, and that had previously provided it to the hearing officer's staff. But the certificate was not in the Griffin file. The hearing officer questioned the witness about when and where he provided the certificate, which he alleged was likely to be found in a central "book" maintained by the hearing officer's staff. After apparently determining that the certificate should have been part of the record, the hearing officer informed Griffin and his counsel that she intended to look for the document and have it entered on the record. *Id.* Based on this, the circuit court, and, later, the fourth district court of appeal, determined that the hearing officer had acted as an advocate. *Id.* Even then, the district court suggested that a remand would have been appropriate, but that the issue had not been preserved for appellate review. *Id.*

Griffin is factually distinguishable from the instant case in that the hearing officer in *Griffin* recessed the hearing to obtain a single piece of evidence that gave the appearance of benefitting one side of the controversy. Here, the hearing officer recessed the hearing to obtain the entire correct file in a case of mistaken identity, not to locate a single document benefitting one party over the other.

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

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[1]Petitioner did not provide a pin cite or reference the footnote to direct the court's attention to it, but only the footnote contained any reference to the exclusion of the HGN test results.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to blood test—Where licensee was not injured in car crash but was taken to hospital for medical attention due to diabetes and COVID-19 at his request, blood test requested after licensee was discharged but still present at hospital was not lawfully requested—Breath test would not have been impossible or impractical where it was possible to transport licensee to breath testing facility, licensee was physically able to provide breath sample, and only three hours had passed between crash and hospital discharge—Petition for certiorari is granted

ROGER BERNARD WOZNIAK III, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2021-CA-001965-XXXX-MB. July 28, 2021. Petition for Writ of Certiorari from Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles. Counsel: Ira D. Karmelin, West Palm Beach, for Petitioner. Elana J. Jones, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner seeks first-tier certiorari review of an order affirming the suspension of his driver license based on his refusal to submit to a blood test. Petitioner argues that the hearing officer departed from the essential requirements of the law by failing to correctly apply Florida Statutes section 316.1932(1)(c) (2021). We agree with Petitioner and hold that the request for a blood draw was unlawful. Accordingly, the Petition for Writ of Certiorari must be granted.

On October 30, 2020, Florida Highway Patrol Trooper White observed a vehicle parked on the left shoulder of I-95 with its hazard lights on. Trooper White approached the vehicle and identified the driver via his Florida driver license as Petitioner. While speaking to Petitioner, Trooper White observed that Petitioner had glassy, watery eyes, slurred speech, and consistently repeated the same questions. After refusing medical attention, Trooper White informed Petitioner that she was conducting a crash investigation, to which Petitioner changed his story several times as to what had caused his crash. After concluding her crash investigation, Trooper White informed Petitioner that she was conducting a driving under the influence ("DUI") investigation, and asked Petitioner if he would be willing to submit to several field sobriety exercises, which Petitioner declined.

Based upon these observations and Petitioner's behavior, Trooper White placed Petitioner under arrest and transported him to Gun Club Jail facility ("Gun Club"). While in route to Gun Club, Petitioner stated that he required immediate medical attention, claiming that he was diabetic as well as Covid-19 positive. Upon the paramedics' arrival at the scene, Petitioner refused medical attention from the paramedics and instead requested to be examined by a doctor or a nurse. Consequently, Trooper White transported Petitioner to JFK Medical Center ("Hospital") for medical treatment. Petitioner was admitted to the Hospital and examined but discharged thereafter upon refusing medical treatment. After Petitioner was medically discharged but still present at the Hospital, Trooper White read Petitioner his Florida implied consent law for blood testing, which Petitioner refused. Ultimately, Petitioner was transported to Gun Club for processing.

Under Florida's implied consent law, all drivers must submit to a breath, urine or blood test if they are being investigated for a DUI offense. § 316.1932(1)(c), Fla. Stat. Law enforcement officers may request a blood draw from a driver suspected of driving under the influence during these instances: 1) where there is cause to believe a person was driving under the influence; 2) the person appears for treatment at a medical facility; and 3) the administration of a breath or urine test is "impractical or impossible." *Id.; see also State v. Serrago*, 875 So. 2d 815, 819 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1632c]; *State v. Kliphouse*, 771 So. 2d 16, 22 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (noting that the Florida legislature emphasized that blood draws are a great "intrusion into personal privacy" and therefore enumerated when they are to be administered in lieu of a breath or urine test). Under subsection (1)(c), law enforcement officers need not arrest the driver before requesting a blood draw. *See Kliphouse*, 771 So. 2d at 22. Petitioner alleges, contrary to the findings of the hearing officer, that the administration of a breath test was neither impossible nor impractical.

The facts in the instant Petition do not support a finding that a breath test was neither impossible nor impractical; therefore, the Petition must be granted. The record refutes whether the administration of a breath test was "impossible." Trooper White admitted that a breath test "wouldn't be impossible for [Petitioner] to have taken" but rather clarified it was "impracticable." Trooper White testified that although Petitioner was involved in a car crash, to her knowledge, he did not sustain any injuries that would prevent him from taking a breath test. *See State v. Donnino,* 18 Fla. L. Weekly Supp. 1200a (Fla. 15th Cir. Ct. September 20, 2011) (noting that due to driver being uninjured and conscious, she was physically able to submit to breath testing; thus, a breath test was not impossible). Additionally, Trooper Sayih acknowledged that it would not have been impossible to transport Petitioner to a "breath testing machine" upon Petitioner's discharge from the Hospital. *See Martin v. State of Florida, Department of Highway Safety and Motor Vehicles,* 15 Fla. L. Weekly Supp. 347b (Fla. 11th Cir. Ct. February 12, 2008) (holding that a breath test was not impractical or impossible as driver was able to supply breath samples).

Additionally, the facts do not support a finding that a breath test was "impractical." Petitioner sustained no apparent injuries from the car crash and there was no indication from the record that he was unconscious during his encounter with law enforcement nor during his visit at the Hospital. Therefore, Petitioner was physically able to provide a breath sample. *Cf. Kliphouse*, 771 So. 2d at 16 (holding that breath test was impractical or inconvenient because driver was unconscious at hospital); *State v. Hughes,* 14 Fla. L. Weekly Supp. 1002c (Fla. 6th Cir. Ct. March 23, 2007) (breath test was impractical where driver was admitted to hospital because driver kept slipping in and out of consciousness). Neither is Petitioner's mere appearance at the Hospital sufficient to establish that a breath test was impracticable. *Doran v. State of Florida, Department of Highway Safety and Motor Vehicles,* 19 Fla. L. Weekly Supp. 12b (Fla. 15th Cir. Ct. August 30, 2011) (holding that "mere appearance at the hospital is insufficient to establish that a breath test was impracticable or impossible"). Although Trooper White testified as to Petitioner's behavior[1] at the Hospital, she did not provide any details as to why the administration of a breath test at that time was impractical. *Id.* (Law enforcement officer did not state that driver was "awaiting treatment, that he was unconscious, or that he was strapped to a gurney" when requesting a blood test). Specifically, Trooper Sayih stated that the closest breath testing machine was "around 15 to 20 minutes" from the Hospital. *See State v. Rolon,* 15 Fla. L. Weekly Supp. 290a (Fla. 16th Cir. Ct. October 19, 2007) (granting motion to suppress in finding blood draw was unauthorized "[d]ue to the close proximity of both the hospital and breath testing equipment, and the fact that the Defendant was not physically or medically incapable of providing a breath sample").

Furthermore, this Court has previously held that "the mere passage of time is not—standing alone—sufficient to establish the impossibility or impracticability of a breath test." *Mejia v. Fla. Dep't of Highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 781a (Fla. 15th Cir. Ct. November 28, 2017). A breath test will only become impractical if there is additional evidence in the record that the driver will continue to remain hospitalized for a length of time. *See, e.g.*, *Markgraff v. State*, 20 Fla. L. Weekly Supp. 1046a (Fla. 12th Cir. Ct. July 26, 2013) (finding a breath test was impractical where the doctor

informed law enforcement that the driver would have to be kept overnight); *Smiley v. State of Fla. Dep't of Highway Safety & Motor Vehicles*, 27 Fla. L. Weekly Supp. 945a (Fla. 15th Cir. Ct. December 20, 2019) (holding that the mere fact that a driver had been in the hospital for two-and-a-half hours was not sufficient to establish impracticability). According to the Florida Traffic Crash Report, the crash occurred at 12:42 AM while Trooper White requested a blood test subsequent to Petitioner's discharge, around 3:30 AM—almost three hours later. Trooper Sayih testified that while at the Hospital, the medical staff were not able to provide a timeframe as to when Petitioner would be discharged. Nevertheless, Trooper White acknowledged that upon Petitioner's refusal of medical treatment at the Hospital and consequent discharge, she "knew that [Petitioner] was no longer going to be treated by the doctors, and that's when [she] thought it was the appropriate time to read him the Implied Consent [for blood]." It was therefore only after Petitioner was released that Trooper White requested that Petitioner submit to a blood test. Upon leaving the Hospital following Petitioner's discharge, Petitioner was taken to Gun Club; yet he was not asked to submit to a breath test. *Donnino,* 18 Fla. L. Weekly Supp. at 1200a (granting motion to suppress because breath test was not impossible or impractical when driver was physically able to submit to breath test, officer did not question how long driver would have to remain at hospital, and driver was taken to breath testing facility after leaving hospital). Petitioner was thus able to physically submit to a breath test and such breath test would have been administered within three hours after Defendant's driving. *See State v. Bice,* 19 Fla. L. Weekly Supp. 661b (Fla. 15th Cir. Ct. April 25, 2012) (granting motion to suppress because breath test was not impractical as police officer had driver at breath testing facility a little over three hours after driver's alleged driving). Therefore, since a breath test was not impractical, the hearing officer failed to obey the essential requirements of the law in finding that Trooper White properly requested a blood draw.

Since a breath test was neither impractical nor impossible, the hearing officer failed to obey the essential requirements of the law in finding that Trooper White properly requested a blood draw. Accordingly, we **GRANT** the Petition for Writ of Certiorari and **QUASH** the order affirming Petitioner's license suspension. (KELLEY, SURBER, and KEEVER-AGRAMA, JJ., concur.)

[1]At the Hospital, Petitioner "dropped himself to the ground a few times" and was placed in a wheelchair.

* * *

GINA SILVESTRI, Appellant, v. BROWARD COUNTY ANIMAL CARE AND ADOPTION, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-020381 (AP). L.T. Case No. AN00019588. July 29, 2021. Appeal from the Environmental Protection and Growth Management Department Animal Care and Adoption Division, Hearing Officer. Counsel: April S. Goodwin, for Appellant. Javier Navas, Broward County Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the September 11, 2019 Order of the Hearing Officer of the Environmental Protection and Growth Management Department Animal Care and Adoption Division is hereby **AFFIRMED**. (BOWMAN, M. DAVIS, and ODOM, JJ., concur.)

* * *

GINA SILVESTRI, Appellant, v. BROWARD COUNTY ANIMAL CARE AND ADOPTION, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-020358 (AP). L.T. Case No. AN00019587. July 29, 2021. Appeal from the Environmental Protection and Growth Management Department Animal Care and Adoption Division, Hearing Officer. Counsel: April S. Goodwin, for Appellant. Javier Navas, Broward County Attorney, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, this Court dispenses with oral argument and the September 11, 2019 Order of the Hearing Officer of the Environmental Protection and Growth Management Department Animal Care and Adoption Division is hereby **AFFIRMED**. (BOWMAN, M. DAVIS, and ODOM, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Timeliness—Licensee was not deprived of due process by fact that hearing that was commenced within 30 days of request for hearing was not completed within 30 days of that request or by fact that licensee was not provided with copies of documents until two days before first day of hearing—Breath test outside of officer's jurisdiction—Where traffic stop and arrest occurred within officer's jurisdiction, officer was authorized to request breath test at jail outside of his jurisdiction as part of his continuing DUI investigation—Lawfulness of stop and detention—Where licensee repeatedly failed to maintain single lane, and her erratic driving posed danger to officer, traffic stop was lawful—Where officer observed that licensee who had been driving erratically had odor of alcohol, bloodshot and glassy eyes and slurred and lethargic speech, officer had reasonable suspicion to detain licensee for field sobriety exercises—Petition for writ of certiorari is denied

AMELIA KENDALL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OF DRIVER IMPROVEMENT, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 20-10-AP. August 30, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

(MICHAEL J. RUDISILL, J.) Petitioner seeks certiorari review of the Department of Highway Safety and Motor Vehicles' final order sustaining the suspension of her driver's license for refusing to submit to a breath test following a lawful arrest. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3).

BACKGROUND

On January 18, 2020, at approximately 3:00 a.m., Corporal Steven Bryant of the Longwood Police Department was traveling eastbound in the center lane of State Road 434 when he observed Petitioner driving the same direction in the inside lane. Petitioner entered the center lane causing Corporal Bryant to swerve to avoid a collision. He then got behind Petitioner and observed her vehicle "bouncing back and forth in the lane" and "travel outside of its lane of travel several times." "Fearing for the safety of the driver," Bryant initiated a traffic stop.

When he made contact with Petitioner, he asked her if she was okay because of her driving pattern. Petitioner advised him that she was on the phone. He observed that Petitioner had a strong odor of alcohol coming from her breath, had bloodshot, red, and glassy eyes, and had slurred and lethargic speech. He believed that she was under the influence of drugs or alcohol and called Officer Tyson Coppola to the scene to conduct a DUI investigation.

Officer Coppola arrived shortly thereafter and made contact with Corporal Bryant, who shared his previous observations with Coppola. Coppola then made contact with Petitioner. He saw that she was holding insurance documentation and asked if she could show him her vehicle insurance and registration. She appeared confused and said she could not find it. He reminded her that she was in fact holding the documentation he had requested. She handed him the documentation,

which was not her current insurance or registration. He noticed an odor of alcohol coming from inside the vehicle, and observed that Petitioner had watery and bloodshot eyes and slurred her words.

Corporal Bryant asked Petitioner to exit her vehicle, and as she walked towards Coppola's vehicle she stumbled and almost fell. Coppola then asked her to perform field sobriety exercises. She was argumentative at first but eventually agreed. He noticed the odor of alcohol coming from her breath got stronger as she spoke. After she performed poorly and failed to follow instructions for the horizontal gaze nystagmus exercise and began the walk-and-turn exercise, she "started to stumble significantly." Coppola became concerned that Petitioner would fall and injure herself if she continued the exercise and determined that she "was so intoxicated that she could not continue," so he ended his investigation and placed her under arrest. While she was being placed in handcuffs, she "braced, tensed, and attempted to drop her weight to the ground in order to resist her arrest." She was eventually placed in handcuffs and transported to the Seminole County Jail.

Breath Technician Operator Stephanie Berrios requested that Petitioner submit to a breath test, but she refused. After she was read the implied consent warning, she maintained her refusal. Petitioner was issued citations for DUI (fourth offense), resisting an officer without violence, failure to drive in a single lane, no proof of insurance, and failure to display registration. Her license was suspended pursuant to section 322.2615, Florida Statutes. She sought formal review of the license suspension.

The Department conducted an initial formal review hearing on February 21, 2020. The following documents were submitted into the record: four Florida DUI Uniform Traffic Citations; Affidavit of Refusal to Submit to Breath, Urine, or Blood Test; Arrest Report; Offense Report; Property and Evidence Chain of Custody; DUI Technician Report; DUI Video Task Format/Implied Consent Affidavit; Request for Test Affidavit; DUI Transmittal Sheet; and Petitioner's driver record. Counsel for Petitioner objected to the documents, claiming that he submitted a Public Records Request for Copies of Records on January 24, 2020, but did not receive the documents until two days prior to the hearing on February 19, 2020. Counsel moved to set aside the license suspension arguing that Petitioner was denied her right to have a meaningful hearing within the thirty-day requirement under section 322.2615(6)(a), Florida Statutes. The hearing officer denied the motion, noting that the documents were stamped in by the clerk on February 19, 2020, and sent to counsel's office that same day. She continued the hearing to allow Petitioner to subpoena witnesses.

The Department conducted a second formal review hearing on March 10, 2020. Corporal Bryant testified that he was traveling eastbound in the middle lane of 434 when he saw Petitioner driving in the inside lane closest to the median. He estimated that his vehicle was 50 to 70 feet behind her vehicle when she drove into the middle lane causing him to swerve into the right lane. Corporal Bryant then slowed down and moved from the right lane to the far left lane behind Petitioner. He observed her swerve into the middle lane a couple times. He initiated a traffic stop for the traffic infraction of failure to maintain a single lane and for "almost striking my vehicle." Petitioner stopped in the left turn lane, and Corporal Bryant instructed her to pull into the shopping plaza parking lot due to safety reasons of stopping in the roadway and possibly being struck by another vehicle. When he made contact with Petitioner, he immediately smelled alcohol and saw her red, glassy, bloodshot eyes. He asked her if there were any medical concerns regarding the way she was driving, and she told him she was looking at her phone's GPS for directions. Her speech was slurred.

DUI Technician Stephanie Berrios testified that upon receiving Petitioner at the Seminole County Jail, she took Petitioner to the DUI room and requested that she submit to a breath test. Officer Coppola was not present when she read the implied consent warning. The hearing officer then continued the hearing to give Petitioner the opportunity to subpoena Officer Coppola.

The Department conducted a third formal review hearing on April 13, 2020. A DVD from the custodian of breath tests was entered into the record. Another DVD with the recording from Officer Coppola's video camera was not in the record despite counsel's belief that it had been submitted. Officer Coppola testified that he arrived at the scene to assist Corporal Bryant with the traffic stop. He first spoke with Corporal Bryant and then spoke with Petitioner. He saw that she was holding some documentation and asked if she could show her vehicle insurance and registration. She appeared to be confused about the fact that she was even holding documentation because she began to search around the inside of her car before he reminded her that she had papers in her hands. The insurance and registration were not current.

Officer Coppola observed that Petitioner had watery, bloodshot eyes, slurred words, and the odor of alcohol coming from inside the vehicle, "a compilation of all these things together being indicative of a person being impaired due to alcohol." Corporal Bryant asked Petitioner to exit her vehicle, and Coppola moved his vehicle to begin field sobriety exercises. Petitioner stumbled and almost fell as she walked from her vehicle towards Coppola's patrol vehicle. He could not recall whether her stumbling was captured on his video camera, so Petitioner's counsel asked for the hearing to be continued to allow him to see the video. The hearing officer denied the request, stating Officer Coppola had to testify as to his memory and she would review the video in its entirety before her final ruling. Counsel then moved to set aside the suspension based on the Department's failure to allow him to play the video to refresh Coppola's memory. The hearing officer denied the motion.

Officer Coppola again testified that Petitioner stumbled and almost fell as she walked towards his vehicle. Prior to the exercises, she had no difficulty with balance but he did observe orbital sway. As she began the walk-and-turn exercise, he believed that she was going to fall and possibly hurt herself because she had an issue walking, so he ended the exercises. Petitioner was then arrested and transported to the Seminole County Jail. The hearing officer granted another continuance to obtain the missing DVD and enter it into the record, and also granted an extension of Petitioner's temporary driving permit.

The Department conducted a fourth formal review hearing on April 28, 2020. The missing DVD was entered into the record. Petitioner's counsel renewed his motion to set aside the suspension based on the due process claim that Petitioner did not receive a meaningful hearing within a meaningful time. The hearing officer denied the motion. Counsel then moved to set aside the suspension arguing that: (1) there was no probable cause to stop Petitioner's vehicle; (2) Petitioner was detained longer than necessary to issue a traffic citation by Corporal Bryant because there was no founded suspicion of criminal activity; (3) Petitioner was detained longer than necessary by Officer Coppola to require her to submit to field sobriety exercises without reasonable suspicion or probable cause; and (4) there was no legal authority for Officer Coppola to request a breath test because he was outside of his jurisdiction. Counsel also moved to strike the results of the horizontal gaze nystagmus (HGN) test because Officer Coppola was not a drug recognition expert and there was no evidence that the test was scientifically reliable. The hearing officer denied the motion regarding jurisdiction but reserved ruling on the other motions.

On May 7, 2020, the hearing officer issued her Findings of Fact, Conclusions of Law and Decision. She found the following: Corporal Bryant observed Petitioner fail to stay within her lane of travel several times and enter the center lane "causing the corporal to swerve and

leave his lane of travel to avoid a collision;" Bryant conducted a traffic stop "[f]earing for the safety of the driver;" Bryant observed the strong odor of alcohol, bloodshot, red, glassy eyes, and slurred, lethargic speech; Officer Coppola observed the odor of alcohol, watery and bloodshot eyes, confusion, slurred speech, and Petitioner stumble and almost fall; Petitioner started to stumble significantly when doing field sobriety exercises; Coppola had a safety concern that she would fall and injure herself so he ended the investigation; and Petitioner was arrested for DUI, read implied consent, and refused to provide a breath sample. The hearing officer viewed the video evidence in its entirety and found that it supported the evidence. The hearing officer granted the motion to strike the HGN results and denied all of Petitioner's remaining motions. She concluded that all elements necessary to sustain the suspension for refusal to submit to a breath test were supported by a preponderance of the evidence.

STANDARD OF REVIEW

The Court's review of the hearing officer's order is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of law had been observed, and whether the administrative order was supported by competent substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So. 3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (internal citation omitted).

ANALYSIS

In a formal review hearing for suspension of a driver's license based upon refusal to submit to a breath, blood, or urine test, the hearing officer's scope of review is limited to the following issues:

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

§ 322.2615(7)(b), Fla. Stat. (2020).

Petitioner argues that the hearing officer violated the essential requirements of law and her decision was not based upon competent substantial evidence because: (1) Petitioner was deprived of due process by failing to have a meaningful hearing within a meaningful time; (2) Petitioner was illegally required to submit to a breath test while located outside of Officer Coppola's jurisdiction; (3) there was no probable cause or founded suspicion to stop Petitioner's vehicle; and (4) there was no founded suspicion to detain Petitioner longer than necessary to issue a traffic citation, require field sobriety exercises, or arrest her.

Due Process

Petitioner contends that she was deprived of due process because she was not provided a meaningful hearing within thirty days under section 322.2615(6)(a), Florida Statutes. She claims that on January 24, 2020, she requested a formal review hearing and made a public records request for documents which the Department intended to use at the hearing. She asserts that a hearing was scheduled for February 21, 2020, but the Department did not provide the requested documents until February 19, 2020, which prevented her from being able to subpoena witnesses in time for the hearing.

The Department argues that Petitioner was afforded due process because a hearing was properly scheduled within thirty days, and her driving privilege was extended through the date of the continued hearing.

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

The Department complied with this statute by scheduling the February 21, 2020 formal review hearing within thirty days after Petitioner requested the hearing on January 24, 2020. Nothing in the statute or relevant case law requires the Department to conduct or complete the formal review hearing within thirty days. *See Donohue v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 551b (Fla. 17th Cir. Ct. Mar. 5, 2013) (holding petitioner misinterpreted section 322.2615(6)(a) by arguing he had a right to a *completed* formal review hearing within thirty days of his request); *Vodar v. Dep't of Highway Safety & Motor Vehicles,* 15 Fla. L. Weekly Supp. 226a (Fla. 13th Cir. Ct. Jan. 11, 2008) (holding petitioner's argument that Department deprived her of due process rights by not holding hearing within thirty days lacked merit, and if hearing was required to be conducted within thirty days "there would be no purpose of any rules outlining continuance procedures under section 322.2615(9)"). The Department also issued Petitioner a temporary driving permit during the continuances. *Garcia v. Dep't of Highway Safety & Motor Vehicles,* 21 Fla. L. Weekly Supp. 105a (Fla. 4th Cir. Ct. Mar. 25, 2013) ("a formal review hearing may be conducted outside of the thirty-day window if a continuance is necessary and the suspended driver is issued a temporary driving permit").

Furthermore, there is nothing in the statute or relevant case law that requires the Department to provide the driver with copies of documents to be presented at the formal review hearing prior to the hearing. *Patel v. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 111a (Fla. 9th Cir. Ct. Oct. 12, 2012) (holding petitioner was not deprived of a meaningful hearing where Department did not provide driver with copies of documents until the day of the hearing). Here, Petitioner was provided with the documents on February 19, 2020, the hearing was continued to March 10, 2020, April 13, 2020, and April 28, 2020. Subpoenas were issued for the witnesses, and therefore Petitioner was able to review the documents prior to the continued hearings and question the witnesses who testified at the hearings.

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

Jurisdiction

Petitioner contends that she was illegally requested to submit to a breath test at the Seminole County Jail, which was outside of Longwood Officer Coppola's jurisdiction.

The Department contends that the jurisdictional argument regarding post-arrest events does not apply to the refusal to submit to a breath test or the reading of implied consent, that Petitioner had already been arrested within Officer Coppola's jurisdiction prior to the request for a breath test, and the location of the breath test refusal is therefore irrelevant.

An officer generally has no power to arrest a subject outside of the

officer's jurisdiction. *State v. Gelin,* 844 So. 2d 659 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D746b]; *Porter v. State,* 765 So. 2d 76 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2001a]. However, "[t]he law does not require that 'implied consent warnings' be given within the arresting officer's territorial jurisdiction." *Thomas v. Dep't of Highway Safety & Motor Vehicles*, 17 Fla. L. Weekly Supp. 1073a (Fla. 9th Cir. Ct. May 13, 2010). "Furthermore, an arresting officer is authorized to request a breath, urine, or blood test as part of the officer's continuing investigation of a DUI offense that originated in the officer's territorial jurisdiction, even if the request is made at a DUI testing facility that is located outside of the officer's territorial jurisdiction." *Id.* (finding the hearing officer did not depart from the essential requirements of law in approving the arresting officer's authority to request a breath test outside his jurisdiction where the arrest and subject matter of the investigation occurred within his territorial jurisdiction); *Brown v. Dep't of Highway Safety & Motor Vehicles,* 2 Fla. L. Weekly Supp. 453a (Fla. 9th Cir. Ct. Sept. 27, 1993) (rejecting petitioner's argument that the arresting Orlando Police Department officer was not authorized to request a urine test at the Orange County Sheriff's Office because the violation for which petitioner was arrested occurred within the officer's jurisdiction and the subsequent request for a urine test was incidental to that arrest).

Here, the traffic stop and arrest of Petitioner occurred in Longwood, within Officer Coppola's jurisdiction. Petitioner was subsequently transported to the Seminole County Jail where she was requested to submit to a breath test. Officer Coppola was authorized to request the breath test as part of his continuing investigation of the DUI offense that originated in his jurisdiction. Thus, Petitioner was not illegally required to submit to a breath test outside of Coppola's jurisdiction, and the hearing officer did not violate the essential requirements of law.

Traffic Stop

Petitioner contends that there was no competent substantial evidence in the record to establish probable cause or reasonable suspicion to stop her vehicle. She claims that the "questionable acts" of her vehicle prior to the traffic stop did not show any objective indication of impairment.

The Department argues that the evidence established a sufficient basis to conduct a traffic stop upon Petitioner's failure to maintain a single lane and to conduct a welfare check. The Department asserts that the video evidence captures the immediate aftermath of Petitioner nearly striking Corporal Bryant's vehicle and her repeated failure to maintain a single lane, which justified a lawful welfare check or traffic stop based upon the infraction.

"The constitutional validity of a traffic stop depends on purely objective criteria." *Dep't of Highway Safety & Motor Vehicles v. Jones,* 935 So. 2d 532, 534 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1518a]. "This objective test 'asks only whether any probable cause for the stop existed' making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Id.* (quoting *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]). "If, therefore, 'the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional.' " *Id.* (quoting *Dep't of Highway Safety & Motor Vehicles v. Utley,* 930 So. 2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a]).

"[A] stop of a motorist is permissible when an officer has probable cause to believe that the motorist has violated a traffic law, even if a reasonable officer would not have detained the motorist for such a violation." *State v. Girard,* 694 So. 2d 131, 131 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1363a] (citing *Whren v. U.S.*, 517 U.S. 806 (1996)). "All that is required for a valid vehicle stop is a founded suspicion by the officer that the driver of the car, or the vehicle itself, is in violation of a traffic ordinance or statute." *Davis v. State,* 788 So. 2d 308, 309 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1215a].

Section 316.089(1), Florida Statutes (2020), provides that "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic, . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Some Florida appellate courts have refused to find a violation of this statute where a driver's failure to maintain a single lane did not endanger himself or herself or anyone else. *Peterson v. State,* 264 So. 3d 1183, 1188 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D641a] (holding that because there was no evidence that appellant's crossing the white line on two occasions created a reasonable safety concern, the deputy did not have probable cause to believe that he violated section 316.089(1)). However, the Fifth District Court of Appeal has held that failure to maintain a single lane, where a driver "deviated from his lane by more than what was practicable," is a violation of section 316.089(1) "irrespective of whether anyone is endangered." *Yanes v. State,* 877 So. 2d 25, 26-27 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a]; *see also Jones,* 935 So. 2d at 535 ("failure to maintain a single lane alone, can under appropriate circumstances, establish probable cause.").

Furthermore, Florida courts have recognized that "a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior." *Dep't of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (finding the deputy had a founded suspicion to stop respondent to determine the cause of his erratic driving); *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975) ("Because of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation."). "Under the community caretaking doctrine, an officer may stop a vehicle without reasonable suspicion of criminal activity if the stop is necessary for public safety and welfare." *State v. Rodriguez,* 18 Fla. L. Weekly Supp. 940a (Fla. 11th Cir. Ct. July 15, 2011). "The purpose of such a stop is to ascertain whether the driver of the vehicle is in need of assistance due to illness, tiredness, or impairment and to protect the motoring public from harm." *Id.*

Here, the record clearly shows that Corporal Bryant had an objectively reasonable basis for making the traffic stop. Petitioner repeatedly failed to maintain a single lane, and her erratic driving posed a danger to Corporal Bryant who had to swerve into another lane to avoid being struck by her vehicle. Petitioner's driving pattern, which was corroborated by the video evidence, violated section 316.089(1) and was also consistent with someone who was potentially ill, tired, or impaired. Thus, the hearing officer's finding regarding the validity of the traffic stop is supported by competent substantial evidence.

Detention

Petitioner contends that there was no competent substantial evidence in the record to establish reasonable suspicion to detain her longer than necessary to issue a traffic citation, require field sobriety exercises, or arrest her because there was no evidence that her normal faculties were impaired. She claims that an odor of alcohol is not indicative of an individual's normal faculties being impaired, and that the traffic stop video contradicted Corporal Bryant's other observations of impairment.

The Department argues that the evidence established reasonable suspicion to temporarily detain Petitioner for a DUI investigation, and that the video did not contradict or negate Corporal Bryant's observa-

tions of impairment.

"To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.' " *Maldonado v. State,* 992 So. 2d 839, 842 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (quoting *Eldridge v. State,* 817 So. 2d 884, 888 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1009a]); *State v. Breed,* 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a]. "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State,* 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]). Certain relevant factors may be evaluated to determine if reasonable suspicion exists, including "[t]he time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; [and] anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge." *State v. Stevens,* 354 So. 2d 1244, 1247 (Fla. 4th DCA 1978).

Evidence of an odor of alcohol, alone, is insufficient to establish reasonable suspicion. *State v. Kliphouse*, 771 So. 2d 16, 24 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (more than the mere odor of alcohol is required to establish reasonable suspicion for a DUI investigation). Here, however, the evidence in the record established that while Petitioner was driving at approximately 3:00 a.m., she repeatedly failed to maintain a single lane and caused Corporal Bryant to swerve to avoid a collision. She had a strong odor of alcohol coming from her breath and vehicle, had bloodshot, red, glassy eyes, and had slurred and lethargic speech. This evidence, which was not contradicted by the video in the record, is sufficient to support a finding of reasonable suspicion. *See State v. Taylor,* 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b] (finding reasonable suspicion where officer observed speeding, odor of alcohol, staggering, slurred speech, and watery and bloodshot eyes); *Castaneda,* 79 So. 3d 41 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and watery eyes); *Ameqrane,* 39 So. 3d 339 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and glassy eyes); *Origi,* 912 So. 2d 69 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot eyes); *State v. Liefert,* 247 So. 2d 18, 19 (Fla. 2d DCA 1971) (finding reasonable suspicion where officer observed driving in a weaving fashion and odor of alcohol). Thus, the hearing officer's finding of reasonable suspicion is supported by competent substantial evidence.

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

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop, detention and arrest—Where officer estimated, based on his training and experience, that licensee's vehicle was approximately 50 feet in front of him when he noticed that license plate was not legible, officer had objectively reasonable basis for traffic stop even if officer was mistaken as to his distance from vehicle—Where, in addition to odor of alcohol, officer observed that licensee had bloodshot and glassy eyes and slurred speech, and licensee admitted alcohol consumption, officer had reasonable suspicion to detain licensee for field sobriety exercises—Indicia of alcohol consumption, admission to drinking, and poor performance on field sobriety exercises provided probable cause for arrest—Breath test outside of officer's jurisdiction—Where traffic stop and arrest occurred within officer's jurisdiction, officer was authorized to request breath test at jail outside of his jurisdiction as part of his continuing DUI investigation—No merit to argument that hearing officer improperly admitted breath test results into evidence without proper scientific predicate—Breath test affidavit that meets statutory requirements is admissible without further authentication and is presumptive proof of test results—Further, challenge to scientific reliability of breath test results is beyond scope of formal review hearing—Petition for writ of certiorari is denied

WILLIAM GIRARD, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, BUREAU OF DRIVER IMPROVEMENT, Respondent. Circuit Court, 18th Judicial Circuit (Appellate) in and for Seminole County. Case No. 20-08-AP. August 30, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING WRIT OF CERTIORARI

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

BACKGROUND

On January 20, 2020, at approximately 11:30 p.m., Officer Leonardo Massip of the Oviedo Police Department was traveling directly behind Petitioner who was driving northbound on Lockwood Boulevard. Massip noticed that the Florida license plate on Petitioner's vehicle was not visible from fifty feet or more. The license plate had one light on the driver's side of the plate "but the light was not sufficient to illuminate the tag." Massip deactivated his vehicle headlights as he traveled behind Petitioner's vehicle to confirm that the plate was not visible from fifty feet or more, and then conducted a traffic stop.

Upon making contact with Petitioner, Officer Massip observed that he had a strong odor of alcohol coming from his breath, had bloodshot and glassy eyes, and had slurred speech. Massip asked Petitioner to exit his vehicle because his dog was barking loudly inside the vehicle, making it difficult for Massip to speak with him. When he got out of the vehicle, Massip noticed that he had tobacco inside his mouth. The tobacco was not in his mouth when Massip first made contact with him.

Officer Massip then asked Petitioner to perform field sobriety exercises based on his observations of impairment. Petitioner stated he knew he was under the influence of alcohol, but that he was under the legal limit and would not drive his vehicle if he knew he was over the limit (which he believed to be 0.02). Massip conducted the Horizontal Gaze Nystagmus (HGN), Walk and Turn, and One Leg Stand exercises and determined that Petitioner did not complete the exercises to standard. He informed Petitioner of his Miranda rights and Petitioner stated he had two beers prior to the stop. Massip placed him under arrest for DUI. He was transported to the Seminole County Jail and turned over to Breath Technician Ray Garcia to collect a breath sample. Petitioner complied with the breath test and the results were 0.137 and 0.134. He was issued citations for DUI and for a tag not visible from fifty feet or more in violation of section 316.221(2), Florida Statutes. His license was suspended pursuant to section 322.2615, and he subsequently sought formal review of the license suspension.

The Department conducted a formal review hearing on March 17, 2020. The following documents were submitted into the record: DVD

of Officer Massip's body camera; two Florida Uniform Traffic Citations; copy of Petitioner's driver's license; DUI Transmittal Sheet; Breath Alcohol Test Affidavit; Arrest Report; Offense Report; Request for Test Affidavit; DUI Technician Report; Agency Inspection Report, Intoxilyzer 8000; and Petitioner's driver record. Petitioner's counsel presented two photographs of the back of Petitioner's truck, one showing the tag with both tag lights on and one with just the left tag light on, both taken the day before the hearing. The hearing officer admitted the photos into the record.

Officer Massip testified that when he first saw Petitioner's vehicle, it was approximately fifty feet ahead of him. He did not actually measure the distance, but he estimated the distance based on his experience and training. He agreed that the distance could have been in the range of fifty-five to sixty feet from his vehicle. The last time his vision was checked he was told it was better than 20/20 without prescription glasses. He did not see Petitioner weave or leave his lane of travel. One of the two tag lights on Petitioner's vehicle was lit and the other was out, which made the tag not visible from fifty feet or more. The reason he stopped Petitioner was because the license plate was not visible from fifty feet or more.

DUI Technician Ray Garcia testified that he administered a breath test per Officer Massip's request. He had no personal knowledge of whether a breath test machine similar to the machine used in this case was approved by the Florida Department of Law Enforcement pursuant to section 316.1932 or FDLE Rule 11D-8.003. He did not make any attempt on the date of the test to determine whether the device could accurately measure breath volume. Garcia did not know what the breath volume was for either subject sample and directed counsel to ask Keith Betham, the agency inspector. The hearing officer offered a continuance to obtain Mr. Betham's testimony, as he was on vacation at the time of the hearing, but counsel waived Betham's testimony.

Petitioner's counsel moved to set aside the suspension arguing that: (1) there was no probable cause for the traffic stop; (2) Officer Massip did not have jurisdiction to stop Petitioner inside a gated community; (3) there was no probable cause or reasonable suspicion to detain Petitioner longer than necessary to issue a traffic citation or to require him to submit to field sobriety exercises; (4) there was no probable cause to arrest Petitioner; (5) Petitioner was requested to submit to a breath test outside of Officer Massip's jurisdiction; (6) Petitioner's commercial driver's license could not be suspended without having been read the commercial driver's license implied consent warning; and (7) the Department failed to show that the breath test results were scientifically reliable. The hearing officer denied the last motion and reserved ruling on the remaining motions.

On March 26, 2020, the hearing officer issued her Findings of Fact, Conclusions of Law and Decision. The hearing officer found the following: Officer Massip observed a vehicle traveling directly in front of his patrol car with a tag that was not visible from fifty feet or more; a light on the driver's side of the tag was not sufficient to illuminate the tag even with Massip's headlights deactivated; Massip conducted a traffic stop, which was initiated while Petitioner turned right on a public road before entering a gated community; Massip observed a strong odor of alcohol coming from Petitioner's breath as well as bloodshot, glassy eyes, and slurred speech; Petitioner acknowledged that he drank alcohol and knew that he was under the influence; Petitioner performed poorly during field sobriety exercises; Petitioner was arrested for DUI; and Petitioner's breath test results were 0.137 and 0.134. The hearing officer viewed the DVD in its entirety and found that it supported the evidence. She denied Petitioner's remaining motions and found that all elements necessary to sustain the suspension for driving with an unlawful breath or blood alcohol level under section 322.2615 were supported by a preponderance of the evidence.

STANDARD OF REVIEW

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

ANALYSIS

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

> 1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
>
> 2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in section 316.193.

§ 322.2615(7)(a), Fla. Stat. (2020).

Petitioner argues that the hearing officer violated the essential requirements of law and her decision was not based upon competent substantial evidence because: (1) there was no probable cause to stop his vehicle; (2) there was no founded suspicion to detain him longer than necessary to issue a traffic citation and to require field sobriety exercises; (3) there was no probable cause to arrest him; (4) Officer Massip illegally required him to submit to a breath test while outside of his jurisdiction; and (5) the hearing officer improperly admitted into evidence scientifically unreliable breath test results.

Traffic Stop

Petitioner contends that there was no competent substantial evidence in the record to establish probable cause to stop his vehicle. He claims that the record failed to establish the actual distance from which Officer Massip attempted to view his tag, that Officer Massip conceded he may have been more than fifty feet from his vehicle, and that section 316.221(2), Florida Statutes, does not require a tag to be legible from a distance of more than fifty feet or require two tag lights. He relies on *Langello v. State,* 970 So. 2d 491 (Fla. 2d DCA 2007) [33 Fla. L. Weekly D3a].

The Department argues that the validity of the traffic stop depends on whether Officer Massip had an objectively reasonable basis to effectuate the stop, and that the law does not require an officer to establish with absolute legal certainty that a traffic violation occurred prior to conducting a stop.

"The constitutional validity of a traffic stop depends on purely objective criteria." *Dep't of Highway Safety & Motor Vehicles v. Jones,* 935 So. 2d 532, 534 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1518a]. "This objective test 'asks only whether any probable cause for the stop existed' making the subjective knowledge, motivation, or intention of the individual officer involved wholly irrelevant." *Id.* (quoting *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]). "If, therefore, 'the facts contained in the arrest report provide any objective basis to justify the stop, even if it is not the same basis stated by the officer, the stop is constitutional.' " *Id.* (quoting

Dep't of Highway Safety & Motor Vehicles v. Utley, 930 So. 2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a]).

"[A] stop of a motorist is permissible when an officer has probable cause to believe that the motorist has violated a traffic law, even if a reasonable officer would not have detained the motorist for such a violation." *State v. Girard,* 694 So. 2d 131, 131 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1363a] (citing *Whren v. U.S.*, 517 U.S. 806 (1996)). Section 316.221(2), Florida Statutes (2020), provides that "[e]ither a taillamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it *clearly legible* from a distance of 50 feet to the rear." (Emphasis added.)

Here, Officer Massip estimated, based on his experience and training, that Petitioner's vehicle was approximately fifty feet in front of his vehicle when he noticed that the license plate on Petitioner's vehicle was not legible, even with one of two operational taillamps. Thus, the record shows that Officer Massip had an objectively reasonable basis for making the traffic stop. *See Davison v. State*, 15 So. 3d 34 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D986a] (the facts established that there was a violation of section 315.221(2) where the police stopped a vehicle because the tag light was not illuminated); *State v. Erdmann,* 9 Fla. L. Weekly Supp. 807a (Fla. 15th Cir. Ct. Sept. 10, 2002) (a traffic stop for violation of 316.221(2) was permitted where only one of two tag lights was operational and, as a result, only one half of the large numbers and letters on the license plate was legible).

Even if Officer Massip was mistaken as to the exact distance, which he conceded could have been in the range of fifty to sixty feet, the traffic stop was lawful. *See Navarette v. California,* 572 U.S. 393, 402 (2014) [24 Fla. L. Weekly Fed. S690a] (a traffic stop is not based on the establishment of factual certainties but on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act"); *State v. Wimberly,* 988 So. 2d 116 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1856a] (holding that where the officer initiated a stop based on a belief that the vehicle's windows were illegally tinted and the tint was actually legal, the stop was lawful because it was based upon the officer's reasonable but mistaken belief that the tint was illegal); *State v. Coleman,* 26 Fla. L. Weekly Supp. 440b (Fla. 18th Cir. Ct. May 29, 2018) (holding the traffic stop was warranted even though the officer mistakenly believed the tag lights were not on).

The *Langello* case relied upon by Petitioner is distinguishable from this case. In that case, the officer stopped the defendant's vehicle because only one of the two tag lights was operational. *Langello,* 970 So. 2d at 492. The officer erroneously believed that having one light out was a violation of section 316.221(2). *Id.* The officer specifically testified that she could not recall whether the tag was rendered illegible because of the single malfunctioning light. *Id.* The court held that the officer's misapprehension of the law did not establish probable cause to stop the vehicle.

In this case, however, there is nothing in the record which suggests that Officer Massip erroneously believed that having one light out constituted a violation of section 316.221(2). Rather, the record clearly establishes that Officer Massip conducted the traffic stop because even with the one operational tag light, Petitioner's tag was not visible from fifty feet or more. There was no misapprehension of the law that would eradicate a finding of probable cause. Thus, the hearing officer's finding regarding the validity of the traffic stop is supported by competent substantial evidence.

Detention

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

The Department argues that the evidence established a reasonable suspicion to temporarily detain Petitioner for a DUI investigation, and that the video did not disprove Officer Massip's observations of impairment.

"To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. "Reasonable suspicion is something less than probable cause, but 'an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write a citation.' " *Maldonado v. State,* 992 So. 2d 839, 842 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2303a] (quoting *Eldridge v. State,* 817 So. 2d 884, 888 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1009a]); *State v. Breed,* 917 So. 2d 206, 208 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1457a]. "A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' " *State v. Castaneda,* 79 So. 3d 41, 42 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1347b] (quoting *Origi v. State,* 912 So. 2d 69, 71 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]). Certain relevant factors may be evaluated to determine if reasonable suspicion exists, including "[t]he time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; [and] anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge." *State v. Stevens,* 354 So. 2d 1244, 1247 (Fla. 4th DCA 1978).

Evidence of an odor of alcohol, alone, is insufficient to establish reasonable suspicion. *State v. Kliphouse,* 771 So. 2d 16, 24 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (more than the mere odor of alcohol is required to establish reasonable suspicion for a DUI investigation). Here, however, the evidence in the record established that at approximately 11:30 p.m., Officer Massip observed that the tag on Petitioner's vehicle was not visible from fifty feet. Petitioner had a strong odor of alcohol coming from his breath, had bloodshot and glassy eyes, had slurred speech, and admitted alcohol consumption. This evidence, which was not contradicted by the video in the record, is sufficient to support a finding of reasonable suspicion. *See State v. Taylor,* 648 So. 2d 701, 703 (Fla. 1995) [20 Fla. L. Weekly S6b] (finding reasonable suspicion where officer observed speeding, odor of alcohol, staggering, slurred speech, and watery and bloodshot eyes); *Castaneda,* 79 So. 3d 41 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and watery eyes); *Ameqrane,* 39 So. 3d 339 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot and glassy eyes); *Origi,* 912 So. 2d 69 (finding reasonable suspicion where officer observed speeding, odor of alcohol, and bloodshot eyes); *State v. Liefert,* 247 So. 2d 18, 19 (Fla. 2d DCA 1971) (finding reasonable suspicion where officer observed driving in a weaving fashion and odor of alcohol). Thus, the hearing officer's finding of reasonable suspicion is supported by competent substantial evidence.

Arrest

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

The Department argues that the evidence gathered following the temporary detention, which included Petitioner's admission of drinking alcohol and his poor performance on the field sobriety exercises, along with the time of day (11:30 p.m.), the odor of alcohol (and use of tobacco to mask the odor), bloodshot eyes, and slurred speech established probable cause to arrest Petitioner for DUI.

"[P]robable cause sufficient to justify an arrest exists 'where the facts and circumstances, as analyzed from the officer's knowledge, special training and practical experience, and of which he has reasonable trustworthy information, are sufficient in themselves for a reasonable man to reach the conclusion than an offense has been committed.' " *Dep't of Highway Safety & Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1165-66 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (quoting *Dep't of Highway Safety & Motor Vehicles v. Smith,* 687 So. 2d 30, 33 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D161a]).

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

Jurisdiction

Petitioner argues that he was illegally required to submit to a breath test at the Seminole County Jail, which was outside of Oviedo Officer Massip's jurisdiction.

The Department contends that the jurisdictional argument regarding post-arrest events does not apply to administration of a breath test, that Petitioner had already been arrested within Officer Massip's jurisdiction prior to the request for a breath test, and the location of the breath test is therefore irrelevant.

An officer generally has no power to arrest a subject outside of the officer's jurisdiction. *State v. Gelin,* 844 So. 2d 659 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D746b]; *Porter v. State,* 765 So. 2d 76 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2001a]. However, "[t]he law does not require that 'implied consent warnings' be given within the arresting officer's territorial jurisdiction." *Thomas v. Dep't of Highway Safety & Motor Vehicles,* 17 Fla. L. Weekly Supp. 1073a (Fla. 9th Cir. Ct. May 13, 2010). "Furthermore, an arresting officer is authorized to request a breath, urine, or blood test as part of the officer's continuing investigation of a DUI offense that originated in the officer's territorial jurisdiction, even if the request is made at a DUI testing facility that is located outside of the officer's territorial jurisdiction." *Id.* (finding the hearing officer did not depart from the essential requirements of law in approving the arresting officer's authority to request a breath test outside his jurisdiction where the arrest and subject matter of the investigation occurred within his territorial jurisdiction); *Brown v. Dep't of Highway Safety & Motor Vehicles,* 2 Fla. L. Weekly Supp. 453a (Fla. 9th Cir. Ct. Sept. 27, 1993) (rejecting petitioner's argument that the arresting Orlando Police Department officer was not authorized to request a urine test at the Orange County Sheriff's Office because the violation for which petitioner was arrested occurred within the officer's jurisdiction and the subsequent request for a urine test was incidental to that arrest).

Here, the traffic stop and arrest of Petitioner occurred in Oviedo, within Officer Massip's jurisdiction. Petitioner was subsequently transported to the Seminole County Jail where he was requested to submit to a breath test. Officer Massip was authorized to request the breath test as part of his continuing investigation of the DUI offense that originated in his jurisdiction. The hearing officer therefore did not violate the essential requirements of law.

Breath Test

Petitioner contends that the hearing officer improperly admitted the breath test results into evidence without a proper predicate showing that the results were scientifically reliable in violation of section 90.702, Florida Statues, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

The Department argues that the breath test results were self-authenticating and constituted presumptive proof of impairment, and that courts have consistently rejected the argument that there must be a scientific predicate to consider breath test results.

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

Petitioner does not argue that the breath test affidavit did not meet the requirements of the statutes. The Breath Alcohol Test Affidavit in this case reflects that the date of the last agency inspection was December 28, 2019, less than a month before the breath test was conducted. *Dep't of Highway Safety & Motor Vehicles v. Falcone,* 983 So. 2d 755, 757 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1504a] ("the Department met the requirements of section 316.1934(5) by providing documentation establishing the date of performance of the most recent required maintenance on the intoxilyzer."). Thus, the breath test affidavit admitted in this case is presumptive proof of Petitioner's impairment.

Furthermore, Petitioner's challenge to the scientific reliability of the breath test results was beyond the scope of the formal review hearing. *Klinker v. Dep't of Highway Safety & Motor Vehicles,* 118 So. 3d 835, 841 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1195a]. This same argument about the reliability of breath test results in a formal review hearing (which has previously been made by counsel for Petitioner) has consistently been rejected. *See, e.g., Torrence v.*

Dep't of Highway Safety & Motor Vehicles, 22 Fla. L. Weekly Supp. 37a (Fla. 9th Cir. Ct. July 8, 2014) (finding that counsel's attempt to ask questions regarding the approval process and scientific reliability of the Intoxilyzer 8000 and breath test results were beyond the scope of the hearing); *Scoma v. Dep't of Highway Safety & Motor Vehicles,* 22 Fla. L. Weekly Supp. 31a (Fla. 9th Cir. Ct. June 23, 2014) (finding that counsel's attempt to introduce documents about a 2002 approval study of the Intoxilyzer 8000 and other driver breath test results were irrelevant, and his challenges to the scientific reliability of the Intoxilyzer 8000 and breath test results were beyond the scope of the hearing). Thus, the breath test results were properly admitted into the record and the hearing officer did not violate the essential requirements of law.

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

* * *

THOMAS R. CHAMBERLAIN, Appellant, v. CITY OF MIRAMAR, A Municipal Corporation and Subdivision of the State of Florida, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE19-015772 (AP). L.T. Case No. 2016-08-00774. July 29, 2021. Appeal from the City of Miramar, Florida Code Compliance Division, Special Magistrate. Counsel: Thomas R. Chamberlain, Miramar, Pro se, Appellant. Michelle Austin Pamies, Office of the City Attorney for the City of Miramar, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the briefs, the record, and the applicable law, the July 10, 2019 Order of the Special Magistrate of the City of Miramar Code Compliance Division is hereby **AFFIRMED**. (BOWMAN, M. DAVIS, and ODOM, JJ., concur.)

* * *

Volume 29, Number 7
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CIRCUIT COURTS—ORIGINAL

Attorney's fees—Prevailing party—Voluntary dismissal—Contractual or statutory basis for award—Insurance—Declaratory judgments—Third-party claimants—Parties who were injured as result of insured's negligence and who were included, as interested parties, in insurer's action seeking declaration that policy was void ab initio were not entitled to recover attorney's fees from insurer following insurer's voluntary dismissal of complaint—Claimants did not contract with insurer for insurance or have first-party contractual relationship with insurer—Third-party claimants, who were neither named nor omnibus insureds, did not have statutory basis for award of fees under section 627.428(1)—Fact that insurer named claimants as interested parties in action seeking to declare policy void did not elevate them to status of named or omnibus insureds

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. DOMINIQUE LESHAYE DOYLE, et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Leon County, Civil Division. Case No. 2019-CA-001663. December 2, 2020. Charles W. Dodson, Judge. Counsel: Ashley Lovelace, Savage Villoch Law, PLLC, Tampa, for Plaintiff. Crystal Eiffert, Eiffert & Associates, for Defendants.

ORDER DENYING DEFENDANTS, LAVACIA WHITE AND TSHAUN ANTONIO BROWN'S, MOTION TO DETERMINE ENTITLEMENT TO FEES AND COSTS

THIS CAUSE having come before the Court at a hearing on November 17, 2020, on the Motion to Determine Entitlement to Fees and Costs (the "Motion") filed by Defendants, Lavacia White and Tshaun Antonio Brown (hereinafter and together, "White and Brown"), and the Court having reviewed White and Brown's Motion, Plaintiff's response in opposition thereto, hearing oral arguments from counsel to both Plaintiff and White and Brown, and being otherwise fully advised in the premises, makes the following findings:

FACTUAL BACKGROUND

1. Plaintiff, an auto insurance company, issued an insurance policy (the "Policy") to the named insured Defendant, Dominique Doyle (hereinafter, "Defendant Doyle").

2. Defendant Doyle was later involved in an auto accident with another vehicle occupied by passengers White and Brown. Blaming Defendant Doyle for causing the accident, White and Brown, who are neither named nor omnibus insureds under the Policy, but instead are third party claimants, made bodily injury claims against Defendant Doyle. Defendant Doyle then looked to Plaintiff for coverage and defense of White and Brown's bodily injury claims pursuant to the Policy.

3. At first, Plaintiff reserved rights under Defendant Doyle's Policy and denied the defense and coverage of those claims due to a material misrepresentation that Defendant Doyle made on her auto insurance application.

4. Ultimately, Plaintiff rescinded the Policy *ab initio* and filed the instant Declaratory Action.

5. Pursuant to section 86.091, Florida Statutes, Plaintiff named White and Brown solely as interested parties because indirectly they had a claim or interest which would be affected by the Declaratory Action: to wit, if the Court had declared the Policy void *ab initio,* then Plaintiff did not have a duty to defend Defendant Doyle or pay coverage on Defendant Doyle's behalf.

6. In response to the Complaint, White and Brown denied the allegations, sought a ruling that Defendant Doyle indeed had coverage under the Policy, and filed a cross claim against Defendant Doyle for negligence as a result of the alleged injuries that they had sustained in the subject motor vehicle accident (i.e., the bodily injury claims).

7. During the pendency of the Declaratory Action, White and Brown, as Cross-Plaintiffs, served Proposals for Settlement against Cross-Defendant Doyle, which Cross-Defendant Doyle accepted with the understanding that Plaintiff would issue payment of the amounts set forth in the Proposals for Settlement on her behalf.

8. Plaintiff then filed its Notice of Voluntary Dismissal of the instant Declaratory Action.

9. Considering themselves the prevailing parties, White and Brown now move to recover their attorney's fees against Plaintiff.

ANALYSIS AND FINDINGS

Florida follows the American Rule, under which each side pays its own attorney's fees. *Azalea Trace, Inc. v. Matos,* 249 So.3d 699 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1235a] (citing *Johnson v. Omega Ins. Co.,* 200 So.3d 1207, 1214 (Fla. 2016) [41 Fla. L. Weekly S415a].

An exception to the American Rule is that a prevailing party attorney's fees will be awarded so long as there is either a contractual or statutory basis for doing so and the request for fees has been properly pleaded. *Ajax Paving Indus., Inc. v. Hardaway Co.*, 824 So.2d 1026, 1029 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1949c].

Here, White and Brown have not shown a valid exception to the American Rule and, therefore, they are not entitled to recover their attorney's fees from Plaintiff. They have neither a contractual nor statutory basis to recover such fees.

First, White and Brown have no contractual basis to recover their attorney's fees because they neither contracted with Plaintiff for auto insurance nor do they have some sort of first-party contractual relationship with Plaintiff. Accordingly, they cannot look to the Policy's contractual language for an attorney's fee provision as a basis to recover.

Second, White and Brown have no statutory basis to recover their attorney's fees. In their Motion, White and Brown cite section 627.428(1), Florida Statutes, as a basis for the recovery of attorney's fees from Plaintiff, an insurer. That section states:

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

White and Brown's contention that the statute is a basis for their recovery fails as a matter of law because they are neither a named nor omnibus insured under the statute. This conclusion is directly supported by binding precedent from the Florida Supreme Court.

In *Roberts v. Carter,* 350 So.2d 78 (Fla.1977), a plaintiff brought a personal injury action against an insured defendant, whose insurance company denied liability coverage. Following a determination that the denial of coverage was improper, the plaintiff, a third-party claimant who was not an omnibus insured under the defendant's policy, sought attorney's fees. The Florida Supreme Court held that the plaintiff, as a third-party claimant, was not within the class of persons entitled to recover attorney's fees under section 627.428(1), Florida Statutes.

Like the plaintiff in *Roberts,* White and Brown are third-party, bodily injury claimants who are neither named nor omnibus insureds under Plaintiff's Policy and, therefore, they are not within the class of persons entitled to recover attorney's fees under section 627.428(1), Florida Statutes.

Specifically, White and Brown are not "named insureds" or "claimants who have a direct first party contractual relationship with

[Plaintiff]." *Industrial Fire & Cas. Ins. Co. v. Prygrocki,* 422 So.2d 314, 315 (Fla. 1982). A "named insured" is one who is specifically "designated as an insured" under the liability policy. *Cont'l Cas. Co. v. Ryan Inc. E.,* 974 So. 2d 368, 374 (Fla. 2008) [33 Fla. L. Weekly S59a]. In this case, that would be Defendant Dominique Doyle.

Furthermore, White and Brown arc not "omnibus insureds," a classification of individuals set forth in the insurance policy as entitled to directly receive coverage from the policy, like personal injury protection benefits. *See State Farm Fire & Cas. Co. v. Kambara,* 667 So.2d 831, 833 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D156c]. An "omnibus insured" is one who is covered by a provision in the policy but not specifically named or designated. *Id*. Put another way, the rights of an "omnibus insured" flow "directly from his or her status under a clause of the insurance policy *without regard to the issue of liability*." *Id*. (emphasis in the original).

Last, when a party is not seeking first-party benefits under the contract but seeks to establish the existence of liability insurance coverage, which would then pay any judgment that the Plaintiff obtained as a result of the insured's (tortfeasor's) liability, they are deemed a "third-party." *Id*. at 832 (*citing Roberts,* 350 So.2d at 78). This is exactly what White and Brown sought to accomplish in defending against the Declaratory Action.

The fact that Plaintiff named White and Brown as interested parties in this Declaratory Action does not elevate them to the status of named or omnibus insureds for recovery of attorney's fees under section 627.428(1), Florida Statutes. Rather, White and Brown, as interested bystanders, defended this Declaratory Action in the hopes that Defendant Doyle would have a valid Policy and that Defendant Doyle would have a payment source of White and Brown's claims made against her.

Following the logic and precedent of the Florida Supreme Court, White and Brown are clearly third-party claimants, not named or omnibus insureds under the Policy.[1] They can obtain their benefits only derivatively through the tortfeasor/named insured, Defendant Doyle, not the insurance policy directly. "Third party claimants are not within the class of insureds under a contract and, thus, are not entitled to recover an attorney's fee pursuant to section 627.428(1)." *AIU Ins. Co. v. Coker,* 515 So.2d 317, 318 (Fla. 2d DCA 1987) (*citing Prygrocki,* 422 So.2d at 315).

RULING

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

1. Defendants' Motion to Determine Entitlement to Attorney's Fees and Costs is hereby DENIED.

[1]The fact that White and Brown are third-party claimants and not "insureds" is further proven by section 627.4136, Florida Statutes (Nonjoinder of Insurers). Pursuant to this statute, White and Brown would not have even be allowed under Florida law to name Plaintiff in a lawsuit for the claims associated with the auto accident because neither of them are "an insured under the terms of the liability insurance contract."

* * *

Torts—Automobile accident—Settlement—Release—Defendants' motion for summary judgment on basis that plaintiff entered into an enforceable agreement to release defendants in a telephone call with defendants' insurance representative is denied—Disputed issues of material fact exist as to whether there was mutual agreement on material settlement terms—Further, even if evidence established legal settlement agreement, there is issue of fact as to whether agreement should be deemed void or voidable because it is based on undue influence or unilateral mistake or because it violates public policy

LUCIA ROSE SCAGLIA, Plaintiff, v. JAMES SCOTT GREENE, JANET WARREN GREENE and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CA-003621. January 21, 2021. Bruce R. Anderson, Judge. Counsel: Nancye R. Jones, Politis & Matovina, P.A., Orange City, for Plaintiff. Senovia L. Portis, Peter F. Nunes & Associates, Jacksonville; and Michael P. Regan, Jr. and James C. Durstein, O'Hara Law Firm, Jacksonville, for Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court to be heard upon Defendants James Scott Greene and Janet Warren Greene's Motion for Summary Judgment. The Court, having considered the motion along with the Plaintiff's response in opposition, having heard argument of counsel and reviewed the summary judgment evidence, and being fully advised in the premises, hereby rules as follows:

Defendants seek summary judgment on the basis that "Plaintiff entered into an enforceable agreement to release Defendants." In support of their argument, Defendants relied solely on a transcript of a portion of a telephone call between Plaintiff and Defendants' State Farm representative, during which Plaintiff answered affirmatively when asked if she agreed with "this bodily injury settlement as outlined."

Through record evidence, Plaintiff asserted that she did not understand, and the State Farm representative was not clear or transparent, in the description of the terms of the settlement agreement, as set forth in the transcript as well as the remainder of the telephone call.

The record evidence considered by the Court,[1] when taken in the light most favorable to Plaintiff, the non-moving party, and resolving every possible inference in Plaintiff's favor, establishes that the material facts regarding whether there was a mutual agreement as to the material settlement terms are in dispute. Because a disputed issue of fact exists that could call into question the validity of the agreement and reasonable inferences exist by which a jury could conclude that, due to Plaintiff's claimed lack of clarity and understanding, there was no mutual agreement as to the material settlement terms or as to the meaning of each material term, the Court concludes that these issues should be determined by the finder of fact.

Further, even if the Court should determine that the record evidence establishes a legal settlement agreement, there is an issue of fact as to whether it should be deemed void or voidable because it was based on undue influence, unilateral mistake, or was violative of public policy.

For all of the foregoing reasons, it is hereby

ORDERED AND ADJUDGED:

Defendants James Scott Greene and Janet Warren Greene Motion for Summary Judgment is hereby DENIED.

[1]The Court reaches its conclusion without considering any proffered evidence for which evidentiary objections may have been raised by the parties.

* * *

Municipal corporations—Ordinances—Food trucks— Constitutionality—Declaratory judgments—Injunctions—Motion for temporary injunction barring enforcement of city food truck ordinance that allegedly violates equal protection, due process, and basic right clauses of state constitution by banning trucks from operating in certain locations is denied—Plaintiffs' alleged claims for loss of enhanced revenues, additional business opportunities, and added reputational exposure do not constitute an irreparable injury that can't be quantified—Although plaintiffs have alleged state constitutional violations, adequate remedy at law exists through federal section 1983 action—Plaintiffs have not established substantial likelihood of success on claims since ordinance bears rational relationship to legitimate policy goals—Public interest will not be served by enjoining an ordinance that is presumptively valid and thereby creating confusion as to state of city's food truck law—City's motion for judgment on pleadings is granted—Ordinance is not facially unconstitutional and is not being applied in discriminatory manner—Due process challenge to ordinance fails—Regulating location and operation of food trucks is rationally related to public health, safety, and welfare, and it is reasonably debatable that city commission could believe that ordinance would further aims of maintaining vibrant commercial districts—Equal protection—Different treatment of restaurants and food trucks does not establish equal protection violation because food trucks are a different business class than restaurants—Reward for industry—Ordinance does not violate right to be rewarded for industry as it does not totally ban plaintiffs from pursuing their profession or deprive them of financial rewards for their efforts

ELIJAH DURHAM, et al., Plaintiffs, v. CITY OF TARPON SPRINGS, a Florida municipal corporation, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County. Case No. 21-002475-CI. August 26, 2021. Patricia A. Muscarella, Judge. Counsel: Justin Pearson, Institute for Justice, Miami, for Plaintiffs. Robert M. Eschenfelder, Trask Daigneault, LLP, Clearwater, for Defendant.

[Related order at 29 Fla. L. Weekly Supp. 527a—this issue.]

ORDER

THIS CAUSE having come to be heard and considered on July 20th 2021 on Plaintiffs' *Verified Motion for Temporary Injunction* (**Dkt. 28**), and Defendant's *Motion for Judgment on the Pleadings* (**Dkt. 35**), and the Court having heard arguments of counsel, considered the pleadings, affidavits, testimony, and the Parties' respective memoranda of law, and being otherwise advised in the premises, the Court makes the following findings and orders:

1. On July 1st 2020, Chapter Law 2020-160, became effective. **C&A, ¶ 29**.[1] Among other statutory revisions, the new law created Florida Statutes § 509.102, entitled *Mobile food dispensing vehicles; preemption,* which provided as follows:

> (1) As used in this section, the term "mobile food dispensing vehicle" means any vehicle that is a public food service establishment and that is self-propelled or otherwise movable from place to place and includes self-contained utilities, including, but not limited to, gas, water, electricity, or liquid waste disposal.
>
> (2) Regulation of mobile food dispensing vehicles involving licenses, registrations, permits, and fees is preempted to the state. A municipality, county, or other local governmental entity may not require a separate license, registration, or permit other than the license required under s. 509.241, or require the payment of any license, registration, or permit fee other than the fee required under s. 509.251, as a condition for the operation of a mobile food dispensing vehicle within the entity's jurisdiction. A municipality, county, or other local governmental entity may not prohibit mobile food dispensing vehicles from operating within the entirety of the entity's jurisdiction.
>
> (3) This section may not be construed to affect a municipality, county, or other local governmental entity's authority to regulate the operation of mobile food dispensing vehicles other than the regulations described in subsection. (2).
>
> (4) This section does not apply to any port authority, aviation authority, airport, or seaport.

2. Prior to this new law, the City Code of the City of Tarpon Springs did not allow for the operation of food trucks in any zone or location within the City. **C&A, ¶ 30**.

3. In order to comply with the new law, the City had to adopt an ordinance which complied with the Legislature's mandate that a local government "may not prohibit mobile food dispensing vehicles from operating within the entirety of the entity's jurisdiction." **C&A, ¶ 68**.

4. The City's planning staff developed staff reports and analysis of the issue, and developed an ordinance for the City to begin discussing. ***Answer,* ¶ 47, Exhibits "B", "C", "D" and "E."**

5. Subsequently, the City's Board of Commissioners and Planning and Zoning Board heard staff presentations and conducted public hearings on the draft ordinance on July 14th 2020, August 17th 2020, September 8th 2020, and September 22nd 2020. **C&A ¶ 52, ¶ 57**; ***Answer*, ¶ 47, Exhibits "B", "C", "D" and "E."**

6. Plaintiffs Mr. and Mrs. Durham appeared and spoke at most of these hearings, advocating against the ordinance as drafted. ***Answer*, ¶ 47, Exhibits "B", "C", "D" and "E."**

7. On September 22nd 2020, Ordinance 2020-22 became effective. **C&A, ¶ 45**. The ordinance amended the *Temporary Uses* section of the City's zoning code by creating new § 56.05 and § 56.06 as follows:

> **§ 56.05 - MOBILE FOOD DISPENSING VEHICLES, TEMPORARY**.
>
> As defined in F.S. 509.102, mobile food dispensing vehicles may operate in areas of the City of Tarpon Springs where property is zoned HB Highway Business, CPD Commercial Planned Development (non-residential property only), IR Industrial Restricted, and IH Industrial Heavy. The following operating criteria shall apply:
>
> (A) Mobile food dispensing vehicles shall only operate within the City limits between the hours of 7:00 a.m. and 10:00 p.m. unless operating in conjunction with an authorized special event.
>
> (B) The mobile food dispensing vehicle shall not operate in or from any public right-of-way or City-owned property, unless operating in conjunction with an authorized special event.
>
> (C) Mobile food dispensing vehicles may not operate in a manner which obstructs the flow of traffic, impedes pedestrians, or otherwise adversely affects public safety.
>
> (D) Mobile food dispensing vehicles may not dispense alcoholic beverages.
>
> (E) The mobile food dispensing vehicle must obtain and maintain all necessary licenses as required by F.S. 509.102.
>
> (F) Mobile food dispensing shall only be authorized on a parcel of land consistent with this section and the following additional regulations:
>
> (1) No more than one mobile food dispensing vehicle is allowed to occupy and operate on a parcel of land at any given time.
>
> (2) The parcel owner shall obtain a business tax receipt license prior to allowing the operation of a mobile food dispensing vehicle.
>
> (3) Mobile food dispensing vehicles shall not operate from vacant land.
>
> (G) Mobile food dispensing vehicles, when not in active operation, may only be parked/stored on a parcel of land in accordance with an approved site plan and in a location where onsite storage of vehicles is a permitted use.
>
> (H) Mobile Food dispensing vehicles shall dispose of all waste products generated by the mobile food vehicle in accordance with all local, state, and federal requirements.
>
> (I) The mobile food dispensing vehicle must display on the vehicle the results of any DPBR inspections for cleanliness and sanitation.

(J) The standards of this section shall not be applied to the establishment of mobile food dispensing vehicles as accessory to food and drink establishments as regulated in Section 56.06 below.

§ 56.06 - MOBILE FOOD DISPENSING VEHICLES; AS ACCESSORY TO FOOD AND DRINK ESTABLISHMENTS.

A mobile food dispensing vehicle may be located as an accessory use (as defined in Section 36.00 (B)) to a legally established food or drink establishment, which is solely operated as a food or drink establishment, subject to the following criteria:

(A) Review and approval of a development application by the Technical Review Committee containing the following minimum information and demonstration of compliance with the following standards:

(1) Site layout indicating location of the mobile dispensing vehicle (may not locate in required off-street parking areas, or in such a manner as to block any accessways, walkways, driveways, loading zones or other site circulation ways for vehicles or pedestrians);

(2) The mobile food dispensing vehicle must be maintained as an operable vehicle and may not be permanently affixed or attached to a building or structure in a manner that would prevent the vehicle from being moved in the event of an emergency.

(3) Indicate operating hours (limited to those of the primary business);

(4) City services requested (water, sewer, solid waste pick up);

(5) Demonstration of compliance with the City's Fats, Oils and Grease (FOG) Management Program;

(6) Evacuation or mitigation plan in the event of a hurricane, wind-storm, or flooding event;

(7) Show method of connection to permanent power with 30 or 50 amp recreational vehicle/marine type plug and cord. When operating in close proximity to residential uses or existing outdoor seating areas the mobile food dispensing vehicle shall be required to operate from battery or appropriate permanent power source to eliminate noise and fumes associated with generators.

(8) The primary business owner shall obtain a separate business tax receipt license for the mobile food dispensing use;

(9) A mobile food dispensing vehicle may only be operated by the primary business owner as an extension of the primary business. The mobile food dispensing vehicle must display a graphic image, name or branding of the primary food or drink establishment.

(10) The mobile food dispensing vehicle must display on the vehicle the results of any DPBR inspections for cleanliness and sanitation.

C&A, ¶ 45, ¶ 46; *Answer*, ¶ 37, Exhibit "A."

8. § 56.06 allows primary business owner (a "bricks and mortar" restaurant) to locate and operate a food truck as an accessory use to the primary business, as an extension of the primary business, so long as its signage notes it is a part of the primary business, and it otherwise complies with City codes.

9. In turn, § 56.05 provides that food trucks which are not being operated as an accessory use by a primary restaurant at the restaurant's location are confined to operate in areas of the City zoned HB Highway Business, CPD Commercial Planned Development (non-residential property only), IR Industrial Restricted, and IH Industrial Heavy.

10. The hours of operation of such trucks are confined to 7:00 a.m. through 10:00 p.m. unless authorized by a special event permit, and they are not allowed to dispense alcoholic beverages.

11. Such trucks are not allowed to operate in or from any public right-of-way or City-owned property unless operating in conjunction with an authorized special event, and they may not be operated in a manner which obstructs the flow of traffic, impedes pedestrians, or otherwise adversely affects public safety.

12. Any private landowner in an authorized zone may not host more than one food truck on site at a time, the land must not be vacant, and the food truck owner must obtain a business tax license from the City.

13. Plaintiffs are collectively a food truck business. **C&A, ¶ 1-3, ¶ 25**.

14. The business was purchased by Plaintiffs in August 2020. **C&A, ¶ 31**.

15. Plaintiffs desire to operate their food truck business in zones which the ordinance does not permit independent food trucks to operate. **C&A, ¶ 37-43**.

16. Specifically, Plaintiffs desire to operate their food truck in the City's downtown, near existing restaurants. **C&A, ¶ 46**.

17. Plaintiffs believed that the adoption of Florida Statutes § 509.102 would allow them to operate their food truck throughout all parts of the City. **C&A, ¶ 30**.

18. Plaintiffs remain able to operate their food truck, and do operate their food truck, in locations other than those which the ordinance prohibits independent food trucks from operating. **C&A, ¶ 44**.

19. On May 18th 2021, Plaintiffs filed a three-count *Complaint* (**Dkt. 2**) against the City of Tarpon Springs, and the individual members of the City's Board of Commissioners in their official capacities.

20. The *Complaint* alleges that the City's September 22nd 2020 Ordinance 2020-22, which provides for regulations related to the operation of food trucks, violates the Florida Constitution's Equal Protection, Due Process, and Basic Rights Clauses.

21. The *Complaint* seeks a declaration of unconstitutionality and an injunction against the Ordinance's enforcement.

22. The City filed a *Motion to Dismiss the Individually-Named Commissioners* (**Dkt. 13**) on June 7th 2021, and its *Answer and Affirmative Defenses* (**Dkt. 20**) four days later.

23. On June 14th 2021, the Court entered an agreed *Order of Dismissal* (**Dkt. 27**) as to the individually-named Commissioners, leaving the City as the remaining Defendant.

24. On June 28th 2021, Plaintiffs filed a *Verified Motion for Temporary Injunction* (**Dkt. 28**). The motion seeks "a temporary injunction prohibiting Defendant from enforcing the Ban for the duration of the dispute." The City filed its response (**Dkt. 33**) to Plaintiffs injunction motion on July 7th 2021. On July 16th 2021, the City filed affidavits from City Code Enforcement Board secretary Beth Hughes (**Dkt. 39**) and City Principal Planner Patricia McNeese (**Dkt. 41**) in opposition to Plaintiffs' injunction motion.

25. The City filed its *Motion for Judgment on the Pleadings* (**Dkt. 35**) on July 7th 2021. Plaintiffs filed their *Memorandum in Opposition* (**Dkt. 37**) to the City's motion on July 13th 2021.

26. Both motions were noticed for hearing and the Court conducted a two-hour hearing on the motions on July 20th 2021.

27. In addition to hearing arguments of counsel, counsel for Plaintiffs called Elijah and Ashley Durham in support of Plaintiffs' injunction motion.

28. At the conclusion of the hearing, counsel for the Parties agreed that there are no disputed issues of fact between the Parties, and the Parties had fully briefed the Court on the law related to both motions. The Court thereafter took the matter under advisement and requested counsel for the Parties to submit proposed orders to the Court disposing of both motions.

29. The Court finds that there remain no material factual issues which would prevent the Court from ruling on the motions, and that the case is otherwise at issue. The Court will first discuss Plaintiffs'

Verified Motion for Temporary Injunction, followed by the City's *Motion for Judgment on the Pleadings.*

Temporary Injunction

A temporary injunction is properly entered only in extraordinary circumstances. *City of Dania Beach v. Konschnik,* 763 So.2d 555 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1812a]. It should be granted sparingly and only after the moving party has alleged and proven facts entitling it to relief. *Hiles v. Auto Bahn Federation, Inc.*, 498 So.2d 997 (Fla. 4th DCA 1986). Indeed, with respect to legislative enactments such as the challenged ordinance, courts have no authority, absent illegality or fraud, to enjoin a legislative act. *City of Ormond Beach v. City of Daytona Beach,* 794 So.2d 660, 664 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1774a], quoting *City of Miami Beach v. Kaiser,* 213 So.2d 449 (Fla. 3d DCA 1968).

To obtain a temporary injunction, the party seeking the injunction must establish that:

(1) irreparable injury will result if the status quo is not maintained,

(2) there is no adequate remedy at law,

(3) the party has a clear legal right to the requested relief, and

(4) the public interest will be served by the temporary injunction.

State, Department of Health v. Bayfront HMA Medical Center, LLC, 236 So.3d 466, 472 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D100d].

The temporary injunction movant must prove each element with competent, substantial evidence. *Sun Trust Banks, Inc. v. Cauthon & McGuigan, PLC,* 78 So.3d 709, 711 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D311a]. "Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction." *City of Jacksonville v. Naegele Outdoor Advert. Co.,* 634 So.2d 750, 754 (Fla. 1st DCA 1994). If the party seeking the temporary injunction fails to prove one of the requirements, the motion for injunction must be denied. *Genchi v. Lower Fla. Keys Hosp. Dist.,* 45 So.3d 915, 919 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2216a]. A trial court's order issuing an injunction must contain clear, definite, and unequivocally sufficient factual findings to support each of the four required elements. *Phelan v. Trifactor Solutions, LLC,* 312 So.3d 1036 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D503b].

IRREPARABLE INJURY:

The Court begins its examination of this factor by noting that, "[a] preliminary injunction does not purport to decide the merits of a cause of action, but merely serves to preserve the status quo until a final hearing." *South Florida Limousines, Inc. v. Broward County Aviation Dept.,* 512 So.2d 1059, 1060 (Fla. 4th DCA 1987). The status quo before the allegedly unconstitutional ordinance is the state of the City Code before the ordinance. However, it is undisputed that the City Code before the ordinance disallowed food trucks to regularly operate in any part of the City.[2] To the extent that Plaintiffs operated at Brighter Days Brewery, the affidavit of City Principal Planner Patricia McNeese, and the documents attached thereto, confirm that Brighter Days Brewery had only obtained a temporary use hot dog cart permit from the City in conjunction with its grand opening, and that it had invited Plaintiffs to operate their food truck on the property instead unlawfully. While Plaintiffs may not have known Brighter Days' representation that it had a permit for the food truck's presence was not truthful, that does not alter the fact that Plaintiffs were not lawfully operating at Brighter Days.

Plaintiffs argue that allegations of violations of constitutional rights are presumed to be irreparable in nature, and that entitlement to a temporary injunction is almost automatic. In support, Plaintiffs cite *Antico v. Sindt Trucking, Inc.,* 148 So. 3d 163, 165-66 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2149a], which provides:

> As a threshold matter, a petition for writ of certiorari is the correct vehicle for reviewing Petitioner's privacy-related objections to the trial court's discovery order. We have noted previously that certiorari relief involving an order compelling discovery is available "when the order departs from the essential requirements of law, causing irreparable harm that cannot be remedied on plenary appeal." *Poston v. Wiggins,* 112 So.3d 783, 785 (Fla. lst DCA 2013) [38 Fla. L. Weekly D1104a] (quoting *Heekin v. Del Col,* 60 So.3d 437, 438 (Fla. lst DCA 2011) [36 Fla. L. Weekly D580a]). The irreparable harm part of this analysis is jurisdictional. *Id*. It is satisfied in this case because irreparable harm can be presumed where a discovery order compels production of matters implicating privacy rights. *Rasmussen v. S. Florida Blood Serv., Inc.,* 500 So.2d 533, 536-37 (Fla.1987); see also *Holland v. Barfield,* 35 So.3d 953, 956 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1018b] (having to disclose a computer hard drive and a cellphone SIM card demonstrates irreparable harm). And so, Petitioner will be entitled to relief if the order below departs from the essential requirements of law.

Antico, at 165-66. Footnote omitted.

Setting aside that the right at issue in *Antico* was the right to privacy of cellphone data, and that the *Antico* court's discussion of the "irreparable harm" factor appellate courts examine when determining if they have jurisdiction to consider certiorari petitions from discovery orders, the court only noted that irreparable harm *can* be presumed where a discovery order compels production of matters implicating privacy rights. The presumption is permissive, not mandatory. Indeed, the *Antico* court ultimately affirmed the lower court's discovery order allowing an expert to retrieve the requested cellphone data.

Plaintiffs also cite *Preston v. Thompson,* 589 F.2d 300, 303 n. 3 (7th Cir. 1978) in support of their automatic irreparable injury argument. *Preston* stated, "[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.". *Preston,* 303 n. 3. Again, setting aside that the issue in *Preston* (whether the trial court abused its discretion in issuing a preliminary injunction which required officials in charge of a state prison to provide two showers a week and an hour of yard time to all inmates who had been locked down after a riot) is dissimilar to the facts in this case, the implication Plaintiffs take from the case are too broad. See, *Davenport v. DeRobertis,* 844 F.2d 1310 (7th Cir. 1988), distinguishing *Preston* as follows:

> *Preston v. Thompson,* 589 F.2d 300, 303 (7th Cir. 1978), upheld a district court's injunction that required a minimum entitlement of two showers a week, but the circumstances were different. The prison officials had imposed a prison-wide deadlock or lockdown, with drastic consequences for all prisoners. The district court thought the prison was too slow in returning to normalcy, and the two-shower provision was intended to nudge the defendants in that direction.

Davenport, at 1316. See also, *Flower Cab Co. v. Petitte,* 685 F.2d 192, 195 (7th Cir. 1982) (rejecting an argument that *Preston* stands for an automatic injury argument in temporary injunction settings); and *Skidmore, Owings & Merrill v. U.S.,* 1985 WL 2526, *6 (N.D. Ill., September 12th 1985) (same).

Plaintiffs next argue that they will suffer irreparable harm because the City's ordinance deprives them of opportunities to reach new customers, to enter into mutually beneficial contractual relationships, and to grow their business reputation. However, such deprivations are quantifiable in money damages, and money damages and loss of business to a competitor generally will not suffice to demonstrate irreparable injury. *Agency for Health Care Admin. v. Cont'l Car Servs., Inc.,* 650 So.2d 173, 175 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D397a]. For instance, in *South Florida Limousines,* the plaintiff sought a temporary injunction because the governmental

entity awarded a contract to a competitor. In affirming the trial court's denial of an injunction, the *South Florida Limousines* court ruled:

> The appellant contends it suffered irreparable harm from the contract being illegally awarded to Yellow Limousine. *** The appellant also contends that it suffered irreparable harm from losing business at the airport. However, the court found that the appellant had an adequate remedy at law for this. Mere loss of business because of a competitor will not suffice to demonstrate irreparable injury. Irreparable injury will not be found if money damages are available as a remedy.

South Florida Limousines, at 1061-62. Citations omitted.

In *State, Department of Health v. Bayfront HMA Medical Center, LLC,* 236 So.3d 466 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D100d], the court ruled that the law did not support Bayfront Hospital's argument that granting a license to a competitor hospital would result in the dilution of trauma patients, increased difficulty in hiring qualified trauma staff due to competition, increased difficulty in maintaining qualified trauma staff due to the decreased volume of trauma patients, and that it therefore was entitled to a temporary injunction, since "case law is clear that economic harm does not constitute irreparable injury; that is, loss of business and money damages due to a decrease in patient volume do not suffice to demonstrate irreparable injury." *Id*., at 475-76.

See also, *State, Dept. of Transp. v. Kountry Kitchen of Key Largo, Inc.,* 645 So.2d 1086 (Fla. 3rd DCA 1994) (restaurant owner's allegation that it would suffer harm if outdoor advertising sign was removed by state department of transportation, because sign generated most of its business, would not support a finding of "irreparable injury" necessary to entitle the owner to a preliminary injunction preventing the sign's removal); and *Department of Corrections v. Croce,* 520 So.2d 695 (Fla. 4th DCA 1988) (public employee not entitled to a temporary injunction prohibiting agency from terminating or demoting her pending outcome of an unfair employment practices action absent showing of irreparable harm and prior to exhaustion of administrative remedies since employee had adequate legal remedies in form of reinstatement, back pay and damages).

In this case, Plaintiffs assert their loss of enhanced revenues, additional business opportunities, and added reputational exposure constitute an irreparable injury that can't be quantified. But when Mr. Durham testified during the hearing, he confirmed the approximate amount of money his food truck made during days it was parked at Brighter Days Brewing (a location Plaintiffs' *Complaint* states it still desires to serve but for the ordinance), and that his business uses a modem point-of-sale system which tracks daily sales. **TR 43**.[3] Mr. Durham also testified that his business maintains business records including income statements. *Id*. These materials would allow a business damages expert to quantify for a jury revenues Plaintiffs could expect if they were allowed to operate throughout the City vs. only in the authorized zones. Since these damages are quantifiable, the injuries alleged are not irreparable.

ADEQUATE REMEDY AT LAW:

Injunctive relief will not lie where there is an adequate remedy of law available. *Meritplan Ins. Co. v. Perez,* 963 So. 2d 771, 776 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1685a]. For purposes of determining whether a temporary injunction should issue, the true test for whether there is an adequate remedy at law is whether a judgment could be obtained in a proceeding at law, not whether the judgment would procure pecuniary compensation. *Oxford Intern. Bank and Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 374 So.2d 54 (Fla. 3rd DCA 1979), certiorari dismissed, 383 So.2d 1199. The "mere difficulty in prevailing on a certain cause of action has never been understood as the lack of an adequate legal remedy. The determination whether there is an adequate remedy at law turns on the possibility of succeeding, not on its probability." *DiChristopher v. Board of County Com'rs.,* 908 So.2d 492, 497 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1927a].

Citing to *Zuckerman v. Prof'l Writers of Fla., Inc.,* 398 So. 2d 870, 872 (Fla. 4th DCA 1981), Plaintiffs' verified motion alleges, at ¶ 22, that they "have no adequate remedy at law because monetary compensation cannot adequately remedy the irreparable harm caused by Defendant's ongoing violations of Plaintiffs' constitutional rights and the resulting interference in the day-to-day operations of Plaintiffs' business." However, *Zuckerman* does not address deprivation of constitutional rights. It was a case between a corporation and former employees of the corporation, and the injunction sought in that case was necessary because the former employees (a husband and wife) had the only key to the secured file storage, files had gone missing, and the corporation needed the files to operate. The Court does not find *Zuckerman* applicable to the facts of this case.

At its core, Plaintiffs' complaint is that they want to operate their food truck in areas of the City where the allegedly unconstitutional ordinance does not allow such operations. In turn, they contend they cannot make as much money as they otherwise could, and there is no legal remedy available to them to recover their damages. The Court disagrees.

In *St. Lucie County v. Town of St. Lucie Village,* 603 So.2d 1289 (Fla. 4th DCA), rev. denied 613 So.2d 12 (Fla. 1992), the plaintiffs (the Town of St. Lucie and various individuals) obtained an injunction against the future expansion of the county airport. On appeal, the court concluded the plaintiffs failed to establish any of the requirements for an injunction, which was entirely against considerations of the public interest. The court pointed out that Florida recognizes common law causes of action for damages which stem from airport operations and thus an injury from airport operations was not irreparable, or a harm for which there was no remedy.

And in *3299 N. Federal Highway, Inc. v. Broward County Commissioners,* 646 So. 2d 215 (Fla. 4th DCA 1994), the court held that "the amounts lost or expended can be calculated after the fact and be fully compensated by money damages." *Id*. at 220. These cases reason that economic losses suffered by plaintiffs challenging ordinances which limit business opportunities, should the ordinance or revocation be overturned, can be established, and therefore temporary injunctions are not a suitable pre-judgment remedy.

Plaintiffs argue that unlike cases founded on contract or tort law, Florida law has no state statute allowing for recovery of lost revenues for constitutional violations by a municipality. While that may be true, 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . .

Municipalities are "persons" subject to liability under this statute. *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611(1978). Florida courts have concurrent jurisdiction to entertain actions brought under 42 U.S.C. § 1983. *Crocker v. Pleasant,* 778 So.2d 978 (Fla. 2001) [26 Fla. L. Weekly S61a]; *Lloyd v. Page,* 474 So.2d 865, 867 (Fla. 1st DCA 1985).

While the City may well have the benefit of sovereign immunity[4] in a damages action founded on *state* law, the federal Constitution's Supremacy Clause waives any such immunity from money damage claims for persons (including local governments) sued for *federal* constitutional violations under 42 U.S.C. § 1983. *Howlett By and Through Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d

332 (1990). Plaintiffs confined themselves in this suit to the asserting violations of the Florida Constitution which, of course, are not cognizable under 42 U.S.C. § 1983.

However, while certain provisions of Florida's Constitution are interpreted so as to provide rights greater than their analogous federal constitutional rights, Plaintiffs' claims would be interpreted under the exact same standards as their federal constitutional counterparts. See, *Eisenberg v. City of Miami Beach,* 1 F.Supp.3d 1327 (S.D. Fla. 2014) (under Florida law, substantive due process claims must satisfy the same standard as under federal law); *Palm Harbor Special Fire Control Dist. v. Kelly,* 516 So.2d 249, 251 (Fla. 1987) (Art. I, § 2 of the Florida Constitution is construed like the Equal Protection Clause of the U.S. Constitution); *Williamson v. Brevard County,* 276 F.Supp.3d 1260, 1297 (M.D. Fla. 2017) (same).

Further, all three of Plaintiffs' claims are subject to the same rational basis test as employed in federal constitutional claims. *Silvio Membreno and Florida Ass'n of Vendors, Inc. v. City of Hialeah,* 188 So.3d 13, 19 (Fla. 3rd DCA 2016) [41 Fla. L. Weekly D618a] ("the rational basis test under Florida due process is the same as the rational basis test under Florida equal protection"). See also *Warren v. State Farm Mut. Auto. Ins. Co.,* 899 So.2d 1090, 1096 (Fla. 2005) [30 Fla. L. Weekly S197b] (holding, in a case involving Florida's equal protection and due process provisions, that "[t]he analysis involved in the due process determination closely resembles that of the equal protection analysis").

Dispelling any fear that a federal court won't consider Plaintiffs' state constitutional claims if they were to bring federal claims via 42 U.S.C. § 1983, such fears would be unfounded. Federal courts have shown their willingness to exercise their own concurrent jurisdiction to entertain Florida constitutional claims when also considering federal claims brough via 42 U.S.C. § 1983. *Newman v. Consolidated Dispatch Agency,* 737 Fed.Appx. 956, 2018 WL 2979482 (11th Cir., June 13th 2018) (relying on Florida law to dispose of claim brought under Art. I, § 9 of the Florida Constitution).

The question of whether an adequate remedy at law is available cannot be confined to a plaintiff's tactical decisions on which claims it desires to bring, and which courts it desires to litigate in. Rather, all that must be considered by the Court is whether Plaintiffs have some adequate remedy at law for the damages they allege they have suffered as a result of the ordinance.[5] The Court finds that 42 U.S.C. § 1983 is an adequate remedy. See, *DiChristopher v. Board of County Com'rs,* 908 So.2d 492 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1927a] (property owner who opposed the county's flooding of his land as part of a mosquito control program was not entitled to injunction as he had an adequate remedy at law by suing for inverse condemnation).

SUBSTANTIAL LIKELIHOOD OF SUCCESS:

"A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated. It is not enough that a merely colorable claim is advanced." *City of Jacksonville,* 634 So.2d at 753, *approved sub nom. Naegele Outdoor Advert. Co., Inc. v. City of Jacksonville,* 659 So.2d 1046 (Fla. 1995) [20 Fla. L. Weekly S169a].

Unless expressly or impliedly preempted by the Legislature, Florida's state and local governments possess substantial home rule police and zoning powers to adopt regulations for the health, safety and welfare of citizens, businesses and the environment. Statutes and ordinances in Florida not only enjoy a presumption in favor of constitutionality, the Florida Supreme Court has repeatedly held that zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality's police power. See *Dep't of Cmty. Affairs v. Moorman,* 664 So.2d 930, 933 (Fla. 1995) [20 Fla. L. Weekly S500a] ("[W]e have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relationship to legitimate societal policies.").

It is well-settled that permissible bases for land use restrictions include concern about the effect of the proposed development on traffic, on congestion, on surrounding property values, on demand for city services, and on other aspects of the general welfare. See *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1375 (11th Cir. 1993).

A court should not set aside the determination of public officers in land use matters unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. See *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield,* 907 F.2d 239, 243 (1st Cir. 1990). The question is only whether a rational relationship exists between the ordinance and a conceivable legitimate governmental objective. See *Id.* at 245. If the question is at least debatable, there is no substantive due process violation. *WCI Communities,* 885 So.2d at 914.

As the Court's disposition of the City's *Motion for Judgment on the Pleadings* (infra) confirms, the City's ordinance is supported by a rational relationship to legitimate policy goals, and so Plaintiffs are unable to demonstrate that they have a substantial likelihood of success as to their claims.

WOULD AN INJUNCTION SERVE THE PUBLIC INTEREST?

As a general rule, it will always be in the public interest to uphold the will of people as enshrined in the Florida Constitution, rather than the will of people's representatives as expressed in laws, when the two clearly conflict. *Gray v. Bryant,* 125 So. 2d 846, 851-52 (Fla. 1960). However, in the context of requests for temporary injunctions against a law only *alleged* to be in conflict with the Constitution, such laws carry a presumption of validity. *School Board of Hernando County v. Rhea,* 213 So.3d 1032 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D540a] ("the public interest is better served by maintaining the integrity of the standards and procedures established by the Legislature").

Neither the Legislature nor local legislative bodies should be enjoined from exercising their constitutional and home rule authority. See, *S. Daytona Rests., Inc. v. City of S. Daytona,* 186 So.2d 78 (Fla. 1st DCA 1966) (affirming denial of injunctive relief where restaurant complained that liquor sales ordinance was capricious, a deprivation of property rights, and an unreasonable exercise of police powers, reasoning that Florida law gives cities the power to regulate sale of alcoholic beverages); *Village of North Palm Beach v. S & H Foster's, Inc.,* 80 So.3d 433 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D462b] (reversing injunction requiring village to grant grandfathering status in light of the village's right to impose its code on annexed land even in the face of allegations the code was not constitutional). This is particularly true when the constitutional provision at issue (such as the right to be rewarded for industry asserted in Count III of Plaintiffs' *Complaint*) may be of questionable justiciability:

> [A]n "inspiring sentiment" in a governing document like "[e]veryone has a right to respect for his private . . . life" provides nothing from which judges can objectively determine what "respect for private life consists of." *Id.* It is this very danger that the constitutional structure protects against through the separation of powers.
>
> Our system of government demands that decisions on disputed policy questions face the rigors of the political process. A courthouse, in a quiet conference room closed to the public, should not be the place we define the parameters of the people's freedoms.

Green v. Alachua County, __ So.3d __, 2021 WL 2387983 (Fla. 1st DCA June 11th 2021) [46 Fla. L. Weekly D1378c] (Long, J. concurring and questioning the very justiciability of provisions such as the right to be left alone).

In addition to the presumption of constitutionality of a legislative enactment, the Court also considers the practical impact that enjoining the ordinance would have. For instance, the records attached to the affidavit of City Code Enforcement Clerk Beth Hughes confirm that food trucks are already operating in the authorized zones, and that the ordinance is being applied to them. Mrs. Durham admitted in her testimony that she, too, has "seen food trucks operat[ing] in those zones as well." **TR 69**. Enjoining the enforcement of the ordinance at this point would not only create confusion as to the state of the City's law on food trucks, and perhaps generate further litigation, but it could also have unforeseen impacts (positive or negative) on existing businesses within the City. The status quo which will be preserved by a preliminary injunction is the last, actual, peaceable, uncontested condition which preceded the pending controversy. *Bowling v. National Convoy & Trucking Co.,* 101 Fla. 634, 135 So. 541 (1931). Since the Court does not read the statute as affirmatively granting a universal right to all food trucks to operate freely anywhere, and since the last actual condition which preceded the adoption of the ordinance was the complete prohibition of regular food truck operations (apart from special event permits) in the City. The Court finds that result as antithetical to the statute's intent, which is to ensure food trucks have places within each city and county to operate, subject to non-preempted local regulations.

Creating such issues should be avoided when considering whether to grant a temporary injunction against enforcement of a law. See, *Fredericks v. Blake,* 382 So.2d 368 (Fla. 3d DCA 1980) (noting that an injunction will not be granted where it is readily apparent that it will result in confusion and disorder and produce an injury to the public that outweighs the individual right of the complainant to have the relief sought).

Based on the foregoing, the Court finds that the public interest will not be served by temporarily enjoining the ordinance.

Finally, the Court has considered the order of Circuit Judge Lawrence Mirman in *Diaz v. City of Ft. Pierce,* 2019 WL 1141117, No. 2018-CA-2259 (Fla. 19th Circuit Court, February 22nd 2019), cited by Plaintiffs in support of their motion. While it is true that Judge Mirman granted a temporary injunction against the enforcement of a food truck ordinance, the order is not particularly instructive. For instance, the full test of the ordinance is not set forth in the order. And, as to the likelihood of success, Judge Mirman relies exclusively on the same general principles of law recounted in *Eskind v. City of Vero Beach,* 159 So. 2d 209, 211 (Fla. 1963) upon which Plaintiffs' primarily rely. Further, while a circuit court cannot grant a temporary injunction without making detailed findings as to each of the four factors, the *Diaz* order simply finds sovereign immunity would bar an adequate remedy, with no discussion of 42 U.S.C. § 1983, finds the injunction would serve the public interest only because of a sentence in *Eskind* with no discussion of what public interests the City may have asserted, and fails to even discuss whether the plaintiff's injury was irreparable. It does not appear the order was ever appealed. While the Court is not bound by orders (particularly interlocutory ones) of a sister circuit judge, such orders can be instructive. However, in this case, given the factual dissimilarities and scant factual and legal analysis, the *Diaz* order is not particularly helpful.

Judgment on the Pleadings

The purpose of a motion for judgment on the pleadings is to test the legal sufficiency of a cause of action or defense. *Talcott Resolution Life Insurance Company v. Novation Capital LLC,* 261 So. 3d 580 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2745b]. A motion for judgment on the pleadings filed pursuant to Rule 1.140(c) must be decided wholly on the pleadings and may only be granted if the moving party is clearly entitled to a judgment as a matter of law. *Swim Industries Corp. v. Cavalier Mfg. Co., Inc.,* 559 So. 2d 301 (Fla. 2d DCA 1990). Pursuant to Fla. R. Civ. P. 1.130(b), any exhibits attached to the pleadings must be considered a part thereof for all purposes. Thus, attachments to pleadings shall be considered on a motion for judgment on the pleadings. *Glen Garron, LLC v. Buchwald,* 210 So.3d 229 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D308a]. If the defendant has filed a motion for judgment on the pleadings, the trial judge must treat all of the allegations of the complaint as true, and all of the disputed allegations of the answer as false. The inquiry is then limited to a determination whether the complaint states a cause of action. *Shay v. First Federal of Miami, Inc.,* 429 So. 2d 64 (Fla. 3rd DCA 1983).

The Plaintiffs allege that the City's food truck ordinance violates the Due Process, Equal Protection, and Rewarded for Industry Clauses of the Florida Constitution, both facially and as applied to them. A facial challenge asserts that a statute always operates unconstitutionally. "To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami,* 243 So. 3d 894, 897 (Fla. 2018) [43 Fla. L. Weekly S236a]. Showing a challenged law "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face." *Ogborn v. Zingale,* 988 So. 2d 56, 59 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1763c]. A facial challenge "must fail unless no set of circumstances exists in which the statute can be constitutionally applied." *Cashatt v. State,* 873 So. 2d 430, 434 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1026b]. Stated differently, "if a challenged portion has any lawful application, the insurers' facial challenge fails as to that portion." *Patronis v. United Insurance Company of America,* 299 So.3d 1152, 1156 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1359d]. Showing that a statute "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face," which explains why a "facial challenge to a statute is more difficult than an 'as applied' challenge" as a general matter. *Ogborn*, at 59.

In addition, legislative enactments such as statutes and ordinances "come clothed with a presumption of constitutionality" and "must be construed whenever possible to effect a constitutional outcome." *Brinkmann v. Francois,* 184 So.3d 504, 507-08 (Fla. 2016) [41 Fla. L. Weekly S25a]. This presumption of constitutionality is overcome only upon a showing of invalidity "beyond reasonable doubt," meaning that the presumption "applies unless the legislative enactments are clearly erroneous, arbitrary, or wholly unwarranted." *State v. Hodges,* 506 So. 2d 437, 439 (Fla. lst DCA 1987) (citing *State v. State Bd. of Educ. of Fla.,* 467 So.2d 294 (Fla. 1985). "All doubts as to validity must be resolved in favor of constitutionality, . . . and if a constitutional interpretation is available, the courts must adopt that construction." *Hodges,* 506 So. 2d at 439 (internal citation omitted).

An as-applied challenge is an argument that a particular piece of legislation is constitutional on its face, yet is unconstitutional as applied to a particular case or party because of its discriminatory effects. *Miles v. City of Edgewater Police Dep./Preferred Governmental Claims Solutions,* 190 So. 3d 171,178 (Fla, 1st DCA 2016) [41 Fla. L. Weekly D985a]. Analysis of such claims must therefore be informed not just by the text of the law, but the facts alleged showing unconstitutional distinctions or impacts are resulting from the law's application to the plaintiff(s).

Due Process

Article I, § 9 of the Florida Constitution provides, in relevant part, "no person shall be deprived of life, liberty or property without due process of law." In Count I, Plaintiffs argue that the City's ordinance violates this Due Process Clause. Constitutional challenges to statutes or ordinances involve pure questions of law. *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n,* 838 So.2d 492, 500 (Fla. 2003) [28 Fla. L. Weekly S134a]. While Plaintiffs' *Complaint* does not make clear whether they are proceeding under the procedural or substantive branch of due process, they make no allegations related to having been denied some procedural right. Rather, their due process claim alleges that the ordinance is not rationally related to any legitimate government interest, and that it is arbitrary. ***Complaint*, ¶ 90-91**. The Court will therefore treat Count I as a substantive due process claim.

"Substantive due process protects fundamental rights that are so 'implicit in the concept of ordered liberty' that neither liberty nor justice would exist if they were sacrificed," *Jackson v. State,* 191 So. 3d 423, 428 (Fla. 2016) [41 Fla. L. Weekly S209a]. These special liberty interests usually include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Doe v. Moore,* 410 F.3d 1337, 1343 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C597a] (citation omitted). Courts have been reluctant to expand substantive due process by recognizing any new fundamental rights. *Id.* Thus, "[a]nalyzing a substantive due process claim begins with a 'careful description of the asserted right.' " *Jackson,* 191 So.3d at 428 (quoting *Reno v. Flores,* 507 U.S. 292, 302 (1993)).

"[S]ubstantive due process has two strands—one that protects against deprivation of fundamental rights and one that protects against arbitrary legislation." *Hillcrest Prop., LLP v. Pasco Cnty.,* 915 F.3d 1292, 1297 (11th Cir. 2019) [27 Fla. L. Weekly Fed. C1688a]. "Conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense." *Waddell v. Hendry Cnty. Sheriff's Office,* 329 F.3d 1300, 1305 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C595a].

Under both substantive due process and equal protection, when the legislation being challenged does not target a protected class (such as race, gender or ethnicity), the rational basis test is applied. *WCI Communities, Inc. v. City of Coral Springs,* 885 So.2d 912, 914 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2196b], citing *Restigouche, Inc. v. Jupiter,* 59 F.3d 1208, 1214 n. 6 (11th Cir. 1995); see also *219 S. Atl. Blvd., Inc. v. City of Ft. Lauderdale, Fla.,* 239 F.Supp.2d 1265, 1276 (S.D. Fla. 2002). Absent a suspect classification being targeted, "[s]ubstantive due process challenges are analyzed under the rational basis test; that is, a legislative act of the government will not be considered arbitrary and capricious if it has a rational relationship with a legitimate general welfare concern.' " *Gardens Country Club, Inc. v. Palm Beach County,* 712 So.2d 398, 404 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D682b].

Because the City's zoning ordinance related to food trucks does not involve a suspect class or impinge on a fundamental right, the "rational relationship" standard of review applies. *Kuvin v. City of Coral Gables,* 62 So.3d 625, 629 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1923a], citing *City of Dallas v. Stanglin,* 490 U.S. 19, 23, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). See *Restigouche,* 59 F.3d at 1214.

Rational basis scrutiny "is the most relaxed and tolerant form of judicial scrutiny." *Kuvin,* at 632. Municipal zoning ordinances, which are legislative enactments, are presumed to be valid and constitutional. *Orange County v. Costco Wholesale Corp.,* 823 So.2d 732, 737 (Fla. 2002) [27 Fla. L. Weekly S608b] (specifying that ordinances reflecting legislative action are entitled to a presumption of validity). Statutes and ordinances in Florida not only enjoy a presumption in favor of constitutionality, the Florida Supreme Court has repeatedly held that zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality's police power. See *Dep't of Cmty. Affairs v. Moorman,* 664 So.2d 930, 933 (Fla. 1995) [20 Fla. L. Weekly S500a] ("[W]e have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relationship to legitimate societal policies.").

The test to determine whether a statute violates substantive due process rights is whether it "bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary or oppressive." *Village of North Palm Beach v. Mason,* 167 So.2d 721 (Fla. 1964); *Folmar v. Young,* 591 So.2d 220, 224 (Fla. 4th DCA 1991). When examining a substantive due process claim regarding the adoption of a law, courts must be guided by the following principle:

> Under this same modern understanding of the proper separation of powers, however, courts' power and responsibility to determine whether a law violates substantive due process and equal protection are at their absolute minimum concerning laws, such as business and economic regulations, that do not establish suspect classes and do not infringe fundamental rights. In these areas, courts have little or no guidance from pre-existing constitutional rules and constitutional policies as to whether to replace a legislative choice with a judicial choice. For such laws, courts undertake only a limited review that is highly deferential to the legislature's choice of ends and means.

Silvio Membreno and Florida Ass'n of Vendors, Inc. v. City of Hialeah, 188 So.3d 13, 22 (Fla. 3rd DCA 2016) [41 Fla. L. Weekly D618a]. To limit the subjectivity that may lurk in any rational basis analysis, the Florida Supreme Court, over several decades, has adopted certain analytical principles.

First, as Justice Pariente noted for the majority in *Haire v. Fla. Dep't of Agric. & Consumer Servs.,* 870 So.2d 774, 781 (Fla. 2004) [29 Fla. L. Weekly S67a], under the rational basis test, "a state statute must be upheld . . . if there is *any* reasonable relationship between the act and the furtherance of a valid governmental objective." 870 So.2d at 782 (emphasis in original; citation and quotation omitted). This is "a deferential standard." *Estate of McCall v. United States,* 134 So.3d 894, 921 (Fla. 2014) [39 Fla. L. Weekly S104a] (Pariente, J., concurring in result). In fact, "rational basis scrutiny is the most relaxed and tolerant form of judicial scrutiny." *Kuvin v. City of Coral Gables,* 62 So.3d 625, 632 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1923a] (citation and quotations omitted).

Under this relaxed and tolerant standard for rationality, a law will be upheld if it is "fairly debatable;" meaning that it is fairly debatable whether the purpose of the law is legitimate and it is fairly debatable whether the methods adopted in the law serve that legitimate purpose. See, e.g., *Gallagher v. Motors Ins. Corp.,* 605 So.2d 62, 70 (Fla. 1992) (holding that a tax statute withstood a challenge under the substantive due process provisions of the federal and state constitutions because "it is 'at least debatable' that a rational relationship exists between the premium tax and the objective of increased regulatory control").

> This standard is not only designed to be lenient, it is intended to be objective. The rational basis test does not license a judge to insert courts into a disagreement over policy or politics. It merely requires a judge to decide if reasonable people might disagree. *If we are intellectually honest, we will admit that most legislation easily passes this test.*

Silvio Mebreno, 188 So.3d at 26. Emphasis added.

"The fact that there may be differing views as to the reasonableness of the Legislature's action is simply not sufficient to void the legislation." *Warren v. State Farm Mut. Auto. Ins. Co.,* 899 So.2d 1090, 1096 (Fla. 2005) [30 Fla. L. Weekly S197b]. "Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment." *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 399, 57 S.Ct. 578, 81 L.Ed. 703 (1937). "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla., Inc*. 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

The first step in determining whether legislation survives the rational basis test is identifying a legitimate government purpose which the governing body could have been pursuing. While Plaintiffs' *Complaint* selectively excerpt comments from individual Commissioners during the public hearings on the ordinance geared toward bolstering their argument that the ordinance had a singular economic protectionism basis (**C&A ¶ 47-60**), Florida's state and federal courts are clear that the motives of individual lawmakers in voting for a given law are not relevant in constitutional challenges. See, *Rainbow Lighting, Inc. v. Chiles,* 707 So.2d 939 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D769a] (city commissioners' motives in adopting ordinances are not subject to judicial scrutiny). The proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis is actually considered by the legislative body. *Restigouche,* 59 F.3d at 1214. The second step of the rational basis test asks whether a rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose. *Id.*

STEP 1: LEGITIMATE PURPOSES FOR THE ORDINANCE:

The City points to the following conceivably rational bases for the adoption of the ordinance:

- Desire to maintain vibrant commercial districts where investors have invested in brick-and-mortar storefronts,
- Desire to comply with the legislative mandate that municipalities not completely prohibit the operation of food trucks within their boundaries,
- Desire to prevent large vehicles drawing patrons on foot from vying for limited space in parts of the City where the City has been trying to encourage a walkable and visually pleasing streetscape,
- Desire to reduce the 'free rider' effects brick-and-mortar restaurants often face from mobile vendors which have not incurred the costs and risks associated with investing in brick-and-mortar storefronts,
- Desire to encourage food trucks to serve underserved areas of the City,
- Desire to reduce chances for conflicts, accidents or injuries between foods trucks and cars, bicycles, or pedestrians,
- Desire to manage limited parking and pedestrian spaces in zones in the City built out during a more pedestrian-focused era, and
- Desire, generally, to balance competing interests between citizens, and to promote the welfare, economic vitality and, ultimately, the general welfare of the City.

It is well-settled that permissible bases for land use restrictions include concern about the effect of the proposed development on traffic, on congestion, on surrounding property values, on demand for city services, and on other aspects of the general welfare. See *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1375 (11th Cir. 1993).

The Court has carefully considered Plaintiffs' response brief and oral arguments (**TR. 9-18**), wherein they make arguments why each of the City's bases are flawed. However, a court should not set aside the determination of public officers in land use matters unless it is clear that their action has no foundation in reason, and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. See *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield,* 907 F.2d 239, 243 (1st Cir. 1990). The question is only whether a rational relationship exists between the ordinance and a conceivable legitimate governmental objective. See *Id.* at 245. Plaintiffs strongly argue each of the City's bases aren't really justified, but that misses the point. If the question is at least debatable, there is no substantive due process violation. *WCI Communities,* 885 So.2d at 914.

It is also of note that the City Commission did not simply decide one day to adopt the ordinance. Rather, after the Legislature mandated that the City not completely prohibit food trucks from operating within its limits, the City was compelled to adopt some food truck regulations. Before doing so, its Commission and planning board both conducted public hearings where the City's professional planning staff could make recommendations, and where citizens and business owners could speak to the matter. ***Answer,* Exibits B - E**. At the injunction hearing, Plaintiffs admit they were present and spoke at these public hearings. **TR 29**. And, while Plaintiffs may have believed or expected that the new statute would allow them to operate anywhere in the City, the Legislature clearly did not create such a mandate. Instead, it simply prohibited cities and counties from maintaining a complete ban of food trucks. Since the City Commission was compelled, for the first time, to consider how to properly zone food truck operations that heretofore were completely prohibited outside of special events, it would not be acting in an arbitrary or irrational way were it to consider any or all of the bases offered by the City.

STEP 2: WERE THE BASES OFFERED FURTHERED BY THE ORDINANCE:

As to whether a rational basis exists for the City Commission to believe that the ordinance would further the hypothesized purpose, a court will start with the rule that it must give great deference to economic and social legislation. See *Gary v. City of Warner Robins, Ga.,* 311 F.3d 1334, 1339 (11th Cir. 2002) [16 Fla. L. Weekly Fed. C44a]. As noted earlier, if any reasonable relationship exists between the act (the adoption of the ordinance) and the furtherance of the valid governmental objectives, the act must be upheld. If it is fairly debatable whether the purpose of the ordinance is legitimate, and it is fairly debatable whether the methods adopted in the ordinance serve that legitimate purpose, the ordinance must be upheld.

And the City is not obliged to prove these questions. Rather, it is the burden of the party challenging the law to prove, through evidence, that "there is *no conceivable* factual predicate which would rationally support the [law]." *Fla. High Sch. Activities Ass'n v. Thomas,* 434 So.2d 306, 308 (Fla. 1983) (emphasis added). See, *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.,* 111 So.2d 439, 443 (Fla. 1959) (holding that zoning regulations are presumptively valid, "and the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is unreasonable and bears no substantial relation to public health, safety, morals or general welfare").

Even if the wisdom of the City's policy is regarded by Plaintiffs foolish or unfair, so long as the court can find it to be debatable (in other words, if reasonable people might disagree), the City Commission is entitled to its judgment. And, "[i]f we are intellectually honest, we will admit that most legislation easily passes this test." *Silvio Mebreno,* 188 So.3d at 26.

Plaintiffs' *Complaint* characterizes the ordinance as nothing more than economic protectionism, and that the rationale behind, and economic "winner and loser" effects of, the City's ordinance should be subjected to adversarial testing in the judicial branch. However, under a rational basis test, "a legislative choice is not subject to

courtroom fact-finding. . . ." *Haire v. Florida Dept. of Agriculture and Consumer Services,* 870 So.2d 774, 787 (Fla. 2004) [29 Fla. L. Weekly S67a] (quoting *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Indeed,

> a court conducts hearings to determine facts only if there is a good faith dispute of material fact. In a rational basis review, however, once a court determines there exists a good faith conflict over facts, some of which support the legislative finding, the court must uphold the finding because the law must be upheld if it is at least debatable.

Silvio Membreno, at 27-28. Quotations and citation omitted.

Regulating the location and operation of food trucks within a municipality is rationally related to public health, safety, and welfare. Food trucks attract people on foot near roads. They must park. They must be powered. They are by necessity of a size that can have an aesthetic impact. And it is reasonably debatable that the City Commission could believe that the ordinance's provisions would further the aims of maintaining vibrant commercial districts where investors have invested in brick-and-mortar storefronts, preventing large vehicles drawing patrons on foot from vying for limited space in parts of the City where the City has been trying to encourage a walkable and visually pleasing streetscape, encouraging food trucks to serve underserved areas of the City, reducing chances for conflicts, accidents or injuries between foods trucks and cars, bicycles, or pedestrians, managing limited parking and pedestrian spaces in zones in the City built out during a more pedestrian-focused era, balancing competing interests between citizens who desire food trucks as a dining option vs. those who feel they are undesirable, and promoting the overall welfare and economic vitality of the City.

Unlike many ordinances which are inspired wholly at the local level, the Court again notes that the City acted after it was mandated by the Legislature to create some regulation to allow some operation of food trucks in at least some parts of the City. The ordinance is the City Commission's first effort at creating such regulations, which it did only after hearing from its professional planning staff and holding public hearings. It may well be as time and experience with the ordinance is gained that the Commission tweaks its initial regulatory efforts, but it is not the Court's role to second-guess the reasons supporting the ordinance:

> [I]t is understandable that a court might attempt to import concepts of record-based fact finding into their review of the legislative process. But this attempt constitutes error. While courts deal with record-based facts of past events, legislatures generally do not.
>
> When enacting laws, legislatures are not normally looking at the type of concrete facts found in courtrooms by judges and juries. Consider a legislature debating whether to enact rent control. Does an emergency exist that justifies capping rents? The question of the existence of an emergency is not so much an empirical fact as a value judgment. Even the decision of what criteria to use to decide whether an emergency exists (e.g., rent for middleclass families, displacement in older neighborhoods, availability of affordable housing for the working poor, or the number of homeless) rests not on concrete facts, but on a community's attitudes and shared vision relating to that particular problem. A situation viewed as perfectly acceptable in one community may be viewed as a crisis in another. The legislative choices in such matters are not driven by the sort of finding of historical facts regarding past events which occurs in a courtroom. They are based instead on legislative findings that are more akin to value judgments than judicial fact finding. In our system of government, only democratically elected representative bodies are competent to form the sorts of legislative judgments upon which these legislative choices are based.

Silvio Membreno, at 27. "Most laws dealing with economic and social problems are matters of trial and error." *Am. Fed'n of Labor, Ariz. State Fed'n of Labor v. Am. Sash & Door Co.* 335 U.S. 538, 553, 69 S.Ct. 260, 93 L.Ed. 222 (1949) (Frankfurter, J., concurring). For this reason, "Legislative bodies have broad scope to experiment with economic problems." *Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

Finally, as to the Plaintiffs' "economic protectionism" arguments, the City's *Answer* admits that one of the motives discussed by Commissioners during the public hearings on the ordinance and in the crafting of authorized and not authorized districts for food trucks to operate in was a desire to reduce the 'free-rider' effects brick-and-mortar restaurants often face from mobile vendors which have not incurred the costs and risks associated with investing in brick-and-mortar storefronts. The City's motion points out that many cities across the country with historical downtowns have worked hard in partnership with private sector investors to revitalize these areas, and Plaintiffs response does not dispute that assertion. While *Eskind* does prohibit legislation which nakedly seeks only to protect one business by harming another for no reason other than to help the protected business be profitable, the City's ordinance is not of the same kind as was at issue in *Eskind.* And while Florida's appellate courts appear to have not yet weighed in on the topic, as will be discussed *infra,* those foreign courts to have squarely analyzed similar food truck ordinances have found them to not violate substantive due process. The Court therefore concludes that the ordinance does not violate Plaintiffs' substantive due process rights.

Equal Protection

Article I, § 2 of the Florida Constitution provides, in relevant part, "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property." In Count II, Plaintiffs argue that the City's ordinance violates this Equal Protection Clause.

It is well-settled that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). "Equal protection is not violated merely because some persons are treated differently than other persons. It only requires that persons similarly situated be treated similarly." *Duncan v. Moore,* 754 So.2d 708, 712 (Fla. 2000) [25 Fla. L. Weekly S215a].

The constitutional principle of equal protection "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *City of Fort Lauderdale v. Gonzalez,* 134 So.3d 1119, 1121 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D286a] (citing *F.C.C. v. Beach Commc'ns., Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69-70, 33 S.Ct. 441, 57 L.Ed. 730 (1913).

As with due process, an equal protection claim not invoking a suspect class is examined under the rational basis test, where the challenged law bears a strong presumption of validity and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns.,* 508 U.S. at 313, 113 S.Ct. 2096. "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id*. at 315, 113 S.Ct. 2096. Indeed, "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature . . . actually articulate at any time the

purpose or rationale supporting its classification." *Nordlinger v. Hahn,* 505 U.S. 1, 15, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). The burden is on the party attacking the legislation to negate every conceivable basis which might support it. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351. (1973). A classification does not fail rational basis review merely because it is not made with mathematical nicety or because in practice it results in some inequality. *Heller,* 509 U.S. at 321, 113 S.Ct. 2637.

A property owner may raise an equal protection claim based on the application of a land use regulation. To prove such a claim, "the plaintiff must show (1) that he was treated differently from other similarly situated individuals, and (2) that the defendant unequally applied a facially neutral ordinance for the purpose of discriminating against him." *City Nat'l Bank of Fla. v. City of Tampa,* 67 So. 3d 293, 297 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D720a]; *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n,* 558 F.3d 1301, 1307 (11th Cir. 2009) [21 Fla. L. Weekly Fed. C1554a]. The claim may also be established by proof that the plaintiff "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *City Nat'l Bank of Fla.,* 67 So. 3d at 297 (quoting *Vill. of Willowbrook,* 528 U.S. at 564, 120 S.Ct. 1073).

Plaintiffs primarily rely on *Chicago Title v. Butler,* 770 So. 2d 1210, 1215-20 (Fla. 2000) [25 Fla. L. Weekly S1031a]; *Eskind v. City of Vero Beach,* 159 So. 2d 209, 212 (Fla. 1963); and *Liquor Store v. Continental Distilling Corp.,* 40 So. 2d 371, 374-76 (Fla. 1949) in support of their claim that the City's ordinance is not rationally related to any interest other than protectionism, which they argue is outside the government's police powers as a matter of Florida constitutional law. These cases, however, are distinguishable.

In *Chicago Title,* a developer challenged several sections of the Florida Insurance Code which prohibited title insurance agents from negotiating or rebating to their clients any portion of the risk premium charged for the issuance of title insurance. Under the challenged Insurance Code provisions, for policies sold by agents, title insurers were guaranteed thirty percent of the risk premium, and title insurance agents retained the remaining seventy percent. The developer sought the right to negotiate the agent's share of the risk premium only. *Chicago Title,* at 1213.

The developer argued that the rule was facially unconstitutional as a violation of his substantive due process rights, claiming that the statutory provisions prohibiting title insurance agents from negotiating partial rebates of their fees with their customers deprived him of his constitutionally secured property interest in contracting and negotiating a commission paid to title insurance agents. *Id.*, at 1214.

The *Chicago Title* court concluded that the anti-rebate statutes did infringe upon a citizen's property rights and unconstitutionally restrict a citizen's rights to freely bargain for services, stating: "While we acknowledge the Legislature's interest in protecting title insurers and agents against insolvency, such purpose is not furthered by the anti-rebate statutes presented herein." *Chicago Title,* at 1220. The *Chicago Title* opinion turned on the complete denial of the ability of title insurance policy customers to look for better policy prices. It focused on the justification for the statute provided by the state (to ensure insurance companies were solvent), and announced no broader proposition about zoning or regulatory enactments which may impact businesses' ability to sell their products wherever and whenever they desire.

In reviewing the nineteen opinions/orders issued by Florida courts citing *Chicago Title,* none cite the case as a basis to overturn a police power regulation. Indeed, while the case of *Enterprise Leasing Co. South Central, Inc. v. Hughes,* 833 So.2d 832 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D2656b] cites *Chicago Title,* it goes on to uphold a state statute imposing a damages cap on short term car leases, even though it limited the liability of car and truck rental companies, but not the liability of any other business which rents or lends a vehicle. *Enterprise Leasing*, at 839. The court noted that the Legislature had several rational reasons to shift economic responsibilities with the statute, but concluded that the "appellee has not shown beyond a reasonable doubt that section 324.021 violates the equal protection and due process clauses of the Florida Constitution and has not overcome the presumption that the statute is constitutional." *Id.*

In the next case Plaintiffs rely on, *Eskind v. City of Vero Beach,* 159 So. 2d 209 (Fla. 1963), the city adopted an ordinance which prohibited the use of outdoor signs to advertise rates for tourist accommodations, but did not prohibit other content, and did not prohibit other businesses from advertising their prices. It is first noteworthy that this 1963 opinion fails to even reveal which clause of the Florida Constitution was at issue, although referral to the lower court's opinion reveals a reference to "substantive due process." *Eskind v. City of Vero Beach,* 150 So.2d 254, 258 (Fla. 2d DCA 1962).

In any event, the *Eskind* court found that the ordinance was not a "valid exercise of the police power", reasoning:

> In the instant case, we can find no justification from an aesthetic viewpoint to prohibit motel signs advertising rates but permitting every other type of motel advertising sign imaginable. The motel which can offer an attractive rate is prohibited from announcing its rate advantage while more luxurious establishments are permitted to appeal by advertising signs announcing television, air conditioning, swimming pools, bars and grills and every other conceivable item of tourist attraction. Similarly, all motels are prohibited from advertising rates by signs while every other business in the vicinity is left free to appeal to the passing motorist with signs announcing charges for its goods or services. The motel cannot display its charges on signs, while restaurants, bars, filling stations, and every other type of business catering to travelers are permitted to do so. It seems obvious to us that a rate sign in front of a motel is no more offensive to the aesthetic sensibilities of the traveler or the community than would be a rate sign in the same immediate area advertising the charges of the other business activities. Similarly, a sign advertising rates is not aesthetically distinguishable from a sign advertising various aspects of a motel's services or conveniences.

Eskind, at 211.

Setting aside that this kind of regulation would now be a First Amendment violation under *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) [25 Fla. L. Weekly Fed. S383a], Vero Beach also argued that its ordinance contributed to the economic welfare of the community. Specifically, the city noted that tourism contributed substantially to its economy, that millions of dollars had been invested in luxury motels, and that "if less-attractive establishments were permitted to announce their rates on outdoor signs they would entice travelers away from the more expensive hostelries." *Eskind*, at 211. The court rejected this justification:

> Although the argument advanced by the City appears plausible, we fear that it is not supportable on constitutional grounds. If it were, then any legitimate business practice which provides a competitive advantage over others in the same business could conceivably be condemned by an exercise of the police power. There are cases which recognize the exercise of the police power to promote the general economic welfare of the community. Those which approve comprehensive zoning plans are typical. However, we have found none which permits discriminatory legislation damaging to one segment of a class of businesses and beneficial to another segment of the same class. Such is the impact of the subject ordinance. The employment of the police power will not be upheld when its exercise imposes an unreasonable restriction on private business on the pretense of

promoting the community interest. Neither a state nor a city can arbitrarily interfere in private businesses or impose unreasonable and unnecessary restrictions upon them, under the guise of protecting the public. In determining the validity of legislation of the instant type, we must consider the effect of the ordinance on the rights of the citizen from the aspect of its practical impact. A restriction of the type here employed must be supported by some sound basis of necessity to protect the public welfare. It must not encroach unreasonable on an individual's right to conduct a legitimate business or discriminate in its application and impact between individuals engaged in the same business. When there is no reasonably identifiable rational relationship between the demands of the public welfare and the restraint upon private business, the latter will not be permitted to stand.

The right to advertise one's business is an aspect of property incidental to the right to engage in the business. A municipality may provide for the protection of the public against fraudulent advertising and, as mentioned above, in appropriate circumstances may move without discrimination to preserve the city's aesthetic qualities. Nevertheless, it does not have the power to impose arbitrary restrictions which deprive an individual of his property rights under the banner of regulation. We have the view that the subject ordinance is nothing less than an attempted exercise of the police power to restrict competition between favored and unfavored segments of the same business activity.

Eskind, at 212. Citations omitted.

The facts in *Eskind* are distinguishable from the case *sub judice.* The Eskind court was addressing a law which prohibited all businesses engaged in the same business (hotels) from advertising prices on street signs so as to protect the 'higher-end' hotels from lower priced competition. The City's ordinance does not create such distinctions between restaurants. Rather, it adopts new regulations on a different business class. While Plaintiffs' may argue that a mobile food truck and a brick-and-mortar restaurant are the same business class because both sell cooked food, they are clearly distinct in many ways. For instance, a brick-and-mortar restaurant cannot pick itself up and travel to a different location with ease if customer traffic is slow at its location. Its insurance requirements, maintenance requirements, staffing requirements, water and energy use, and customer experience are all distinctly different. See, *Other Place of Miami, Inc. v. City of Hialeah Gardens,* 353 So.2d 861 (Fla. 3rd DCA 1977), wherein the court ruled that the city's ordinance lowering the operating hours of bars, even though alcohol could be purchased during the closing hours in other venues, was a valid exercise of police power given the differences between the comparators.

Further, the ten Florida court opinions which cite *Eskind,* none cite it to overturn an ordinance similar to the City's. Indeed, the federal district court in *Patch Enterprises, Inc. v. McCall,* 447 F.Supp. 1075 (M.D. Fla. 1978) noted *Eskind's* principles, but went on to uphold an ordinance limiting the hours of bottle clubs. In *Patch,* the bottle club[6] originally operated in the City of Leesburg. However, that city adopted an ordinance outlawing such establishments, and so the owners moved their business to unincorporated Lake County.

Neighboring citizens soon complained of the negative impact of the noise, brawls, drunk-driving and other bad behavior of club patrons in the club's early morning hours. In response, the county adopted an ordinance limiting the operating hours of establishments "that deal in alcohol." *Patch,* at 1078. The club sued, alleging equal protection and due process violations of the Florida and federal constitutions. In upholding the ordinance, the Patch court found as follows:

The legitimate interests which defendants allege are the objective of the ordinance are generally the safety and welfare of the county's residents. It was the County Commissioners' decision that it best served their constituents to control the sale and consumption of alcoholic beverages during the late night and early morning hours. More specifically, a decrease in the incidence of drunken driving and automobile accidents, as well as sudden public violence, often resulting in serious injury or death, was intended. These are not unreasonable legislative goals.

The means employed by the ordinance to attain its intended objectives, are an absolute ban on the sale or permitted consumption of alcoholic beverages by members of the class of "establishments dealing in alcoholic beverages." In enacting socio-economic, general welfare legislation, states and their subdivisions have a wide latitude of discretion to select implementing classifications. Such instrumental classifications need not be universal, all-inclusive, or drawn with absolute precision. The overall requirement of the Equal Protection Clause, however, is that the statutory line that draws distinctions and classifications is a rational one, bearing some rational relationship to a legitimate state purpose.

On its face, the county ordinance in this case applies to any establishment which deals in alcoholic beverages, as defined by the ordinance. That definition includes bottle clubs, hotels, motels, restaurants, night clubs, or similar establishments where alcoholic beverages are sold, dispensed, served, or permitted to be consumed. Defendants, in addition, have interpreted the ordinance as applying uniformly to all bars, lounges, country clubs, and any establishment or business that sells or permits the consumption of alcoholic beverages. Plaintiffs' contention that the ordinance's classification discriminates against them, therefore, is contrary to both the facial language and the interpretation of the ordinance. The only remaining question, therefore, is whether the uniform classification prohibited by the ordinance is drawn without any rational relationship to the intended, general welfare purpose of the ordinance. The Court holds that this absolutely and unvaryingly prohibited classification, evenly applied, is fairly, substantially, and reasonably related to the safety and general welfare aims of the ordinance.

Patch, at 1079-80. Citations omitted. Additionally, the court found:

The Court has already found that the stated purposes of the county ordinance in this case are reasonable ones. There is no constitutional provision, or federal statutory law, that guarantees the right to sell or consume alcoholic beverages. Neither is there a fundamental right or liberty of individuals to sell, use, or permit the consumption of alcoholic beverages in one's business. The particular ordinance in this case is a reasonable legislative instrument to achieve a legitimate concern of the county. It is neither arbitrary or irrational; and this Court will not propose to review the wisdom or efficaciousness of it. The ordinance, as a reasonable result of the county's discretion to regulate the sale and use of alcoholic beverages for the safety and welfare of its residents, does not offend the Due Process Clause.

Id., at 1081. Citations omitted.

Plaintiffs' final case, *Liquor Store v. Continental Distilling Corp.,* 40 So. 2d 371 (Fla. 1949), was a suit between two private parties, supplier and seller of whiskey. It appears a liquor supplier wanted seller to stop selling its whiskey at a price lower than a then Florida statute provided for. While the opinion contains truisms regarding the government's proper police power role when regulating industry, the outcome of the case was the court's decision not to force sale at the higher price because the underlying statue was "a price-fixing statute" which interfered in the marketplace just to protect the seller and its brand identity, but with no public policy benefits. *Liquor Store,* at 375-76. The Court finds price-fixing statute cases such as *Liquor Store* to be factually distinct from the ordinance factually distinct from the case *sub judice.*

Indeed, the federal appeals court for Florida distinguished *Liquor Store* in a case with facts somewhat more similar to those in this case. In *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority,* 906 F.2d 516 (11th Cir. 1990), car rental agency Alamo maintained

its operation location off the airport's premises. Five other rental companies had "on-airport" concessions, which had been obtained through competitive bidding. In 1981, without permitting competitive bidding, the Authority rolled over the existing concession contracts, and in July 1982 the Authority passed a resolution requiring the off-airport car rental companies to pay the Authority ten percent of their gross receipts obtained from customers who came from the airport. In addition, the resolution prohibited the off-airport car rental companies from soliciting business in the airport, and forbade them to pick up passengers who lacked a reservation. The resolution also prevented car rental companies from having more than one "courtesy" van at the airport terminal at any time. Car rental companies located at the airport also paid a ten percent fee to the Authority. The on-airport companies rent counter space and parking spaces from the Authority, and they enjoy the accompanying exposure to walkup customers. *Alamo,* at 517.

Alamo sued, claiming violations of various constitutional provisions including due process and equal protection. The court's first action on the case overturned an injunction against the airport authority, and found that Alamo could not prove an equal protection violation because it it was not authorized to be on property. *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.,* 825 F.2d 367 (11th Cir. 1987). After remaining counts were addressed on remand, the Eleventh Circuit found Alamo could not prove a due process violation either as the airport's rules were rationally related to its legitimate governmental interests.

In responding to Alamo's invocation of the *Department of Insurance v. Dade County Consumer Advocate's Office,* 492 So.2d 1032 (Fla. 1986) (predecessor of the *Chicago Title* case) and *Liquor Store* cases for the proposition that the government was undermining its competitive abilities, the *Alamo* court noted:

> These cases are entirely inapposite. In *Department of Insurance,* the Florida Supreme Court struck down a Florida statute that prohibited insurance agents from accepting lower commissions from their customers than the commission set by the insurer; the court reasoned that the statute "unnecessarily limit[ed] the bargaining power of the consuming public. . . ." 492 So.2d at 1033. Here the consuming public continues to have a choice between on-airport and off-airport sources of rental cars, and we do not see how the exclusion of Alamo from the opportunity to bid competitively for an on-airport concession restricts the right of the *consumer* to bargain with the rental car company. *Liquor Store* is no more helpful to Alamo as it involved a "price fixing statute" to maintain retail prices; our attention has not been directed to any part of the record to support a conclusion that rental car prices in the Sarasota-Bradenton area have been "fixed."
>
> In the absence of any authority to the contrary, we conclude that the Authority's failure to hold competitive bidding for the on-airport concessions prior to imposing the user fee did not violate the due process clause of either the United States or Florida Constitutions.
>
> The Authority's resolution imposing on Alamo a fee of ten percent of gross receipts derived from airport customers does not violate the due process clause of the Florida or United States Constitution, nor does it violate the commerce clause of the United States Constitution. The resolution's single van restriction is rationally related to a valid local purpose, mitigating airport traffic congestion, and is, therefore, acceptable. . .

Alamo, 906 F.2d at 523.

While the City's ordinance does permit a food truck operated by a brick-and-mortar restaurant to operate in the downtown location Plaintiffs' desire to operate in, such trucks are confined to operation only on the restaurant's property as an accessory use, pursuant to an approved site plan, and with truck branding tying it to the restaurant. While Plaintiffs are free to negotiate with a restaurant to re-brand itself and serve the food that restaurant would serve (thus gaining access to the downtown zone), they are not prohibited under the ordinance from engaging in commerce in the authorized zones, and in any other city or county in the region. Nothing in the ordinance seeks to regulate the prices Plaintiffs charge, nor how the Plaintiffs advertise and market themselves, and the ordinance does not constrain the right of Plaintiffs and customers to negotiate food prices.

Florida's courts routinely find that local government ordinances which exercise the home rule zoning or police power in ways which impact businesses or their owners in some positive or negative way to not be equal protection violations. For instance, in *Cowan v. St. Petersburg,* 149 Fla. 470, 6 So.2d 269 (1942), the Florida Supreme Court ruled that a municipal ordinance requiring places where intoxicating liquors were sold to be closed during stated hours, as applied to a restaurant where liquors were sold, was held not to work an unlawful discrimination between persons engaged in the restaurant business, although restaurants where liquors were not sold operated without the same restriction. And in *State v. City of Miami Springs,* 245 So.2d 80 (Fla. 1971), the court held that the city's adoption of one water rate for single family residences and a different rate unrelated to use for apartments and motels was not an arbitrary violation of due process or equal protection.

While no Florida appellate court has of yet addressed the constitutionality of a food truck regulation akin to the City's ordinance, the high courts in Illinois and Maryland have found similar regulations to have been rationally based. For instance, in *LMP Services, Inc. v. City of Chicago,* 2019 IL 123123 160 N.E.3d 822 (Ill. 2019), the Illinois Supreme Court addressed a prohibition of food trucks within 200 foot of any restaurant's principal customer entrance. The court upheld the ordinance as it contained various accommodations and exceptions, and was arguably created to (1) balance the interests of brick-and-mortar restaurants with food trucks, (2) encourage food trucks to locate in underserved areas, and (3) manage sidewalk congestion:

> [Chicago] has a legitimate governmental interest in encouraging the long-term stability and economic growth of its neighborhoods. The 200-foot rule, which helps promote brick-and-mortar restaurants and, thus, neighborhood stability, is rationally related to this legitimate interest. Importantly, too, in 2012, when the City passed Ordinance 2012-4489, section 7-38-117 was added to the Code. This section created a number of food truck stands, i.e., designated areas along the public way where food trucks are permitted to park without being subject to the 200-foot rule. Thus, the City has not entirely banned food trucks. Rather, it has created a regulatory scheme that attempts to balance the interests of food trucks with the need to promote neighborhood stability that is furthered by brick-and-mortar restaurants.

LMP Services, 160 N.E.3d at 828.

More recently, the Maryland's high court in *Pizza di Joey, LLC v. Mayor of Baltimore,* 470 Md. 308, 235 A.3d 873 (Ct. App. Md. 2020) ruled that a city's rule prohibiting food trucks from operating within 300 feet of brick-and-mortar restaurants did not violate due process or equal protection because the city proffered arguably valid policy reasons for the prohibition, and did not result in a total ban on the trucks. The court noted that the City's economist testified that the City's rule:

> addressed a "free rider" problem posed by food trucks siphoning business from brick-and-mortar restaurants after those restaurants have invested their resources and become semi-permanent members of the neighborhoods in which they are based. The City's expert testified that, while food trucks provide an important service, they threaten the vibrancy and viability of the City's commercial districts if allowed to operate too closely to brick-and-mortar establishments that sell primarily the same type of food.

Pizza di Joey, at 235 A.3d 879. In analyzing the facts, the *Pizza di Joey* court began by finding:

> In modern America, Baltimore City and other local governments have had more on their plates when promoting the general welfare than just ensuring economic vitality. In 2020, the coronavirus pandemic and concerns about racism in policing have dominated civic discourse in Maryland and throughout the nation. In Baltimore City, policymakers and concerned citizens have confronted issues relating to equality and policing (and other social issues) for many years prior to this one. Nevertheless, promoting and maintaining economic strength remains an important governmental interest in Baltimore and other cities. Without economic strength, cities struggle to remain vibrant, as tax bases shrink and public safety challenges increase. Promoting a city's general welfare requires that local lawmakers balance competing interests and make sometimes difficult choices. This case concerns Baltimore City's efforts to balance the interests of brick-and-mortar restaurants and food trucks.

Pizza di Joey, 235 A.3d at 879. It then noted:

> Not every city has had the same experience with food trucks over the past decade. In some cities, the emergence of food trucks has been viewed as a wholly positive development. In other cities, the relationship between food trucks and established businesses and the local citizenry has been more complicated. But there is no doubt that food trucks have become increasingly popular and prevalent in Baltimore and many other American cities over the past decade.

Id., at 880. Next it found:

> In 2014, responding to the increasing popularity of food trucks, the City established a series of regulations that apply to the operation of food trucks within its boundaries. The stated goal of the legislation was to promote "entrepreneurship and a vibrant business climate for food truck vendors and local restaurants," taking into account "pedestrian, traffic and parking concerns" while also promoting "public safety and health." * * *

Id., at 882-83. Citations omitted.

In finding the ordinance was constitutional, the court wrote:

> Here, the 300-foot rule does not effectively deny Pizza di Joey, Madame BBQ, and other City-licensed mobile vendors from pursuing their chosen vocation. Rather, it regulates the places where they may do so within the City. It is undisputed that the Ordinance provides other locations in the City where mobile vendors may operate. And, if mobile vendors are not satisfied with those locations and the other locations where they are permitted to park in the City, they may pursue their chosen vocation across the City line, as Pizza di Joey and Madame BBQ did.

Id., at 897. The court went on to rule:

> As explained above, the rational basis test requires us to consider whether the 300-foot rule is rationally related to a legitimate government interest. We agree with the Court of Special Appeals that the 300-foot rule rationally furthers the City's legitimate interest in addressing the free-rider problem that arises when mobile vendors set up within a block of direct brick-and-mortar competitors.
>
> When we review a legislative enactment under the rational basis test, we do not substitute our judgment for that of the legislative body. Rather, we recognize that the Legislature exercises a large discretion in determining what the public welfare requires, in what may be injurious to the general welfare of the public and also what measures are either necessary or appropriate for the protection and promotion of these interests. This is particularly the case when the legislative body is dealing with a serious problem in a new and untried fashion; in such cases, courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem.
>
> For these reasons, legislative decisions like the 300-foot rule carry a strong presumption of constitutionality, despite the fact that, in practice, its laws result in some inequality. Therefore, we will not invalidate the 300-foot rule unless the City misused or abused its legislative authority, or acted arbitrarily, oppressively or unreasonably in enacting the Rule.

Id., at 898. Citations and quotations omitted.

Finally, the court addressed the plaintiffs' economic protectionism argument:

> The Food Trucks argue that the City misused and abused its legislative authority by infringing on the practice of their trade in order to enrich existing brick-and-mortar restaurants. According to the Food Trucks, the City's protectionist goals in enacting the 300-foot rule, by definition, do not constitute a legitimate government interest. We disagree.
>
> The City established at trial that protecting brick-and-mortar restaurants through the 300-foot rule is not an end in itself, but rather is a means to an end: maintaining vibrant commercial districts. The creation and retention of vibrant commercial neighborhoods surely is a legitimate interest that the City may seek to achieve through the enactment of ordinances. That the means it has chosen to do so in this instance reduces the competition brick-and-mortar restaurants face from mobile vendors does not render the 300-foot rule unconstitutional. To the contrary, our cases demonstrate that, in furtherance of the general welfare, legislative bodies may limit competition as long they do not impermissibly discriminate based on a suspect classification or otherwise make arbitrary and capricious distinctions that do not further the general welfare of the community.
>
> ***
>
> [T]he circuit court found that the City's goal in enacting the 300-foot rule is to promote the general welfare by ensuring the vibrancy of the City's commercial districts. The Food Trucks point to no evidence in the record that contradicts this finding, and the circuit court did not clearly err in reaching this conclusion.
>
> Nor do the Food Trucks seriously dispute that the 300-foot rule rationally furthers this legislative goal. The circuit court found that the Rule helps maintain the vitality of the City's commercial districts by eliminating the threat that mobile vendors pose to brick-and-mortar restaurants and, therefore, helping to ensure that restaurants become permanent fixtures in their neighborhoods. This, in turn, provides jobs, property tax revenue, and prevents a growing number of vacant properties. The court also determined that the 300-foot rule protects the contributions brick-and-mortar establishments make to the City's commercial districts, promotes entrepreneurial investments and opportunity, and diversifies the marketplace to maximize positive economic effect by creating meaningful choices for the consumer. The Food Trucks do not challenge these factual findings, and even if they did, such a challenge would fail. . .
>
> As noted at the outset, local governments routinely must balance competing interests to promote the general welfare. This requires that cities such as Baltimore sometimes make difficult choices that help some businesses and hurt others. While the Food Trucks discern no cost to the City in allowing the free market to decide, without any interference, how mobile vendors would affect nearby restaurants, the City's lawmakers reasonably could have seen it otherwise. They reasonably could have concluded that, just as a "free lunch" often turns out not actually to be free, there would be a cost to the purported "free lunch" of unregulated competition that the Food Trucks offer here: mobile vendors would siphon business from brick-and-mortar restaurants and harm the economic vitality and, ultimately, the general welfare of the City. It was within the City's authority to enact an economic regulation designed to address the "free rider" problem [the economist] described. And the City did so in the context of a robust regulatory regime that also allows mobile vendors to operate in specific dedicated zones, as well as in other locations that are not within 300 feet of directly competing brick-and-mortar restaurants. While the Food Trucks claim this balancing of interests infringes on their rights to substantive due process and equal protection, we see it simply as democracy in action.

Id., at 899-900. Footnote, citations and quotations omitted.

Absent controlling authority from Florida's appellate courts, the Court finds the analysis and reasoning of these foreign authorities are persuasive, and that the constitutional tests used to arrive at their holdings are not significantly different from the standards Florida's courts will apply to similar constitutional challenges to ordinances. The Court therefore finds the ordinance does not violate the Equal Protection Clause.[7]

Basic Rights—Rewarded for Industry

Article I, § 2 of the Florida Constitution provides:

> All natural persons. . .have inalienable rights, among which are the right. . .to be rewarded for industry. . ."

In Count III of Plaintiffs' *Complaint,* they allege that the ordinance violates their Florida constitutional "right. . .to be rewarded for industry." ***Complaint,* ¶ 122**. While there is not a substantial body od case law analyzing the clause, the right to occupational freedom is a nontrivial constitutional right, entitled to nontrivial judicial protection. *Muratti-Stuart v. Department of Business and Professional Regulation,* 174 So. 3d 538 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1981a]. However, the right to pursue a lawful business is not an absolute right. It is subject to reasonable restraint in the interest of the public welfare, and legislative limitations upon its exercise are constitutional if they rationally relate to a valid state objective. *Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State,* 392 So. 2d 1296 (Fla. 1980); *Department of Business Regulation v. National Manufactured Housing Federation, Inc.* 370 So. 2d 1132 (Fla. 1979).

Legislative limitations upon the exercise of the right to contract and the right to pursue a lawful business are constitutional if they rationally relate to a valid state objective. *Knowles v. Central Allapattah Properties, Inc.,* 145 Fla. 123, 198 So. 819 (1940). "A statute that places some constraints on the time and place where a person can practice a trade, but does not entirely prevent the person from pursuing that trade (and does not discriminate based on geography or another suspect classification that suggests the proffered legitimate governmental interest is pretextual), is reviewed under the rational basis test." *Pizza di Joey, LLC v. Mayor of Baltimore,* 470 Md. 308, 349, 235 A.3d 873 (Ct. App. Md. 2020) (upholding food truck zone rules).

In *Triple A Services, Inc. v. Rice,* 131 Ill.2d 217, 545 N.E.2d 706 (Ill. 1989), the Supreme Court of Illinois found a Chicago ordinance prohibiting mobile food vendors from conducting their businesses within the city's medical center district did not violate either equal protection or due process, in part because they were able to operate in other areas of the city and the city had rational reasons for adopting the location restrictions.

While Florida's appellate courts have yet to rule as to a food truck ordinance case, the City's motion directs the Court to a Florida Circuit Court which addressed an analogous 'vendor location' ordinance. In *Membreno v. City of Hialeah, Florida,* 2014 WL 12540498 (Fla. 11th Jud. Cir. July 23rd 2014), the city's code provided regulations addressing where and how "itinerant vendors and peddlers" could operate within the city. These vendors and peddlers filed a declaratory judgment action and sought an injunction claiming these regulations violated the right to be rewarded for industry. In granting judgment for the city, the court found, first, that "there is no fundamental right at issue", and that the rational basis test applied. The court then found that the interests the city put forward as support for the regulations were legitimate, and the regulations were rationally related to those interests.

There are strong similarities between the supporting policy justifications for the location restrictions on the street peddlers in *Membreno* and the policy justifications for the City's food truck ordinance in the case *sub judice.*

The Court finds that the City's ordinance does not totally ban Plaintiffs from pursuing their desired profession, nor deprive them of the financial rewards for their efforts. Therefore, the ordinance does not violate the Rewarded for Industry provision in Art. I, § 2 of the Florida Constitution.

Conclusion

The Court finds that the ordinance, on its face, may be constitutionally applied in a variety of circumstances. First, food trucks operated by brick-and-mortar restaurants may operate their trucks both on location (under the accessory use provision), and in any of the approved zones. To the extent an independent truck is confined to only the approved zones, so too are restaurant-operated trucks, except when they operate at the restaurant's physical location as an accessory use.

While Plaintiffs correctly point out that the code does allow restaurant-operated trucks to operate as accessory uses to physical restaurants located in otherwise prohibited zones, the ordinance does not prohibit a physical restaurant from contracting with an independent food truck owner (such as Plaintiffs) to temporarily re-brand to the restaurant's brand and thus operate as an accessory use in those same zones. Food trucks may also obtain a permit to participate in a special event in the City. The ordinance therefore may clearly be lawfully applied and is thus not a facial violation of the Florida Constitution.

In addition, the ordinance is not being applied by the City in a discriminatory manner toward Plaintiffs, vs. other food truck owners. Plaintiffs' *Complaint* does not even make such an allegation. Indeed, although Plaintiffs' assert "as applied" challenges as to each of the three constitutional provisions they invoke, they do not separately state their as applied claims in distinct counts of the *Complaint.* Rather, the Plaintiffs argue the City discriminated against all independent food trucks when it prohibited them from operating in certain zones of the City while allowing restaurants to apply for an accessory use permit to operate a restaurant-branded food truck on the restaurant's property.

Since the Court has already found that there is a rational relationship between the City's ordinance and the legitimate general welfare concerns cited by the City, while Plaintiffs, other independent food truck operators, and food truck afficionados may disagree with the wisdom of efficacy of the distinctions, the City's regulations satisfy the fairly debatable standard applicable to the rational basis test.

"Many legislative experiments fail, but in failing, provide the experience needed to draft a more effective law." *Silvio Membreno,* at 28. But, as the United States Supreme Court noted in rejecting a due process challenge to the Florida Supreme Court's decision to allow cameras in the courtroom:

> Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state . . . experimentation.

Chandler v. Florida, 449 U.S. 560, 582, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981). This was true even in the absence of empirical or scientific evidence that the experiment would be a success. *Id.* at 576,101 S.Ct. 802.

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED** that

Plaintiffs' *Verified Motion for Temporary Injunction* is hereby **DENIED**.

Defendant's *Motion for Judgment on the Pleadings* is hereby **GRANTED**.

The Court will enter a separate *Final Judgment.*

[1]Herein, C&A denotes the *Complaint* (Dkt. 2) and *Answer* (Dkt. 20).

[2]The Court is mindful that Plaintiffs argued at the hearing that Florida Statutes § 509.102 (2020) gave the right, as of July 1st 2020, to all food trucks to operate in any city or county in the State without consideration of location or regard for then-existing regulations, and therefore that is the status quo they seek to restore. However, Plaintiffs' *Complaint* seeks no such declaration. And even if it did, the statute plainly only does four things: a) preempts the licensing, registration and permitting of trucks to the state; b) prohibits local governments from requiring separate licenses, registrations or permits; c) prohibits local governments from assessing a separate fee for food trucks to operate; and d) prohibits local governments from prohibiting food trucks "from operating within the entirety of the entity's jurisdiction." But subsection (3) of the statute clearly preserves the authority of local governments to adopt and maintain regulations regarding the operation of food trucks other than those noted above. Since the statute did not preempt local government authority over regulations related to the locations in which food trucks may operate, the Court would not have agreed with such an argument.

[3]TR used herein stands for the transcript of the hearing on the Parties motions conducted on July 20th 2021.

[4]The City asserted sovereign immunity as an affirmative defense in its *Answer.*

[5]Mr. Durham admitted in his testimony that if 42 U.S.C. § 1983 would allow him to recover money damages, then he would have an adequate remedy. TR 54.

[6]A bottle club is an establishment where patrons bring their own alcohol, pay a cover charge, and have access to food and entertainment.

[7]The Court notes that the City's *Motion for Judgment on the Pleadings* argues that Plaintiff Durham Products and Services, LLC, does not have standing to pursue their Basic Rights claims (Counts II and III) since Florida Constitution Art. I, § 2 provides rights only to "natural persons", and a limited liability corporation is not a "natural person." Black's Law Dictionary (11th ed. 2019) (defining "person" as "A human being.—also termed natural person."); Webster's 3rd New International Dictionary (2002) (first definition 1a: " 'person' means 'an individual human being.' "). In light of the Court's disposition of Plaintiffs' equal protection claim, the Court declines to rule on this argument.

* * *

Municipal corporations—Ordinances—Food trucks—Constitutionality—Facial challenge—Declaratory judgments—Motion to amend complaint seeking declaration that city ordinance allowing restaurant owner to host food truck on site as accessory use so long as truck displays signage that confirms that it is part of restaurant violates free speech rights—Amendment would be futile where plaintiff food truck owners, who do not allege that they have applied for accessory use permit under ordinance, have no bona fide, actual present practical need for declaration—Since food truck owners who do not own primary restaurant are not in class of businesses able to acquire accessory permit under ordinance, they do not have standing to challenge ordinance's signage requirement—Moreover, plaintiffs would not prevail on merits where the only way their food truck could operate on restaurant property would be by private agreement with restaurant owner, which would include agreement to include on truck "a graphic image, name or branding of the primary food or drink establishment"; and if no signage was displayed, restaurant owner, not plaintiffs, would be subject to citation—Requirement that a restaurant obtaining an accessory use permit to host a food truck on site ensure the truck displays certain signage relates to specific factual representation and would not violate plaintiffs' free speech rights—Motion to amend is denied

ELIJAH DURHAM, et al., Plaintiffs, v. CITY OF TARPON SPRINGS, a Florida municipal corporation, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 21-002475-CI-7. UCN Case No. 522021CA002475XXCICI. August 31, 2021. Patricia A. Muscarella, Judge. Counsel: Justin Pearson, Institute for Justice, Miami, for Plaintiffs. Robert Michael Eschenfelder, Trask Daigneault, LLP, Clearwater, for Defendant.

[Related order at 29 Fla. L. Weekly Supp. 513a—this issue.]

ORDER DENYING MOTION TO AMEND

THIS CAUSE having come to be heard and considered on August 25th 2021 on Plaintiffs' *Motion for Leave to Amend Complaint* (**Dkt. 43**), and Defendant's response thereto (**Dkt. 50**), the Court, having heard arguments of counsel, considered the Parties' respective memoranda of law, and being otherwise advised in the premises, denies Plaintiffs' motion for the following reasons:

Standard for Consideration of Motions to Amend a Pleading

Leave of court to amend a pleading shall be given freely when justice so requires. Fla. R. Civ. P. 1.190(a). "A trial court's refusal to permit an amendment of a pleading is an abuse of discretion unless it is clear that: (1) the amendment would prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile." *Laurencio v. Deutsche Bank Nat'l Tr. Co.,* 65 So.3d 1190, 1193 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D1600b].

A court may, in its discretion, deny any party the right to amend his pleadings if the proposed amendments will change or introduce new issues or materially vary the grounds for relief. *Florida Department of Transportation v. Tropical Trailer Leasing, LLC,* 308 So.3d 242, 249 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2659a] (affirming denial of motion to amend where, on the eve of trial, plaintiff sought to amend its complaint to add a new count which would have significantly altered the applicable legal theory of the case and introduced new factual issues).[1] The hearing on all other issues had concluded. However, the primary problem with the proposed amendment is that the amendment, if allowed, would be futile.

Plaintiffs Lack Standing

Plaintiffs invoke the Florida Declaratory Judgement Act to obtain a declaration that § 56.06(9) violates their free speech rights. However, since § 56.06 provides rights to, and responsibilities for, owners of restaurant property, not food trucks, and since Plaintiffs do not allege that they have made any application for an accessory use permit under § 56.06, Plaintiffs cannot establish the Florida Supreme Court's requirement that a party seeking declaratory relief must show that:

- there is a bona fide, actual, present practical need for the declaration;
- the declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts;
- some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;
- there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;
- the antagonistic and adverse interests are all before the court by proper process or class representation; and
- the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity.

Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996) [21 Fla. L. Weekly S271a].

The Court agrees with the City's argument that no "power, privilege or right of the complaining party is dependent upon" the interpretation or application of § 56.06 because Plaintiffs, as food truck owners, have no power, privileges or rights under § 56.06, which only applies to the ability of a brick-and-mortar restaurant to apply for an accessory use permit. Therefore, there is, at least as to § 56.06, no bona fide, actual, present practical need for the declaration as to how the Florida Constitution's free speech clause applies to that section. Applying some future hypothetical set of facts regarding how the City might apply § 56.06 would therefore be akin to the Court's merely answering questions propounded from curiosity.

This test is a statutory version of the common law mandate that plaintiffs have standing to sue. It has long been the rule in Florida that, "[o]ne cannot raise an objection to the constitutionality of a part of a statute, unless his rights are in some way injuriously affected thereby, . . ." *State ex rel. Clarkson v. Phillips,* 70 Fla. 340, 70 So. 367 (Fla. 1915). A party "may not challenge the constitutionality of a portion of the statute which does not affect them." *State v. Hagan,* 387 So.2d 943, 945 (Fla. 1980). "[I]t is also a rule that a court will not listen to an objection made to the constitutionality of a statute by a party whose

rights it does not affect, and who has, therefore, no interest in defeating it." *State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers,* 84 Fla. 592, 601, 94 So. 681, 684 (Fla. 1922). See also, *Tribune Co. v. Huffstetler,* 489 So.2d 722, 724 (Fla. 1986) ("We find, however, that Tunstall lacks standing to raise this issue. One may only challenge the constitutionality of a public law when that law directly affects him.").

The code provision at issue with respect to Plaintiffs' assertion of a free speech violation is § 56.06(9) of the City's Land Development Code. Section 56.06 provides:

> **§ 56.06 - MOBILE FOOD DISPENSING VEHICLES; AS ACCESSORY TO FOOD AND DRINK ESTABLISHMENTS.**
>
> A mobile food dispensing vehicle may be located as an accessory use (as defined in Section 36.00 (B)) to a legally established food or drink establishment, which is solely operated as a food or drink establishment, subject to the following criteria:
>
> (A) Review and approval of a development application by the Technical Review Committee containing the following minimum information and demonstration of compliance with the following standards:
>
> (1) Site layout indicating location of the mobile dispensing vehicle (may not locate in required off-street parking areas, or in such a manner as to block any accessways, walkways, driveways, loading zones or other site circulation ways for vehicles or pedestrians);
>
> (2) The mobile food dispensing vehicle must be maintained as an operable vehicle and may not be permanently affixed or attached to a building or structure in a manner that would prevent the vehicle from being moved in the event of an emergency;
>
> (3) Indicate operating hours (limited to those of the primary business);
>
> (4) City services requested (water, sewer, solid waste pick up);
>
> (5) Demonstration of compliance with the City's Fats, Oils and Grease (FOG) Management Program;
>
> (6) Evacuation or mitigation plan in the event of a hurricane, wind-storm, or flooding event;
>
> (7) Show method of connection to permanent power with 30 or 50 amp recreational vehicle/marine type plug and cord. When operating in close proximity to residential uses or existing outdoor seating areas the mobile food dispensing vehicle shall be required to operate from battery or appropriate permanent power source to eliminate noise and fumes associated with generators.
>
> (8) The primary business owner shall obtain a separate business tax receipt license for the mobile food dispensing use;
>
> (9) A mobile food dispensing vehicle may only be operated by the primary business owner as an extension of the primary business. *The mobile food dispensing vehicle must display a graphic image. name or branding of the primary food or drink establishment*.
>
> (10) The mobile food dispensing vehicle must display on the vehicle the results of any DPBR inspections for cleanliness and sanitation.

C&A, ¶ 45, ¶ 46; *Answer,* ¶ 37, Exhibit "A." Emphasis added.

Section 56.06 allows a primary business owner (a "bricks and mortar" restaurant) to locate and operate a food truck as an accessory use to the primary business, as an extension of the primary business, so long as it displays a graphic image, name or branding which confirms it is a part of the primary business, and it otherwise complies with City codes.

Plaintiffs contend that if they were allowed to amend their *Complaint,* they would be allowed to prove that § 56.06(9) is an unlawful content-based regulation, in violation of their free speech right to control the commercial message on their food truck. This would only be possible if the § 56.06 accessory use permit application option belonged to food truck vendors. However, a plain reading of the text clearly demonstrates it does not. Rather, it belongs to the owner of the brick-and-mortar establishment who/which may desire to add a food truck as an accessory use on the establishment's property. And, as the first sentence of subsection (9) confirms, it would be the owner of the business (not the food truck's owner) who would be operating it: "A mobile food dispensing vehicle may only be operated *by the primary business owner* as an extension of the primary business." Code § 56.06(9). Emphasis added.

Since Plaintiffs would only be adding "a graphic image, name or branding of the primary food or drink establishment" to their food truck were their truck to be operated by a restaurant owner as an accessory use to that owner's restaurant, and the Plaintiffs would be allowing that operation as part of a private consensual contractual arrangement between them and the restaurant owner, there would be no "injury in fact", nor any "invasion of a legally protected interest." Plaintiffs' food truck business isn't in the class of business able to acquire an accessory use permit under § 56.06. Therefore, they do not have standing to challenge it. See, *Hardage v. City of Jacksonville Beach,* 399 So.2d 1077 (Fla. lst DCA 1981) (owner of licensed liquor establishment did not have standing to challenge portion of city ordinance which restricted Sunday liquor sales to consumption on premises since owner was in group of liquor vendors not allowed to sell liquor on Sunday and, thus, was not affected by that portion of the ordinance); *State v. Peters,* 534 So.2d 760 (Fla. 3rd DCA 1988) (owner of pure breed pit bull lacked standing to challenge municipal ordinance regulating pit bull ownership because of alleged vagueness about ordinance's applicability to nonpure breed dogs); *Florida Home Builders Ass'n, Inc. v. City of Tallahassee,* 15 So.3d 612, 613 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1096b] (while appellant Hermitage Ventures was found by the trial court to have standing since it had submitted a permit application that would be subject to the challenged ordinance, on appeal it had no pending application, and the appellate court found it "no longer has standing to pursue the legal challenge to the ordinance").

Plaintiffs Would not Prevail on the Merits

While the Plaintiffs' lack of standing to challenge § 56.06(9), alone, is sufficient to find that the proposed *Amended Complaint* (seeking to add just such a challenge) would be futile, the Court also agrees with the City's argument that § 56.06(9)'s requirement that a restaurant obtaining an accessory use permit to host a food truck on site ensure the truck displayed "a graphic image, name or branding of the primary food or drink establishment" would not violate Plaintiffs' free speech rights.

As noted earlier, since Plaintiffs' food truck has no independent legal right to operate in Plaintiffs' desired zones', the only way it could be used by Plaintiffs to earn money in those zones is by way of entering into a private, consensual agreement wherein Plaintiffs allow the restaurant to operate the truck during the times it is parked at the restaurant. Presuming the restaurant owner includes in the contract terms that Plaintiffs would allow the display of the restaurant's graphic image, name or branding on the truck, Plaintiffs' acceptance of that contractual term would not constitute any government mandate that Plaintiffs speak, or not speak, in any particular way.

The First Amendment protects an individual against being compelled to express a message in which he does not agree. *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 557, 125 S.Ct. 2055, 2060, 161 L.Ed.2d 896 (2005) [18 Fla. L. Weekly Fed. S288a].[2] It also protects commercial speech from unwarranted governmental regulation. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980). The Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and

its audience," and noted that commercial speech is entitled to less constitutional protection than other forms of speech. *Id.* at 561-63,100 S.Ct. at 2349-50.

Plaintiffs' proposed *Amended Complaint* would seek to argue that the § 56.06(9)'s requirement that a restaurant obtaining an accessory use permit to host a food truck on site ensure the truck displayed "a graphic image, name or branding of the primary food or drink establishment" would violate their free speech rights. However, if Plaintiffs sign a contract with the restaurant owner agreeing to that subsection's image/name/branding display requirement, it would be a voluntary act. As the court in *Foley v. Orange County,* 2016 WL 361399, 638 Fed.Appx. 941, 945 (11th Cir. 2016) observed, "voluntary actions do not constitute compelled or commercial speech because neither do they amount to a government regulation that compelled them to express a message in which they did not agree. . ."

And, as the City points out in its response, were the City to discover that a restaurant holding an accessory use permit for an on-site food truck wasn't complying with § 56.06(9), it would be the restaurant, not Plaintiffs, to be cited since the duty to comply rests with the restaurant owner.

While a restaurant actually covered by § 56.06(9) is not before the Court to challenge the subsection, even if it did compel Plaintiffs to "speak" by displaying a business identifier on their truck, the requirement would not be a free speech violation as all that is being required is the identification of the business operating the truck. This is a simple factual representation. Where an advertiser is compelled to include factual statements which complete or explain statements in the underlying advertisement regarding the advertised services, the compulsion to speak is not likely to be unduly burdensome. For example, the compelled disclosure in *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 105 S.Ct. 2265, 2274, 85 L.Ed.2d 652 (1985) dealt directly with "the terms under which [the advertised] services will be available," so that the listener could make an informed choice regarding those services. *Zauderer,* 105 S.Ct. *at* 2282. The compelled disclosure made the statement regarding the clients' responsibility for payment of fees "more" complete and truthful. See, *CTIA-The Wireless Association v. City of Berkeley, California,* 2017 WL 1416504 (9th Cir. 2017) (disclosure compelled by city ordinance requiring cell phone retailers to disclose information to prospective purchasers about federal government's radio-frequency radiation exposure guidelines was "purely factual" and the requirement was therefore not a First Amendment violation). See also *S.S.S. v. Federal Trade Commission,* 416 F.2d 226 (6th Cir. 1969) (where underlying speech invited listeners to draw faulty conclusion, compelled speech was curative and, therefore, constitutional).

As-Applied Challenge not Foreclosed

At the close of the July 20, 2021 hearing on Defendant's Motion for Judgment on the Pleadings and Plaintiff's Verified Motion for Temporary Injunction, the Court heard all arguments of counsel and received all documentary evidence pertaining to the above motions. The Court took the matters under advisement and requested proposed orders from counsel. The hearing had been completed.

In denying Plaintiffs' *Motion for Leave to Amend* to add a free speech count facially challenging § 56.06, the Court wishes to clarify that it does not have before it, and thus is not ruling on, any *as-applied* free speech challenge to any future application of § 56.06 to the Plaintiff. The Court understands Plaintiffs' proposed *Amended Complaint* sought to state both a facial and as-applied free speech challenge to the ordinance, but the Court's review of the pleadings and record evidence already on file, it is clear § 56.06 has not been "applied" to Plaintiffs. Mrs. Durham admitted that while she obtained a copy of the accessory use application from City staff, she did not intend to actually use it (transcript of July 20th hearing, pg. 72, lines 1-4), and that while she understood contracting with a restaurant to allow the Plaintiffs to make money by allowing the restaurant to operate their truck at the restaurant, the Durhams did not like this option as the restaurant's brand would get the credit. (*Id*., line 25).

However, for the reasons set forth herein, their desired facial challenge under the Florida Constitution's free speech clause would be futile.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' *Motion for Leave to Amend Complaint* is hereby **DENIED**.

The Court will issue a ruling on *Plaintiff's Verified Motion for Temporary Injunction, Defendant's Motion for Judgment on the Pleadings* and *Final Judgment* by separate order.

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[1]Plaintiffs argued, both in their motion and at oral argument, that their proposed new free speech count required discovery. *Plaintiffs' Motion for Leave to Amend,* pg. 4, ¶ 10(a). While a facial challenge to a law only focuses on the text of the law, and while Plaintiffs' counsel agreed at the Court's July 20th hearing that no discovery was needed (transcript of July 20th hearing, pg. 95, lines 13-25 and pg. 96, lines 1-9.), to the extent this proposed new count would require factual development that the initial three counts did not, that would support denial of the motion in favor of a separate, as-applied challenge.

[2]The scope of protection accorded to freedom of expression in Florida is the same as is required under First Amendment, and Florida's courts will apply the principles of freedom of expression as announced in decisions of Supreme Court of the United States. *O.P-G. v. State,* 290 So.3d 950 (Fla. 3rd DCA 2019) [44 Fla. L. Weekly D2548a], rehearing denied.

* * *

Criminal law—Removal from sex offender registry—Petition for removal of requirement to register as sex offender pursuant to section 943.0435(11)(a)1 is denied where defendant has been free from convictions or sanctions for less than 25 years—2007 amendment to statute that increased from 20 years to 25 years the length of time in which a sex offender must have not been arrested for any felony or misdemeanor in order to qualify for removal of registration requirement does not violate ex post facto protections of U.S. Constitution—Removal of registration requirement pursuant to subsection (11)(a)3, which authorizes removal when court is satisfied that offender is not current or potential threat to public safety, is denied where defense counsel made representations regarding defendant's education and employment but court was not provided with supporting testimony or reports

STATE OF FLORIDA, v. FERNADO IVAN RUIZ, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 1996-034738 CFAES. August 24, 2021. Dennis Craig, Judge. Counsel: Sarah Thomas, Assistant State Attorney, Office of the State Attorney, Daytona Beach, for State. Ron M. Kleiner, Law Offices of Ron M. Kleiner, Miami Beach, for Defendant.

FINAL ORDER DENYING DEFENDANT'S "PETITION FOR REMOVAL FROM FLORIDA'S SEX OFFENDER REGISTRY PURSUANT TO §943.0435(11)"

THIS MATTER came before the Court upon Defendant's "petition for removal from Florida's sex offender registry pursuant to §943.0435(11)" filed on June 3, 2021, by and through counsel. The Court having reviewed the petition, the court file; conducted a hearing; heard oral arguments from both parties; and being otherwise fully apprised of the premises, finds as follows:

Defendant petitions this Court for removal from the Florida Sex Offender Registry. At the hearing on the petition, counsel appearing on behalf of Defendant and counsel appearing on behalf of the State of Florida, brought forth several suitable arguments. Based upon the pleading and said arguments, and for the following reasons, the petition shall be **DENIED**.

First, the Court makes no comment regarding the issue of standing concerning the presence of the Florida Department of Law Enforcement at these types of proceedings; however, the Court shall address the following issues.

> Except as provided in s. 943.04354, a sexual offender shall maintain registration with the department for the duration of his or her life unless the sexual offender has received a full pardon or has had a conviction set aside in a postconviction proceeding for any offense that meets the criteria for classifying the person as a sexual offender for purposes of registration. However, a sexual offender shall be considered for removal of the requirement to register as a sexual offender only if the person:
>
> (a) 1. Has been lawfully released from confinement, supervision, or sanction, whichever is later, for at least 25 years and has not been arrested for any felony or misdemeanor offense since release, provided that the sexual offender's requirement to register was not based upon an adult conviction:
>
> a. For a violation of s. 787.01 or s. 787.02;
>
> b. For a violation of s. 794.011, excluding s. 794.011(10);
>
> c. For a violation of s. 800.04(4)(a) 2. where the court finds the offense involved a victim under 12 years of age or sexual activity by the use of force or coercion;
>
> d. For a violation of s. 800.04(5)(b);
>
> e. For a violation of s. 800.04(5)(c) 2. where the court finds the offense involved the use of force or coercion and unclothed genitals or genital area;
>
> f. For a violation of s. 825.1025(2)(a);
>
> g. For any attempt or conspiracy to commit any such offense;
>
> h. For a violation of similar law of another jurisdiction; or
>
> i. For a violation of a similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this subparagraph.

§ 943.0435(11), Fla. Stat. (2021). As stated in Defendant's petition, in 2007, the Florida Legislature amended subsection (11)(a)(1) of 943.0435, Florida Statutes. The amendment increased the time in which a sex offender must not be arrested for any felony or misdemeanor from twenty (20) years to twenty-five (25) years, or an increase of five years.

Defendant argues that the above-mentioned 2007, amendment violates the ex post facto protections provided by the United States Constitution. The Court finds that the amendment *does not* violate ex post facto protections and relies upon the following analogous authorities: *Vega v. State,* 208 So. 3d 215, 216 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2513b]; *Givens v. State,* 851 So. 2d 813, 814-15 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1809d]; *Garcia v. State,* 909 So. 2d 971, 971-72 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2112b]; and *Hanson v. State,* 905 So. 2d 1036 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1677c], in reaching this conclusion. Here, as stated in the instant petition Defendant has been free from convictions or sanctions for more than twenty (20) years, but less than twenty (25) years. Therefore, Defendant's "petition for removal from Florida's sex offender registry pursuant to §943.0435(11)" is **DENIED** in that respect.

> **The court may grant or deny relief if** the offender demonstrates to the court that he or she has not been arrested for any crime since release; the requested relief complies with the federal Adam Walsh Child Protection and Safety Act of 20061 and any other federal standards applicable to the removal of registration requirements for a sexual offender or required to be met as a condition for the receipt of federal funds by the state; **and the court is otherwise satisfied that the offender is not a current or potential threat to public safety**.

§ 943.0435(11)(a)(3), Fla. Stat. (2021) (emphasis added). Within the instant petition, Defendant's counsel as an officer of the Court, made several representations regarding Defendant's educational and employment background. Counsel also made various representations regarding recidivism. However, at the hearing held on August 16, 2021, the Court was not provided with any further testimony or reports regarding this matter. Accordingly, based upon the record before this Court, the undersigned is not "satisfied that the offender is not a current or potential threat to public safety." § 943.0435(11)(a)(3), Fla. Stat. (2021). Therefore, Defendant's "petition for removal from Florida's sex offender registry pursuant to §943.0435(11)" is **DENIED** in that respect.

RULING

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "petition for removal from Florida's sex offender registry pursuant to §943.0435(11)" is **DENIED.**

Petitioner has **thirty (30) days** from the rendition of this order to file a notice of appeal.

* * *

Criminal law—Discovery—Depositions—Category C witnesses—Crime lab supervisor was not properly categorized by state as category C witness where supervisor's knowledge of case was not fully set out in police report or other statement furnished to defense as required by rule 3.220(b)(1)(A)(iii)—Rule's requirement that witness's knowledge of case be fully set out in report or statement to qualify for category C status is applicable both to witnesses state does not intend to call at trial and those who performed only ministerial functions—Motion for leave to depose supervisor is granted

STATE OF FLORIDA, Plaintiff, v. DETRICK LAMAR HUSSEY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F16-024902, Section 09. September 14, 2021. Joseph Perkins, Judge.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL DEPOSITION AND PRODUCTION OF STATE WITNESS

This case is before the Court on Defendant Detrick Hussey's Motion to Compel Deposition and Production of State Witness. For the reasons below, the motion is GRANTED IN PART as to Defendant's request that the Court authorize Defendant to take the deposition of Miami-Dade crime lab supervisor Robert Griffith. It is DENIED IN PART as to Defendant's request that the Court order the State to produce Mr. Griffith for deposition.

BACKGROUND

The Defendant has been charged by Information with various offenses. On the eve of trial earlier this year, the State disclosed a DNA lab analysis report purporting to show that Defendant's DNA was included in a mixture found on the alleged victim. The Court continued the case to enable Defendant to obtain discovery on the issue. Thereafter, Defendant hired a DNA expert to evaluate the crime lab's analysis. The DNA expert desires that Defendant depose a Miami-Dade crime lab supervisor, Robert Griffith, concerning protocols that the lab follows (or should follow) in determining whether an extracted profile matches a known standard.

For the four-plus years that this case has been pending, the State has neither listed Mr. Griffith nor expressed any interest in listing him as a witness. On August 12, 2021, Defendant's counsel contacted the Assistant State Attorney ("ASA") assigned to this case to coordinate Mr. Griffith's deposition. At the time, Defendant was entitled to depose Mr. Griffith without leave of court because the State had not included Mr. Griffith on its witness list.[1] Three weeks later, on September 1, 2021, the ASA responded that he would list Mr. Griffith as a Category "C" witness and that the defense would have to "go before the judge" to depose him. The State then amended its witness list to include Mr. Griffith as a Category "C" witness. Defendant now

seeks an order authorizing Defendant to depose Mr. Griffith and compelling the State to produce him for deposition.

LEGAL STANDARD

Rule 3.220(b)(1)(A) of the Florida Rules of Criminal Procedure requires the State, as part of its discovery obligation, to categorize its witnesses into one of three categories:

> (i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.
>
> (ii) Category B. All witnesses not listed in either Category A or Category C.
>
> (iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense . . . .

Id. A defendant may, without leave of Court, take depositions of Category A witnesses and unlisted witnesses. Fla. R. Crim. P. 3.220(h)(1)(A). "No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown." *Id*. at 3.220(h)(1)(B).[2] "A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category." *Id*. at 3.220(h)(1)(C).

DISCUSSION

The question presented is whether the State properly designated Mr. Griffith as a Category C witness. The Court concludes it has not because, as discussed below, Mr. Griffith's "knowledge of the case" was not "fully set out in a police report or other statement furnished to the defense." Fla. R. Crim. P. 3.220(b)(1)(A)(iii).

The State argues that the requirement that a Category C witness's "involvement with and knowledge of the case [be] fully set out in a police report or other statement furnished to the defense" applies only to witnesses the State does not intend to call at trial. That is, the State argues that a Category C witness is either (a) a witness who performed only ministerial functions, or (b) a witness the State does not intend to call at trial and whose knowledge of the case is fully set out in a police report or other statement furnished to the defense. The Defendant contends that the last sentence of Rule 3.220(b)(1)(A)(iii) modifies the entire paragraph. That is, the Defendant argues that a Category C witness is (a) a witness who either performed only ministerial functions or whom the State does not intend to call at trial, and (b) whose knowledge of the case is fully set out in a police report or other statement furnished to the defense. The construction of Rule 3.220(b)(1)(A)(iii) appears to be a first-impression issue.

When a rule of procedure is clear and unambiguous, courts will not look behind the plain language or resort to canons of construction to ascertain meaning. *See Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008) [33 Fla. L. Weekly S481a].[3] Here, however, the Rule's definition of a Category C witness is undeniably susceptible to multiple and irreconcilable interpretations. Rule 3.220(b)(1)(A)(iii)'s plain language could easily be construed as the State asserts it should be and could just as easily be construed as the defense contends it should be construed. The Court therefore cannot rely solely on the Rule's plain language to discover its meaning. *Cf. Kasischke*, 991 So. 2d at 807.

The Court next turns to the history of the Rule. In 1989, the Supreme Court amended Rule 3.220, *inter alia*, "to provide prosecutors the discretion to designate certain witnesses who may not be deposed unless ordered by the trial court, upon good cause shown." *In re Amendment to Florida Rule of Criminal Procedure 3.220 (Discovery)*, 550 So. 2d 1097, 1098 (Fla. 1989). The amended rule permitted

> [t]he defendant [to] take the deposition of any person not designated by the prosecutor as a person:
>
> a. who performed only a ministerial function with respect to the case or whom the prosecutor d[id] not, in good faith, intend to call at trial, and
>
> b. whose involvement with the case and knowledge of the case [wa]s fully set out in a police report or other statement furnished to the defense.

In re Amendment to Florida Rule of Criminal Procedure 3.220 (Discovery), 550 So. 2d 1097, 1099 (Fla. 1989). A defendant could take the deposition of a person so designated with leave of court upon a showing of good cause. *Id*. at 1102.

In 1996, the Supreme Court amended Rule 3.220 to further limit depositions and created three categories of witnesses instead of two:

> Category A witnesses are subject to deposition as under the former rules. Category B witnesses are subject to deposition only upon leave of court upon a showing of good cause. Absent a showing that a Category C witness has been improperly designated, such witnesses cannot be deposed.

In re Amendment to Florida Rule of Criminal Procedure 3.220(h) & Florida Rule of Juvenile Procedure 8.060(d), 681 So. 2d 666, 667 (Fla. 1996) [21 Fla. L. Weekly S369a]. Instead of being divided into subparagraphs a and b, the text of the former rule relating to witnesses whom the defense was not entitled to depose without leave of court was merged, nearly word-for-word, into a single paragraph—Rule 3.220(b)(1)(A)(iii)—and Category B was created to permit depositions of additional witnesses with leave of court upon a showing of good cause. While there were minor changes to the language of the rule, the changes were stylistic and grammatical, not substantive.[4] Under the amended rule, Category C witnesses could no longer be deposed merely upon a showing of good cause. *Id*. at 669. Rather, Category C witnesses were no longer subject to deposition unless the court determined that they should have been listed in another category. *Id*. at 672.

It is well settled that the Court may consider subsequent amendments of a rule as an aid to interpreting the rule, and the amendment of a rule does not necessarily indicate that the Supreme Court intended to change the rule. *See Keck v. Eminisor*, 104 So. 3d 359, 369 (Fla. 2012) [37 Fla. L. Weekly S697a]. Additionally, "[a]n amendatory section of a [rule] takes the place of an original section and operates together with the unchanged provisions of the [rule] according to the nature of the changed language." *Beckwith v. Bd. of Pub. Instruction of Dade County*, 261 So. 2d 504, 507 (Fla. 1972).

Here, the Supreme Court plainly intended to further limit (and, with express language, did limit) the ability to take depositions of the witnesses previously identified in the 1989 version of the rule. The nature of the changed language relating to the description of witnesses not subject to deposition, however, was only stylistic and grammatical. As a result, the amendment to the definition of witnesses not subject to deposition should be interpreted in harmony with the 1989 definition, and removal of the subsection a and b labels from the definition of such witnesses, without more, does not indicate an intention to redefine the witnesses that fall within such category.

This construction of Rule 3.220(b)(1)(A)(iii) is consistent with the purpose of the discovery rules. *M.H. v. State*, 151 So. 3d 32, 36 (Fla.

3d DCA 2014) [39 Fla. L. Weekly D2274a] (discussing the procedure for construing the materially identical Rule 8.060 of the Florida Rules of Juvenile Procedure and holding that "[a] practical, common-sense application must be used . . . , taking into consideration the purpose of the discovery rules, the content of the witness's testimony, and the effect of the classification"). "[T]he 'chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush.' " *Id.* at 36 (quoting *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006) [31 Fla. L. Weekly S114a]). As for the content Mr. Griffith's testimony, it may or may not be highly relevant to the Defendant's guilt or innocence—Mr. Griffith has not testified yet—but the State is contending that the Defendant's DNA was included in a mixture found on the alleged victim, and the extent to which the crime lab followed or did not follow proper protocols in testing the DNA could potentially assist the truth-finding function of our justice system and avoid surprise. Finally, the effect of the State's classification of Mr. Griffith as a Category C witness (three weeks after Defendant sought to coordinate Mr. Griffith's deposition) was to preclude Defendant from depositing a witness he previously could depose without leave of court. This effect is inconsistent with the purpose of our discovery rules.[5]

In sum, consistent with the 1989 version of the rule and the purpose of our discovery rules, the revision history of Rule 3.220(b)(1)(A)(iii) indicates that a Category C witness is (a) a witness who either performed only ministerial functions or whom the State does not intend to call at trial, and (b) whose knowledge of the case is fully set out in a police report or other statement furnished to the defense.

APPLICATION OF RULE 3.220(b)(1)(A)(iii)

At the hearing held on September 13, 2021, the State stipulated that the Court should decide this issue based on the current record before the Court and declined the opportunity to supplement the record regarding whether the State has produced to Defendant a "statement" of Mr. Griffith. In light of the Court's determination that a witness can only be properly designated a Category C witness if the witness's "knowledge of the case is fully set out in a police report or other statement furnished to the defense," and there being nothing in the record that such a report or statement has been furnished to the defense, the Court determines that Mr. Griffith was not properly designated as a Category C witness. *See* Fla. R. Crim. P. 3.220(h)(1)(C). The Court need not determine whether Mr. Griffith would properly be a Category A or B witness because, after consideration of the factors in Rule 3.220(h)(1)(B), the Court determines that Defendant has shown good cause to take Mr. Griffith's deposition. As a result, the motion to compel is granted insofar as it seeks leave to depose Mr. Griffith.

REQUEST FOR ORDER COMPELLING STATE TO PRODUCE MR. GRIFFITH

The Court denies the motion to compel insofar as it requests an order compelling the State to produce Mr. Griffith for deposition. It is well settled that "[t]he state does not have an obligation to produce witnesses for deposition." *State v. Rodriguez*, 483 So. 2d 751, 751 (Fla. 3d DCA 1986); *State v. Boykins*, 314 So.3d 429, 431 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2575b] (holding that trial court departed from the essential requirements of law in entering order granting motion to compel the State to produce witness because it is well established that it is not the prosecution's responsibility to produce the State's witnesses for depositions; citing multiple cases).

CONCLUSION

Defendant's motion to compel is GRANTED IN PART insofar as it seeks leave to depose Mr. Griffith. It is DENIED IN PART insofar as it seeks an order compelling the State to produce Mr. Griffith for deposition.

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[1]The Florida Rules of Criminal Procedure provide that "[a]fter receipt by the defendant of the Discovery Exhibit, the defendant may, ***without leave of court***, take the deposition of any unlisted witness who may have information relevant to the offense charged." Fla. R. Crim. P. 3.220(h)(1)(A)(emphasis added).

[2]"In determining whether to allow a deposition [of a Category B witness], the court should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition." *Id*.

[3]"Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) [23 Fla. L. Weekly S266a].

[4]The new rule defined Category C witnesses as follows: "All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense."

[5]The Court need not decide whether the rule of lenity—that ambiguity in criminal statutes must strictly be interpreted in favor of an accused—applies because that rule is a canon of last resort and only applies if the statute remains ambiguous after consulting traditional canons of statutory construction. *Kasischke*, 991 So. 2d at 814. The rule does not remain ambiguous after application of the above canons.

* * *

Trusts—Action against trustee by remainder beneficiaries of trust seeking to unwind decanting of trust principal that had effect on age at which plaintiffs would receive their remainder interest—Affirmative defenses—Defendants cannot assert defenses of consent, waiver, and estoppel against plaintiffs based on plaintiffs' deceased mother's alleged consent to decanting—Because plaintiffs, as contingent remainder beneficiaries at time of decanting, were entitled to notice of trustees' intentions to decant, defendants cannot argue that they lack standing to demand notice of, and raise objections to, decanting at time it was performed and now—Mother's alleged consent to decant is merely waiver of notice period, not waiver of objections to, or consent to, decant—Breach of fiduciary duty—Motion to strike defense alleging impossibility of performance in response to claim for breach of fiduciary duty based on failure to make certain annual accountings is denied—Motion to strike affirmative defenses alleging reasonable reliance on advice of counsel is denied—Affirmative defenses of unjust enrichment and set-off, claiming that defendant trustee accused of making improper distributions to herself also made gifts to plaintiffs, such that it would be inequitable to allow plaintiffs to retain those benefits and also recover damages or that gifts should be set-off against damages, are stricken

EMILY A. HAIGNEY and ALEXANDER J. HAIGNEY, Plaintiffs, v. JOAN K. EIGEN and DAVID L. EIGEN, as co-trustees of the Joan K. Eigen 2017 Trust, u/a/d December 13, 2017, and ZACHARY HAIGNEY, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2020-3277-CP-02. September 13, 2021. Milton Hirsch, Judge. Counsel: Roselvin S. Edelman, for Plaintiffs. John B.T. Murray, Jr., for Defendants.

ORDER ON MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiffs have filed a motion to strike Defendants' affirmative defenses. DE 32, 33. Defendants have provided a memorandum of law in opposition to that motion. DE 34.

I. As to Affirmative Defenses Three, Four, and Five

Plaintiffs identify themselves as beneficiaries of "a multi-generational trust that was created by [their] great-grandfather" and that is valued at more than $24 million. *Amended Complaint*, Ex. 1 to DE 19, ¶8. Asserting various specimens of misconduct on the part of Defendants, "Plaintiffs bring this action to unwind [certain] trust decantings" brought about by Defendants.[1] *Id*. ¶9.

Defendant Joan Eigen is the daughter of the grantor of the trust, Edward Kimmel. Wendy Haigney was Joan's daughter and Plaintiffs' mother. Wendy was a remainder beneficiary of the trust. *See gen'ly Amended Complaint*, ¶¶10-17.

Wendy predeceased her mother Joan, departing this world on May 6, 2017. *Id*. ¶35. Plaintiffs, as Wendy's children, succeeded her as remainder beneficiaries of the trust. *Id*. Joan remains a trustee, and is a defendant in that capacity.

Plaintiffs allege that Defendants' decanting had the effect of altering certain important trust terms and conditions. *Id*. ¶¶26, 27. The principal effect was to alter the age at which the plaintiffs, as Wendy's successors, would receive their remainder interest in the trust. *Id*. ¶8 (the decanting "eliminat[ed] Plaintiffs' rights to a mandatory distribution of their trust funds at age 25"); ¶18 (under the terms of the Trust prior to the decanting, "Plaintiffs . . . would receive their respective shares free of trust if they are 25 years of age or older"). As a consequence of the decanting, Plaintiffs are entitled to 35% of their shares at age 30, and the balance at age 35. *Id*. ¶30.

Defendants assert that Wendy executed a document, variously identified as a waiver or a consent, concurring in the decanting and the resulting changes in terms and conditions. *Id*. ¶ 28. This document forms the basis of Affirmative Defenses Three, Four, and Five.[2] Defendants argue that, whether termed waiver (Affirmative Defense Three), estoppel (Affirmative Defense Four), or consent (Affirmative Defense Five), Wendy's apparent concurrence in the actions of the Defendants renders those actions not wrongful or actionable. In Defendants' view, "Plaintiffs stand in their mother's shoes: they became remainder beneficiaries only after their mother's death and only after their mother consented to the decanting." *Co-Trustees' Opposition to Plaintiff's Motion to Strike Affirmative Defenses*, DE 34 ¶23. *See also Co-Trustee's Answer and Defenses to Amended Complaint*, DE 26, ¶¶124-126. Thus the Defendants, as they see it, were under no obligation to provide Plaintiffs with notice of, or seek Plaintiffs' consent to, Defendants' proposed decanting of the trust assets.

For their part, Plaintiffs take the position that because they were known to be their mother's heirs presumptive, and were adults at the time in question, they were statutorily entitled to be noticed—not vicariously through their mother, but directly. It appears also to be Plaintiffs' position that the document upon which Defendants rely to support their claim of waiver or consent, even if it dispenses with the statutorily-required 60-day notice period, does not reflect a concurrence in or consent to the substantive acts of decanting in which Defendants engaged. I consider these two arguments in turn.

a. Plaintiffs were entitled to notice

A trustee's power to decant is governed by Fla. Stat. § 736.04117, captioned, "Trustee's power to invade principal in trust." Subsection (8), captioned "Notice," requires a trustee to "provide written notification of the manner in which he or she intends to exercise his or her power to invade principal to all of the following parties at least 60 days before the . . . exercise of such power." Fla. Stat. § 736.04117(8)(a). Apropos the case at bar, the parties to whom notice is due are, "All qualified beneficiaries of the first trust." Neither "qualified beneficiary" nor "beneficiary" is defined in § 736.04117. Presumably, then, those terms have the meaning generally ascribed to them in the law of estates and trusts. Section 736.0103(4), Fla. Stat., the general definitional statute, uses the word "beneficiary" very broadly to mean any "person who has a present or future beneficial interest in a trust, vested or contingent." "It is immaterial for this purpose whether the beneficial interest is present or future, vested or contingent." John G. Grimsley, *Florida Law of Trusts,* 18 Fla. Prac. § 16:1 (2016-2017 ed.). Pursuant to that capacious definition Plaintiffs, who at all times material had an interest—future, if not present; contingent, if not vested—in the trust, qualified as beneficiaries. Subsection (19) of § 736.0103(4) defines "qualified beneficiary" as one who, "on the date the beneficiary's qualification is determined"—presumably, in the case at bar, the date when Defendants gave notice of their intent to decant the trust assets—either "[i]s a distributee or permissible distributee of trust income or principal" or "[w]ould be a distributee or permissible distributee of trust income or principal if the interests of the [actual] distributees . . . terminated on that date." On the relevant date Plaintiffs were not "distributees or permissible distributees," but would be distributees or permissible distributees if their mother's interest terminated (as, for example, by death) on that date. "The term 'qualified beneficiary' . . . [includes] living persons who are current beneficiaries, intermediate beneficiaries, and first line remainder beneficiaries, whether vested or contingent." Grimsley, *supra*, § 16:1. "For example, contingent remainder beneficiaries of a trust are qualified beneficiaries . . . because of their interest in the distribution of any principal remaining after the death of a lifetime beneficiary." *Rachins v. Minassian*, 251 So. 3d 919, 923 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1572a] (citing *Harrell v. Badger*, 171 So. 3d 764 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1719a]). On a straightforward reading of the applicable statutory language, then, it appears that Plaintiffs were entitled to notice of the trustees' intentions before the fact, separate and apart from any notice served upon their mother. In Plaintiffs' view, Defendants cannot argue that Plaintiffs were without standing to demand notice of, and raise objections to, the decanting at the time it was performed; but are too late to demand such notice, or raise such objections, now.

b. As a matter of law, Wendy did not waive the right to object, nor did she consent, to decanting

Apart from the foregoing, it is the plaintiffs' position that the document executed by Wendy, and upon which the defendants rely, must be construed as a waiver of nothing more than the 60-day notice period; and cannot be construed as a consent to the defendants' substantive changes to the terms and substance of the trust. In Plaintiffs' view this construction follows, not from any factual interpretation of Wendy's subjective intent, but from the language of the controlling statute, and from the application of well-accepted hermeneutic principles.

Wendy's written waiver was undoubtedly drafted for her signature by counsel for Defendants. Any ambiguity must therefore be construed against Defendants, and in favor of Wendy's successors. The bulk of the written waiver is simply Wendy's acknowledgment of her receipt of certain documents. The last sentence—the *sole* support for the defendants' position—provides, "This will also confirm that I waive the notice period for the . . . trustees' power to invade the principal of [the] trust to be effective[,] and consent to said power to invade principal being effective immediately." This appears to be, and Plaintiffs would argue that it is, a waiver of the 60-day waiting period between date of notice and date of decanting that would otherwise be incumbent upon the trustees. Alternatively it could be, and Defendants would argue that it is, a waiver of *both* the waiting period *and* any substantive objection to the decanting itself. The former interpretation is supported by context, by logic, and perhaps most importantly by my obligation to construe ambiguity against the drafter. The single sentence at issue reflects no more than a "waive[r] of the notice period" and a consent to whatever it is as to which notice is given "being effective immediately." There is no recitation of the terms and consequences of the proposed decanting. There is no representation that those terms and consequences have been made known to, and were understood by, Wendy. There is no representation that Wendy has discussed the matter with counsel of her own. This cannot be read as a knowing, informed, and voluntary concurrence in the profoundly consequential decanting that the defendants proposed to undertake. If the defendants, and their very competent counsel, had wanted to make explicit that Wendy's waiver extended not only to the demised

waiting period, but also to the content of any decanting, they were obliged to make that clear beyond peradventure. They did nothing of the kind.

Given, then, that Plaintiffs' predecessor in interest made a knowing and intentional waiver of nothing more than the notice period, Fla. Stat. § 736.04117(8)(c), neither she nor they would be "limited [in] the[ir] right . . . to object to the exercise of the . . . trustee's power to invade principal." Fla. Stat. § 736.04117(8)(d). It is the clear intent of the statute carefully to preserve to a beneficiary his or her right "to object to the exercise of the . . . trustee's power to invade principal." Such a statutory intent is entirely appropriate. The trustee who purports to invade principal exercises a power that can easily work to the detriment of a beneficiary—the very person as to whom the trustee has a fiduciary obligation to act with loyalty and care. Unsurprisingly, then, the statute provides that even the beneficiary who clearly and unequivocally waives the 60-day notice period has not, by that waiver, also surrendered his or her power to object to the substance of the decanting. No fact-finding is required for me to conclude that Wendy never waived the latter power. That conclusion follows irrefragably from the language and purpose of the statute, and from the insufficiency and ambiguity of the waiver.

Defendants assert that Plaintiffs stand in their mother's shoes. So they do. She did not waive any objection, or offer any consent, to the decanting of the trust. And if she did not, her successors in interest did not. Affirmative defenses such as waiver and consent cannot be offered against them. As to Affirmative Defenses Three, Four, and Five, Plaintiffs' *Motion to Strike Affirmative Defenses* is well-taken, and is granted.

II. As to Affirmative Defense Six

Count III of Plaintiffs' *Amended Complaint* is captioned, "Breach of Trust for Failure to Account." It alleges that the defendants "breached their fiduciary duty by failing to provide an annual trust accounting to Plaintiffs for more than three years." *Amended Complaint* ¶91. The three years in question appear to be from May 2017 to March 2020. *Motion to Strike Affirmative Defenses* ¶8. The *Amended Complaint* prays that the defendants be compelled "to provide to [*sic*] an accounting of the administration of the assets used to fund Joan's Trust," not just for the demised three-year period but "from the initial funding of the trust in 2011 to the present." *Amended Complaint* ¶96.

In their Sixth Affirmative Defense, Defendants concede that the accounting for the period October 1, 2011 through December 31, 2019, was indeed tardy. *Co-Trustee's Answer and Defenses to Amended Complaint*, ¶127. This untimely compliance, however, they attribute to the accountant whose responsibility it was to prepare the necessary reports, and who was hindered and delayed by a host of causes beyond her control and certainly beyond that of the defendants. *Id*. In their *Opposition to Plaintiff's Motion to Strike Affirmative Defenses*, ¶34, Defendants make the same argument as to "the period following March 2020."

Of course a breach of fiduciary duty—what Plaintiffs allege as to this count—is complete at the time it occurs; it cannot be uncommitted later. If Defendants breached their fiduciary duty by failing to provide timely accounting reports, the subsequent untimely provision of those reports does not "unbreach" their duty. Defendants argue, however, that their failure to provide timeous reports was attributable to circumstances beyond their control, which circumstances constitute an affirmative defense.

At issue is not simply whether Defendants acted reasonably, or in good faith. What is required of a fiduciary is more than a reasonable, good-faith effort in the discharge of his duties. In the oft-quoted language of then-Chief Judge Cardozo, a fiduciary "is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). *See also* Mariani, Kammerer, and Guffey-Landers, *Understanding Fiduciary Duty*, 84 Fla. Bar J. 20 (March 2010).

But a fiduciary is not a guarantor of the future. The law requires that he be faithful—"a faithful shepherd," Wm. Shakespeare, *As You Like It*, Act V sc. 2—but not that he be infallible. Whether the current pandemic, or other uncontrolled and uncontrollable factors, rendered it impossible for Defendants to provide the necessary accounting reports on time is more than I know, and more than the pleadings can tell me. For now, it is enough that Defendants have alleged with particularity the impossibility of the accountant's timely performance, and therefore the impossibility of their own. As to Affirmative Defense Six, Plaintiffs' *Motion to Strike Affirmative Defenses* is respectfully denied.

III. As to Affirmative Defenses Eight and Nine

The *Motion for a More Definite Statement* is granted.

IV. As to Affirmative Defenses Ten and Eleven

Count I of the *Amended Complaint* seeks to "Unwind the Trust Decantings." Count II avers a breach of trust for improper decanting. It is presumably in reply to these counts that Defendants offer Affirmative Defenses Ten and Eleven.[3] Specifically, Affirmative Defense Ten alleges that the defendants reasonably relied on advice of counsel and therefore "pursuant to Fla. Stat. § 736.1009 and § 736.0816(20) . . . cannot be held liable." *Co-Trustee's Answer and Defenses to Amended Complaint*, ¶131. Affirmative Defense Eleven alleges that the defendants "reasonably relied on the advice of counsel in drafting and establishing the . . . Trusts and . . . reasonably relied upon the terms of the trust instruments in making distributions," again citing to Fla. Stat. § 736.1009. *Co-Trustee's Answer and Defenses to Amended Complaint*, ¶132. Section 736.1009, Fla. Stat., captioned "Reliance on trust instrument," provides that, "A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." Section 736.0816, Fla. Stat., captioned, "Specific powers of trustee," provides at subsection (20) that a trustee may, "[e]mploy persons, including but not limited to attorneys . . . to advise or assist the trustee in the exercise of any of the trustee's powers . . . and [may] act without independent investigation on the recommendations of such persons."

There is little decisional law. *Harrell v. Badger*, 171 So. 3d at 768, 770 n. 5, rejects the notion that reliance on advice of counsel provides "a blanket defense against liability for . . . numerous breaches of fiduciary duty." *Accord*, *Kritchman v. Wolk*, 152 So. 3d 628, 633 n. 6 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2082a]. And what little decisional law there is tells us little that we did not already know. In their Affirmative Defenses, Defendants wisely plead not merely reliance on advice of counsel, but *reasonable* reliance on advice of counsel, and *reasonable* reliance on the terms of the trust instrument. Whether the advice given by counsel, and the reliance thereon, was in fact reasonable; whether the terms of the trust instrument were fairly and honorable procured, and fairly and reasonably interpreted; are questions of fact. They are therefore not presently before me. Defendants' pleadings are sufficient, for now.

As to Affirmative Defenses Ten and Eleven, Plaintiffs' *Motion to Strike Affirmative Defenses* is respectfully denied.

V. As to Affirmative Defense Twelve

In Count IV, *see, e.g., Amended Complaint* ¶102 (referring to fees paid by the trust "which fees inure to David and Joan's personal benefit"); Count V, *see, e.g., Amended Complaint* ¶¶106, 107; and Count VI, *see, e.g., Amended Complaint* ¶119 (referring to "invasions of principal for the benefit of Joan Eigen and to the detriment of" the

plaintiffs); Plaintiffs allege that, in gross derogation of her fiduciary duty, Joan plundered the trust, benefitting herself and disadvantaging the plaintiffs. In her Affirmative Defense Twelve, Joan replies that she made "significant contributions" to the plaintiffs. As a result, in her view "Plaintiffs would be unjustly enriched and it would be inequitable if Plaintiffs were permitted to recover damages for the allegedly improper principal distributions to Joan . . . while simultaneously retaining the benefits they obtained from her." *Co-Trustee's Answer and Defenses to Amended Complaint*, ¶133.

The elements of a claim for unjust enrichment are a benefit conferred upon one party by another, the recipient's appreciation of the benefit, and the recipient's acceptance and retention of the benefit in circumstances that make it inequitable for him to retain it without paying the value thereof. *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1242 n. 4 (Fla. 2004) [29 Fla. L. Weekly S672a] (quoting *Ruck Bros Brick, Inc. v. Kellogg & Kimsey*, 668 So. 2d 205, 207 (Fla. 2d DCA 1995) [21 Fla. L. Weekly D71a]). To the selfsame effect *see Peoples Nat. Bank v. First Union Nat. Bank*, 667 So. 2d 876, 879 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D283a] (citing *Hillman Const. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. 4th DCA 1994)). Regarding any benefit conferred upon the plaintiffs here by Joan, Joan promises only that, "Discovery will establish that Joan K. Eigen has contributed financially to virtually every aspect of Plaintiffs' lives." *Opposition to Plaintiff's Motion to Strike Affirmative Defenses*, ¶51.

This won't do. It is a principle too well-settled to invite citation to authority that Florida requires ultimate fact, and not merely notice, pleading. That requirement extends to the pleading of affirmative defenses. *See, e.g., Zito v. Wash. Fed. Sav. & Loan Ass'n*, 318 So. 2d 175 (Fla. 3d DCA 1975); *Walker v. Walker*, 254 So. 2d 832, 834 (Fla. 1st DCA 1971) ("A plaintiff is as much entitled to be aware of the ground upon which it is claimed he should not recover as is a defendant to be apprised of the basis of the plaintiff's claim"). If Joan has contributed financially to every aspect of Plaintiffs' lives, she no doubt knows the date, nature, and amount of her contributions without waiting for discovery to bring them to light. She need not identify each and every such contribution down to the last penny; but she must plead with the requisite particularity to show that circumstances would make it inequitable for Plaintiffs to retain those contributions while pursuing their claims against her here. This she has failed utterly to do.

And there is another problem. Joan cannot and does not deny that, with respect to the transactions at issue here, she was in a fiduciary relationship to the plaintiffs. Neither the authorities cited in the various pleadings filed by the parties nor my own (admittedly as yet very incomplete) research tells me whether a fiduciary who allegedly breached her duty (by, as is alleged in this case, pillaging trust accounts) is, as a consequence of that breach, precluded from asserting an affirmative defense of unjust enrichment in connection with financial benefits she allegedly conferred upon the trust beneficiaries. But such a preclusive effect seems inherent in the nature, role, and responsibilities of a trustee. It is one thing to say that, as between parties dealing at arms'-length, if one makes a financial claim against the other, the other can assert a defense of unjust enrichment arising from financial benefits previously or concurrently conferred upon the claimant. It is quite another thing when one party stands in a fiduciary relationship to the other. Surely the better rule is that a fiduciary is obliged to make good his defalcations even if, and without regard to whether, he has otherwise benefitted the person whose interests he was charged with guarding. To recur to the words of Chief Judge Cardozo, a trustee is held to a standard of duty far "stricter than the morals of the marketplace." It would be inconsistent with that standard of duty to say that a trustee has the option either to invigilate the trust over which he is to stand watch, or, in the alternative, to plunder that trust so long as he remembers to bestow gifts upon the persons who suffer the consequences of that plundering.

These are equitable proceedings. On the averments appearing in the pleadings presently before me, it would be inequitable to permit the defendants to assert a defense of unjust enrichment. As to Affirmative Defense Twelve, Plaintiffs' *Motion to Strike Affirmative Defenses* is granted without prejudice.

VI. As to Affirmative Defense Thirteen

Affirmative Defense Thirteen, alleging Joan's entitlement to set-off, is of a piece with Twelve: because Joan lavished gifts on the plaintiffs in the past, she alleges that the amount of those gifts should be offset against any judgment rendered against her in the present. I entertain the same concerns about the legal sufficiency of this affirmative defense that I do about the previous one. Unless I very much misunderstand the tenor of the law in this area, a trustee who willfully breaches the trust to the detriment of a beneficiary is equitably barred from asserting a claim of set-off for benefits unrelated to the trust corpus that the trustee conferred upon the beneficiary. To hold otherwise would be to vest a fiduciary with an entirely inappropriate choice: the choice either to honor her fiduciary duty; or, if she prefers, to breach that duty, provided she compensates the trust beneficiary in a manner of the fiduciary's own connivance. Such a choice is utterly inconsistent with the very notion of a fiduciary—the notion of one possessed of, and prompted in her actions by, "the punctilio of an honor the most sensitive."

As with Affirmative Defense Twelve, I recognize that additional facts, or supplemental briefing, may compel me to change the position I take here. Accordingly, as with Affirmative Defense Twelve, Plaintiffs' *Motion to Strike Affirmative Defenses* is granted as to Affirmative Defense Thirteen without prejudice.

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[1]Citing Fla. Stat. § 736.04117, Plaintiffs use the term of art "decanting" narrowly, to refer to the "exercise of the power to invade principal." *Amended Complaint* ¶25. *See also Harrell v. Badger*, 171 So. 3d 764 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1719a]. *See gen'ly* Ashlea Ebeling, "Old Money, New Bottle: Decant if You Don't Like the Terms of an Old Trust," *Forbes Magazine*, https://www.forbes.com/sites/ashleaebeling/2017/03/16/old-money-new-bottle-decant-if-you-don't-like-the-terms-of-an-old-trust/?sh=7e65d658f32a.

[2]A second decanting occurred later. Affirmative Defenses Three, Four, and Five appear not to be addressed to that later decanting. That second decanting occurred in December 2017, *Amended Complaint* ¶37, about half a year after Wendy's death. There can be no suggestion that Wendy consented to this second decanting.

[3]Perhaps Affirmative Defense Eleven, which references both reliance on advice of counsel and reliance on the terms of the trust instrument, is directed as well to Count V, "Breach of Trust for Abuse of Discretion in Invading Principal."

* * *

Estates—Discovery—Privilege—No merit to argument that sons of decedent's widow have principal-agent relationship with widow that preserves confidential status of documents that widow disclosed to sons—Widow did not waive claim of privilege by disclosing attorney-opinion work product to son and failing to claim privilege at outset of son's deposition because the documents claimed to be privileged were not disclosed to litigation adversary—However, where son was financial advisor to decedent and widow and may therefore be material witness in case, disclosure of attorney-opinion work product to son was ill-advised—Requested remedy of ordering production of attorney-opinion work product to adversary is disproportionate sanction—Instead, son who is financial advisor will be excluded as witness unless adverse party calls him as witness

IN RE: ESTATE OF HAROLD COMMINGS, Deceased.[1] Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2019-1518-CP-02. August 16, 2021. Milton Hirsch, Judge.

ORDER ON STATUS OF PRIVILEGE LOG DOCUMENTS

Counsel for Miriam Davis Commings have provided a privilege

log, seeking to insulate the documents identified in it from discovery. Counsel for Carla and Mitchell Boden seek to compel discovery, alleging either that no privilege ever attached to the demised documents, or that privilege has been waived as a consequence of Mrs. Commings's lawyers' handling of the documents. A hearing was had on July 26. References to the transcript of that hearing appear as "*Tr.* ___."

Miriam Davis Commings is the widow of the decedent herein, Harold Commings. She has two adult sons from a prior marriage, Bruce Davis and Leslie Davis. Counsel for the Bodens set Bruce for deposition, issuing a subpoena with a lengthy *duces tecum* schedule. Pursuant to that subpoena, Bruce's deposition commenced on May 19 of this year. Although Bruce produced none of the documents sought in the *duces tecum* portion of the subpoena, Mrs. Commings's counsel expressed no objection to production. *Memorandum of Law in Support of Position that Documents in the Possession of Bruce Davis Should be Produced, and for Sanctions*, DE 364 ("*Memo*"), p. 3 ¶6. Asked about the documents during deposition, Bruce said he would produce them; again, Mrs. Commings's counsel made no objection. *Id*. *See also id.* pp. 5-6 ¶25.

Bruce's deposition was not completed, and was rescheduled for June. On May 28 Mrs. Commings interposed a written objection to the production of the demised documents. *Memo,* p. 3 ¶9. In that objection, counsel for Mrs. Commings explained that, "All of the materials objected to contain the mental impressions of Miriam's attorneys regarding th[is] litigation." *Miriam Davis Commings's Objection to the Production of Documents by Non-Party Bruce Davis*, DE 214, p. 1. More particularly, "The materials consist of a very lengthy time line prepared by the attorneys, identification by the attorneys of important documents in the litigation, a confidential memorandum submitted by the attorneys to the mediator in an earlier mediation, and related analysis and commentary by the attorneys." *Id.* On June 3, *see* DE 227, and again on June 7, *see* DE 246, Mrs. Commings's counsel noticed the filing of a privilege log. *Memo*, p. 4 ¶¶13, 15. It is not disputed that the documents sought by counsel for the Bodens, and as to which privileged status is asserted by counsel for Mrs. Commings, have been shared with Bruce Davis. In Mrs. Commings' *Notice of Filing Revised Privilege Log*, DE 246, they are referred to as "Bruce Davis's documents."

Despite, in the language of Mrs. Commings's lawyers' pleading, Bruce Davis's "non-party" status, her counsel insist that the demised documents remain privileged, even in his hands. Initially, this was said to be so because Mrs. Commings had signed papers purporting to appoint her sons as her "attorneys in fact." At the July 26 hearing, however, counsel for Mrs. Commings very properly acknowledged that those papers did not comport with the requirements of Fla. Stat. §§ 709.2101 *et. seq*. defining and regulating attorneys in fact and were therefore not effective. *Tr.* 17 ("not proceeding under the very particularized terms of the attorney-in-fact statute"); 37 ("She signed powers of attorney that were not intended to be and were not powers of attorney").[2] Counsel instead argued, first, that a "common-law principal-agent" relationship existed between Mrs. Commings and her sons with respect to this litigation, the effect of which was to bring them within the umbra of any privilege that she enjoyed, *Tr.* 18, 43; and second, that the work-product privilege, and especially the work-product privilege for attorney impressions and opinions, is so rugged and unyielding that nothing short of wilful disclosure to the enemy camp will dismast it.

I. Were Mrs. Commings's sons her agents for purposes of the application of privilege?

A very considerable share of the testimony received at the hearing was devoted to description of the principal-agent relationship that was alleged to exist between Mrs. Commings and her sons in connection with these lawsuits. According to James Pressly, presently one of Mrs. Commings's lawyers, it was his understanding that, "Mrs. Commings's sons were guiding her in the litigation, and that communication with Mrs. Commings should be made through and simultaneous with the sons." *Tr.* 34. So complete was the involvement of the sons in this regard that James Pressly was obliged to acknowledge that he had never seen Mrs. Commings until he met her at the hearing. *Tr.* 46; 52 ("I did not meet her. I did talk to her at least once on the phone . . . and . . . all my other communications were through the sons"). *See also Tr.* 44 ("All of my communications with Mrs. Commings either went through the two sons, who then discussed them with her"); 50-51. A former Commings' attorney, Gene Glassmer, had the same perspective. The sons "had to be involved in the day-to-day activity and be involved in the litigation." "[S]he knew that she was overwhelmed and couldn't handle things by herself." *Tr.* 130. Mr. Glassmer was pressed on this point on cross-examination:

> Q: So it is your testimony without the assistance of Bruce and Leslie Davis, this case could not have progressed because you would not have been able to communicate effectively with her?
>
> A: That is my testimony.
>
> . . .
>
> A: Oh, she's very difficult to deal with. She can't follow simple instructions. She needs guidance and does not understand a lot of things and has to be explained and re-explained, [she's] very emotional.

Tr. 143-44.

Perhaps most instructive and detailed was the testimony of former Commings attorney Andrew Cummings. Excerpts follow:

> [T]he first time I met Miriam . . . she was overwhelmed. She was emotional. She had lost her husband. She needed assistance. She didn't use email, as I recall. Communicating with her was difficult. There was a lot of phone tag, and she said she needed the assistance of her sons to help her with communications, with handling the litigation.

Tr. 258.

> I needed to communicate with her. It was difficult to communicate with her. Number one, she was elderly. She was very emotional. She was confused about the entire process. She thought what was going to be a very simple estate administration turned into a highly litigated matter, and that is why she said she wanted her children to be involved, and the attorneys later agreed, after she said that, that her children should be involved as her agents.

Tr. 272.

Mrs. Commings testified at the hearing. *Tr.* 195 *et. seq*. I saw none of the confusion, the sense of being overwhelmed, the lack of comprehension, reported by her lawyers. Yes, she is an octogenarian, and in the ordinary course of nature she may have less celerity of mind than she had half a century ago. Yes, having buried two husbands, the second a victim of Alzheimer's, she has endured "the heartache and the thousand natural shocks/That flesh is heir to," Wm. Shakespeare, *Hamlet*, Act III, sc.1. But seated on the witness stand in open court—ordinarily, a very stressful experience—she came across as lucid, even well-spoken. Her answers to counsels' questions were responsive. Her facial expressions were appropriate. She did not struggle to recall words, or to express ideas. She went toe-to-toe with a very skilled and prepared cross-examiner, and she gave as good as she got.

Apparently before the present pandemic she was involved in charitable work and other activities that kept her reasonably active. *Tr.* 201-02. She lives alone, but wishes she had someone with whom she could "hav[e] some fun in life." *Tr.* 200. She is adamant that her sons must be permitted to assist her in connection with this litigation, but

could not identify any particular thing that they had done, or that she needed them to do:

> Q: How does Bruce assist you in these lawsuits?
>
> A: He assists me when I ask him to.
>
> Q: And can you tell me how he does that?
>
> A: I don't know how he does that. I ask him to help me and whenever I ask him, he comes and he—they're my children.

Tr. 208.

"[P]robate litigation is sophisticated litigation," *Tr.* 146, the more so where, as here, there are considerable assets, complicated issues, and energetic disputes. When asked on cross-examination how laymen such as Bruce and Leslie Davis could more effectively discuss and review this "sophisticated litigation" with their mother than could her own lawyers, Attorney Glassmer—a respected probate practitioner with decades of experience—replied:

> Well, you obviously don't do lot of estate and trust work because this is as commonplace as it is. I would say right now, I probably have ten of these where you can't always communicate with the older person and the things need to go through the children. This is like very commonplace in estate work.

Tr. 149.

Although I find Miriam Davis Commings to be in possession of her faculties, I accept Mr. Glassmer's suggestion that someone circumstanced as she is may need the help of her adult children in a hundred ways. I accept that, as Mr. Glassmer puts it, there are times when "you can't always communicate with the older person." But I accept, too, that environed by "woe, destruction, ruin and decay," Wm. Shakespeare, *Richard II* Act III, sc. 2, a surviving family member *of any age* may, indeed must, call upon other family members and loved ones for support of every kind. In Miriam's words, "I ask him to help me and whenever I ask him, he comes and he—they're my children."

Bruce and Leslie Davis appear to be dutiful and devoted sons. No doubt they take their mother's calls at all hours, listen to her sorrows, raise her spirits, visit when they can, bring her treats. In the words of Attorney Cummings, "a lot of what Leslie and Bruce did to assist their mother was clerical in nature." *Tr.* 272. There was testimony that Leslie and Bruce also review documents in this litigation with their mother, explain her lawyers' questions and concerns, and then communicate her responses to those lawyers. By doing these things they make discussion of unpleasant matters more palatable to their mother, while at the same time saving lawyer time and billing.

Assume all this to be so. The question then becomes: Does this sort of conduct—the conduct that any dutiful and affection relative would render to another in a time of need—constitute a formal principal-agent relationship, such that any litigation privilege inhering in the principal extends, as a matter of law, to the agent?[3]

It seems grandiose to describe the support and assistance that Bruce and Leslie Davis have rendered to their mother in connection with her litigation and her other related problems as forming a formal principal-agent relationship. In legal terms, a principal-agent relationship requires (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *See, e.g., Goldschmidt v. Holman*, 571 So. 2d 442, 424 (Fla. 1990) (citing Restatement (Second) of Agency § 1 (1957)). Here, condition three is missing. True, all agree that Miriam has ultimate control over the litigation itself. A decision to settle this lawsuit, for example, would be for her and not her sons to make. But control over the litigation and control over the agent or agents are two very different things. If Bruce and Leslie acted as intermediaries between their mother and her lawyers, there can be no serious suggestion—and none appears in the record of the July 26 proceedings—that Miriam exercised control over the ways and means by which Bruce and Leslie did so. If Bruce and Leslie assisted their mother in downloading and printing emails, in organizing documents, in performing what Attorney Cummings referred to as "clerical functions," there can be no serious suggestion—and none appears in the record of the July 26 proceedings—that Miriam exercised control over the ways and means by which Bruce and Leslie did so. And surely if Bruce and Leslie consoled their mother in her bereavement and her widowhood with their sympathy, their presence, and their affection, there can be no serious suggestion—and none appears in the record of the July 26 proceedings—that Miriam exercised control over the ways and means by which Bruce and Leslie did so.

As pointed out in n. 3, *supra*, lead counsel for Mrs. Commings very forthrightly acknowledged that he had found no case in Florida or elsewhere in which "adult children acting to provide moral support, advice, assistance of various kinds, to an octogenarian parent, the parent being drawn suddenly into very consequential litigation, were deemed to be agents for this purpose, were found to be agents for work-product purposes, simply by virtue of those functions, that role, those services." I suspect that there are no such cases. The various evidentiary privileges appearing at Fla. Stat. § 90.501 *et. seq*. serve important policy goals, but they often do so at a price to the court's truth-seeking function. If every family member or friend who assists another family member or friend in dealing with the logistical and psychological burden of probate (or indeed any other sophisticated form of) litigation is rendered, by virtue of that assistance, an agent at law of the family member or friend thus assisted; and is, as a consequence of that principal-agent relationship, able to resist compulsory process and discovery by invoking a claim of privilege; litigation becomes so severely hobbled as to be almost impossible. Bruce and Leslie are clearly affectionate sons. But no judge has yet held that the mere expression of filial affection creates an agency relationship. I decline to become the first.

II. Assuming that the documents identified on the privilege log are work product, do they retain their work-product status even in the hands of non-party, non-lawyer Bruce Davis?

Counsel for Mrs. Commings take the position that at the core of the work-product privilege is the privilege against "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation." Fla. R. Civ. P. 1.280(b)(4). In their view, the bar against discovery of such materials is all but absolute. *See, e.g., State v. Rabin*, 495 So. 2d 257, 262 (Fla. 3d DCA 1986) ("opinion work product is absolutely, or nearly absolutely, privileged") Because the documents listed in the privilege log are alleged to contain just such materials,[4] the act of sharing those documents with someone who, although a non-party and non-lawyer, is clearly within the defense camp, clearly not a threat to divulge those materials to the adversary, does not—again, in the view of Mrs. Commings's counsel—undermine the privilege in any way.

The first response to this position offered by counsel for the Bodens is that the privilege was waived. Lead counsel for Mrs. Commings testified at the hearing. Lead counsel for the Bodens, in cross-examination, made clear his frustration at what he understandably viewed as a tardy assertion of privilege. The *duces tecum* portion of the deposition subpoena issued to Bruce Davis called for materials that would later find their way into the privilege log. But no assertion of privilege was made when the subpoena was issued, and none was asserted at the deposition itself.

> Q: . . . You sat there [in Bruce Davis's deposition] and you let him say he was giving me everything.
>
> A: I did because I did not know what the documents—
>
> Q: And whose fault is that?

A: Maybe mine, but—

Tr. 180. And again:

Q: . . . How do you not bring this up [*i.e.*, the question of privilege] prior to the deposition?

A: . . . I brought it up as soon as it occurred to me that maybe those documents are within the scope of this subpoena . . . .

Q: Why didn't you object [on grounds of work-product privilege]?

A: Because I did not realize that there was anything to object to . . . .

Q: So what you did was you assumed, correct? You assumed in reading that there was nothing responsive?

. . .

Q: But, unfortunately, it appears you were mistaken.

A: Correct.

Tr. 183. *See also* 168; 185.

As noted, counsel's frustration is understandable. Bruce Davis's deposition extended over several hours and was not completed. The work-product objection to materials called for in the *duces tecum* portion of the deposition subpoena should have been raised, and could have been resolved, prior to the commencement of the deposition. The failure to raise the objection, coupled with Mr. Davis's assurance at deposition, in the presence of his mother's attorneys, that he would produce the subpoenaed materials, conveyed a profoundly misleading impression to counsel for the Bodens about the nature of this case, and assured a duplication of time and labor in discovery.

But it did not constitute waiver. Where the work-product doctrine is concerned, waiver is narrowly construed. *See, e.g., Nevin v. Palm Beach Cty. Sch. Bd*, 958 So. 2d 1003, 1007 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1365a] (waiver of work-product privilege is not favored under Florida law). Of course a knowing and voluntarily disclosure of putatively privileged materials constitutes a waiver, *Tumelaire v. Naples Estates Homeowners Ass'n*, 137 So. 3d 596, 599 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D935b], but that did not occur here. On the contrary; although Mrs. Commings's lawyers certainly did not assert privilege at the first opportunity (nor, the Bodens' lawyers would surely add, at the second or the third), they did so before any privileged material was divulged. Lead counsel for Mrs. Commings was candid in his testimony. He as much as admitted that he was insufficiently attentive to the work-product issue and to the implications of the *duces tecum* portion of the Bruce Davis subpoena. But his inattention, if inattention it was, did not result in the disclosure to his litigation adversary of any evidentiary artifact as to which he now asserts a claim of privilege. Thus the privilege remains intact at this juncture. It has not been waived.

Counsel for the Bodens, however, have another argument to make. It turns upon the role of Bruce Davis in this litigation. And it raises very troubling concerns about the manner in which this case has been conducted.

This argument turns on whether Bruce Davis will be a witness, and if so a material witness, at any trial of this cause. As to that issue, the two sides take wildly differing positions.

Bruce is a financial advisor. He serves in that capacity for his mother, and he served in that capacity for her late husband. *Tr.* 94. For that and other reasons, counsel for the Bodens take the position "that Bruce is a material witness and his role included, but was not limited to," *Memo* p. 6 ¶27, the following:

a. Attending estate planning meetings with the decedent and Miriam when material changes were made to the decedent's estate planning which go to the heart of this litigation, *i.e.*, the changes were procured through undue influence, deceit, trickery, mistake, *etc.*

b. Conferring with Miami's attorneys about the revisions to the decedent's Will, Trust, Deeds, and the Prenuptial Agreement which led to distributions to Miriam, the validity of which are disputed in this litigation. Moreover, Bruce was instrumental in manipulating estate planning documents in favor of his mother, Miriam.

c. Extensive knowledge and involvement in the creation and revisions to the majority, if not all, of the documents in dispute in this litigation.

d. As the decedent's fiduciary, Bruce was responsible for managing his investments and systematically proving [*sic*; providing?] financial advice to the decedent. Here, contrary to his testimony, Bruce's management ultimately inured to the benefit of Miriam.

e. Contrary to his sworn testimony, Bruce was well aware that Miriam obtained a Power of Attorney from Bruce's employer, as he was responsible for the account.

f. Knowledge relating to the creation of joint bank accounts at Suntrust for the decedent and Miriam, which were used to syphon money from the decedent's assets to Miriam.

g. Attending the decedent's doctors appointments and consulting with them about the decedent's deteriorating medical condition.

Memo pp. 6-7 ¶27a-g.

For their part, Mrs. Commings's lawyers were at pains at the July 26 hearing to demonstrate that Bruce Davis is, as they term him, no more than a "fluff" witness—one who can perhaps testify, based on his own observations, about the decedent's declining health and cognitive function toward the end of his life, but has no more to offer than that. In a series of questions, Mrs. Commings's lawyers sought to demonstrate how far from material Bruce Davis's testimony is:

Q: [The Bodens] are challenging the working in the will and trust signed by [Decedent] in December 2009. Did you participate in any way in the preparation of that will and trust?

A: I had no personal knowledge of it at all. No.

Q: Do you have any personal knowledge regarding the preparation and signing of that will and trust?

A: No.

. . .

Q: [The Bodens] are challenging the validity of three amendments made to [Decedent's] trust. Did you participate in any way with the preparation of those trust amendments?

. . .

A: No.

Q: Do you have any personal knowledge regarding the preparation and signing of the trust amendments?

A: No.

Tr. 65-66. The questioning continues in the same vein: Mr. Davis testifies that he has no knowledge or testimony to offer about the trust amendments, *Tr.* 66; about the validity of a deed that the decedent signed in 2010, *Tr.* 66-67; about the validity of a deed that the decedent signed in 2013, *Tr.* 67; about two particular bank accounts at Suntrust, *Tr.* 67-68; about an amendment to a prenuptial agreement executed in 2015, *Tr.* 68; about a certificate of deposit, *Tr.* 68; and so on.

There thus emerge two very different iterations of Bruce Davis as a witness in this case. According to the Commings camp, Davis had next to nothing to offer by way of testimony. Permitting him to see the attorney-opinion work product, presumably for the purpose of reviewing it with his mother, could have no consequences. It could not alter his testimony, because he had little or no testimony to give. And it could not compromise the privilege, because he would be the last person in the world to break privilege by sharing the privileged material with anyone in the Boden camp.

According to the Boden camp,

> the dissemination of work-product materials to Bruce as a material witness had the effect of completely shaping his testimony. It allowed Bruce to testify consistent with what was shared with him by Miriam's counsel and to downplay or avoid areas that might be more problematic. It provided Miriam with a strategic advantage by turning an otherwise material witness who has knowledge of the many central issues to this litigation into essentially a mouthpiece to push Miriam's counsel's theories of the case.

Memo p. 16. *See also Tr.* 301 ("[A]s a material witness, Counsel gave to him his mental impressions, his work product, his theories of the case, which coached him on how to testify.")

I cannot know with anything approaching certainty, even based on the record made at the July 26 hearing, which version of Bruce Davis is the true one. I can say, with something approaching certainty, that no matter which version is the true one, the decision to share the attorney-opinion work product with Bruce Davis was ill-advised. Bruce had a role as his mother's, and her late husband's, financial advisor. By contrast Leslie Davis works as a contractor. *Tr.* 230. Given Bruce's unique role, there always was, and indeed there still is, the possibility that he would be a witness to something more than "fluff." Given Leslie's lack of any involvement in this case other than as his mother's son, there was never much of a possibility that he would be a witness at all, and no possibility that he would be a crucial, material witness. If it was truly necessary that the attorney-opinion work product be shared with someone to assist in explaining it to Miriam—if her highly competent and experienced lawyers could not, in connection with this important material, make a one-time exception and actually invest the time, patience, and effort to meet with and explain this material to her themselves—then it should have been shared with Leslie and not with Bruce. Miriam's lawyers' position is that sharing this work product with Bruce would not abrogate the privilege. But that would have been true as to Leslie. The Bodens' lawyers' position is that sharing this work product with Bruce constituted, or could constitute, witness-coaching. *Memo* pp. 16 *et. seq*. But that could not have been true as to Leslie. *Tr.* 304.

The Bodens' lawyers take the position that the only way out of this quagmire is by stripping the items on the privilege log of their privileged status and compelling their production in discovery. That is the most extreme of remedies, and one I am loath to impose. Ordering the production of an attorney's opinions and impressions about his case to his adversary would be all-but-unprecedented in Florida practice, and would be a disproportionate sanction for the troubling but not irremediable problems that this lawsuit presents.

There are lesser, and more tailored, sanctions that may be more appropriate. One such sanction is the exclusion of Bruce Davis as a witness unless called by the Bodens' attorneys (in which case his examination on "cross" by Mrs. Commings's attorneys would be limited to the topic or topics about which he was asked on "direct" by the Bodens' attorneys). This would preserve intact the Commings work-product material, but it would be difficult for the Boden camp to allege that they were prejudiced. Mrs. Commings, of course, is entitled to see her attorneys' work product, and if she chooses to testify at the trial of this cause her adversaries cannot complain that they have been unfairly disadvantaged. Leslie Davis, as previously noted, has little to say, and certainly nothing that could be profoundly altered by his perusing the privileged material.

The Commings camp may see this remedy as excessive. But to oblige counsel for the Bodens to confront and cross-examine Bruce Davis at trial without knowing the content of the privilege-log documents, the extent to which Bruce has reviewed those documents, and the manner and extent to which his testimony has been influenced by those documents, would reduce cross-examination to a game of blind-man's bluff.

The Boden camp may see this remedy as inadequate. But the complete abandonment of privilege as to attorney-opinion work product is, on the facts before me, a draconian and excessive remedy. I decline to impose it.

III. Conclusion

Production in discovery of the materials identified on the privilege log is, at least for the present, DENIED.

Bruce Davis is EXCLUDED as a trial witness unless called on behalf of the Bodens.

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[1]Consolidated with *Miriam Davis Commings v. Carla F. Boden, as Personal Representative of the Estate of Harold Commings*, Case No. 2020-2044-cp-02; *Carla F. Boden v. Miriam Davis Commings*, Case No. 2020-2032-cp-02; *In Re: Estate of Harold Commings/Mitchell Boden, Successor Trustee of the Harold Commings Trust Dated December 23, 2009 v. Miriam Davis Commings and Carla F. Boden, as Personal Representative of the Estate of Harold Commings*, Case No. 2020-1342-cp-02.

[2]The purported powers of attorney were received in evidence, *Tr.* 40, 41, not as powers of attorney but as expressive of Mrs. Commings's intent and understanding. *See, e.g.,* Fla. Stat. § 90.803(3)(a)2 ("statement of intent [or] plan . . . offered to . . . [p]rove or explain acts of subsequent conduct of the declarant"). The purported giving of a power of attorney is also analogous to the giving of consent, admissible as a verbal act. "A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it." *Arguelles v. State*, 842 So. 2d 939, 943 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D763a] (quoting *Banks v. State*, 790 So. 2d 1094, 1097-98 (Fla. 2001) [26 Fla. L. Weekly S510a]).

[3]I posed the same question to counsel for Mrs. Commings during his closing argument at the hearing:

> BY THE COURT: Is there a Florida case, or an out-of-jurisdiction case, in which adult children acting to provide moral support, advice, assistance of various kinds, to an octogenarian parent, the parent being drawn suddenly into very consequential litigation, were deemed to be agents for this purpose, were found to be agents for work-product purposes, simply by virtue of those functions, that role, those services?
>
> MR. PRESSLY: I did not see any [such] cases.
>
> . . .
>
> BY THE COURT: . . . [Opposing counsel] Mr. Rosner, in a minute, is going to get up and argue that the sort of intrafamilial advice that one relative always gives another does not rise to the level of principal/agent relationship for purposes of work-product privilege.

Tr. 289-90.

[4]For purposes of this analysis, I assume without deciding that all items appearing on the privilege log would fall within the very capacious definition or description of attorney-mental-impression work product. *See, e.g., Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970); *Smith v. Florida Power & Light*, 632 So. 2d 696 (Fla. 3d DCA 1994).

* * *

Criminal law—Juveniles—Aggravated battery—Immunity—Stand Your Ground law—Burden of proof established by section 776.032(4) for immunity hearings in criminal prosecutions is not applicable to juvenile delinquency cases—In delinquency cases, initial burden to prove justifiable use of force in self-defense by preponderance of evidence is on child—If child meets initial burden, burden shifts to state to rebut affirmative defense beyond reasonable doubt

IN THE INTEREST OF J.J., A CHILD. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, Unified Family Court, Juvenile Division. Case No. 20-CJ-2281-A, Division F. August 24, 2021. Thomas N. Palermo, Judge. Counsel: Nathan Keith Waters, Assistant State Attorney, and Andrew H. Warren, State Attorney, Tampa, for Petitioner State of Florida. Antina L. Mobley, Assistant Public Defender, and Julianne M. Holt, Public Defender, Tampa, for Respondent J.J., a Minor Child.

ORDER ON BURDEN OF PROOF FOR THE CHILD'S MOTION TO DISMISS BASED ON STATUTORY IMMUNITY (STAND YOUR GROUND)

On July 21, 2021, J.J. (the Child) filed a motion to dismiss the Petition[1] pursuant to Florida Rule of Juvenile Procedure 8.085 and §§ 776.012 and 776.032, Florida Statutes. Doc. 60. In the motion, the Child asserts that § 776.032(4), Florida Statutes, applies. *Id*. at 4. This provision sets forth the burden during an immunity hearing in criminal prosecutions. After reviewing the motion, the Court ordered the parties to brief whether § 776.032(4) applies in juvenile delinquency cases and, if it does not, what burden should apply. On August 11, 2021, the State filed its brief. Doc. 69. On August 12, 2021, the Child filed his brief. Doc. 72. After a careful review of the briefings, the Court finds that § 776.032(4) applies to criminal prosecutions, but

not to juvenile delinquency cases. Applying *T.P. v. State*, 117 So.3d 864 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1529a], and the dissent in *Bretherick v. State*, 170 So.3d 766 (Fla. 2015) [40 Fla. L. Weekly S411a], the Court finds that the initial burden is preponderance of the evidence and it is on the Child. If the Child meets his initial burden, then the burden shifts to the State to rebut the affirmative defense beyond a reasonable doubt.

Procedural History

On November 4, 2020, the Child was arrested for the delinquent act of Aggravated Battery (Great Bodily Harm). Doc. 17 (CRA). At his detention hearing, the Court ordered the Child placed on supervised release, specifically, intensive home detention. Doc. 3 (Detention Order). On December 7, 2020, the State of Florida filed a Petition for Delinquency, alleging that the Child committed the delinquent act of Aggravated Battery (Great Bodily Harm). Doc. 20 (Petition). Discovery was conducted. See, e.g., Doc. 45 (Notice of Taking Deposition). The case was set for an adjudicatory hearing. Doc. 54 (Clerk's Minutes). On July 21, 2021, the Child, asserting that he acted in self-defense, filed his motion to dismiss under Florida Rule of Juvenile Procedure 8.085. Doc. 60.

Averment

The dismissal motion avers that, on September 14, 2020, the Petition victim was engaged "in a verbal disagreement with a subject at the County Hills Park." Doc. 60 at 1. The Petition victim "left the park but later returned with his older brother-in-law." *Id.* The Petition victim and his brother-in-law "had a verbal discussion with the subject and his brothers." *Id.* After the discussion, the Petition victim "charged (ran toward) and grabbed the Child, J.J., trying to tackle the Child to the ground." *Id.* After the Petition victim "forcefully grabbed the Child, the Child responded physically, in self-defense, by using force against [the Petition victim's] use of unlawful force." *Id.* The defense asserted in the motion—justifiable use of force, that is, self-defense—pursuant to § 776.012(1), Florida Statutes.[2]

Process

The dismissal motion properly invoked Rule 8.085. The justifiable use of force defense is an affirmative defense. Florida Rule of Juvenile Procedure 8.085(2), entitled "Motion to Dismiss," requires, in pertinent part, that "[a]ll defenses not raised by a plea of not guilty or denial of the allegations of the petition shall be made by a motion to dismiss the petition." Any child who wishes to raise an affirmative defense must, therefore, raise it through a motion under Rule 8.085(2).

The Child further cited the immunity hearing statute, § 776.032(1), Florida Statutes, which set forth, in relevant part, that "[a] person who uses or threatens to use force as permitted in § 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 . . ." The Child asserted that he need only make a *prima facie* showing to obtain an evidentiary hearing, noting that "Florida Law requires a **criminal defendant** to raise a *prima facie* claim of self-defense immunity before trial." *Id.* at 3 (emphasis supplied). The Child argued that the burden is set forth in § 776.032(4), Florida Statutes, here quoted in full:

> In a **criminal prosecution**, once a prima facie claim of self-defense immunity from **criminal prosecution** has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from **criminal prosecution** provided in subsection (1).

(emphasis supplied). In sum, the Child claims that he has made a *prima facie* claim for the justifiable use of force in self-defense and, therefore, the burden should now be on the State of Florida to rebut his immunity claim by clear and convincing evidence under § 776.032(4).

Plain Language

On its face, section 776.032(4) applies to criminal prosecutions. Delinquency proceedings are not criminal prosecutions. Therefore, it does not apply.

"In interpreting the statutes, we follow the 'supremacy-of-text principle'—namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' " *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. Dec. 31, 2020) [46 Fla. L. Weekly S9a] (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). The Court's primary task in statutory construction is to give the statutory text its plain and obvious meaning; Courts lack the "power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *State Farm Fire & Cas. Ins. Co. v. Wilson*, No. 2D19-4046, 2021 WL 2024167, at *2 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1183a] quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

Section 776.032(4), Florida Statutes, expressly applies to only one category of cases: criminal prosecutions.

Although the term "criminal prosecutions" is unambiguous, section 776.032(1) expressly defines the term: "[a]s used in this subsection, the term 'criminal prosecution' includes arresting, detaining in custody, and charging or prosecuting the defendant." There is a common feature in each of the aspects of criminal prosecutions described: the defendant. In other words, the object of each of the verbs listed is plainly the defendant: arresting the defendant, detaining the defendant in custody, charging the defendant, or prosecuting the defendant. Criminal cases have defendants.[3] Juvenile delinquency cases do not; they have children.[4]

In its brief on the issue, the State argued that "Florida Rules of Juvenile Procedure directly address 'arresting, detaining juveniles in custody, and charging or Prosecuting' juvenile defendants." Doc. 69 at 7. In support of this proposition, the State discussed Florida Rule of Juvenile Procedure 8.010, which governs detention hearings. The State's discussion consistently refers to juvenile defendants in relation to other language in the Rule. *See, e.g.*, Doc. 68 at 7 ("Subsection (f)(1) provides that the juvenile defendant 'shall be advised of the nature of the charge for which he or she was taken into custody.' "). The problem is that "juvenile defendants" is not the language of the Rule. The Rule actually refers to the "child." For example, staying with Subsection (f)(1), the Rule states that "[a]t the detention hearing the persons present shall be advised of the purpose of the hearing and the **child** shall be advised of (1) the nature of the charge for which he or she was taken into custody." (emphasis supplied.) Even the State's brief itself properly follows the correct convention, referring to J.J. as the Child and not the "juvenile defendant" throughout the brief. These cases may be juvenile delinquency prosecutions or prosecutions of violations of law by a child but they are not criminal prosecutions.

There is no ambiguity in § 776.032(4), Florida Statutes. The legislature means what it plainly said and only what it said. And the legislature did not include juvenile delinquency within the ambit of § 776.032(4).[5] The only reason the language is potentially ambiguous is because many are simply unsure what juvenile delinquency actually is.

Neither Fish nor Fowl

Humans feel the need to classify and categorize; we love taxonomy. Even Julius Caesar in his Commentaries on the Gallic Wars begins with "[a]ll Gaul is divided into three parts." Julius Caesar, *De Bello Gallico* ("Gallia est omnis divisa in partes tres."). Lawyers are no different. Most lawyers cleave the law in two: civil law and

criminal law. Only the most intrepid lawyers venture into the areas of the law that are some of both but, in the end, are neither, like juvenile delinquency. *See State v. Boatman*, 329 So. 2d 309, 312-13 (Fla. 1976) ("Juvenile delinquency proceedings are neither wholly criminal nor civil in nature. The United States Supreme Court has refused to simplistically categorize juvenile proceedings as either 'criminal' or 'civil,' avoiding thereby a 'wooden approach.' While certain federal constitutional rights obtain in juvenile proceedings, others do not."); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

Juvenile delinquency falls under the umbrella of the Unified Family Court. It is its own area of law. Frequently treated as criminal, juvenile delinquency is actually a legislative carve out that shunts children away from the criminal justice system. *See State v. A.N.F.*, 413 So. 2d 146, 147 (Fla. 5th DCA 1982) ("The jurisdiction of the Juvenile Court is specially carved out of the general jurisdiction of the circuit court, and it is by special legislative grace and favor, that individuals are given special treatment and consideration under that system."). Juvenile delinquency is perhaps the original diversion scheme.

The Florida Constitution clearly expresses a distinction between those charged with crimes, Article I, § 15(a), and children "charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases," Article I, § 15(b). This is the constitutional underpinning of Florida's juvenile delinquency system.

In criminal prosecutions, the accused have the right to a jury trial. This right initially flows from the Sixth Amendment to the United States Constitution. In language not dissimilar to § 76.032(4), Florida Statutes, that is, "criminal prosecutions," the Sixth Amendment's first four words define the scope of its application: "[i]n all criminal prosecutions." Yet, in juvenile delinquency, there are no jury trials, because, at least for now, juvenile delinquency is not a criminal prosecution. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that juveniles have no right to a jury trial).

This is not to say that children accused of juvenile delinquency are without rights. The substance of other rights enumerated in the Sixth Amendment applies even if not from the Sixth Amendment itself. Those rights arise as a matter of due process flowing from the Fourteenth Amendment. *See McKeiver*, 403 U.S. 528, 532 (1971) (citing *In re Gault*, 387 U.S. 1, 30-31 (1967)). In 1868, in the aftermath of the Civil War, our nation adopted the Fourteenth Amendment, which included a Due Process Clause that was unambiguously aimed at the states, but otherwise matched the language of the Fifth Amendment: "No State shall . . . deprive any person of life, liberty, or property without due process of law." This same language is expressed directly in Article I, § 9 of the Florida Constitution: "No person shall be deprived of life, liberty, or property without due process of law . . ." Thus, a Florida juvenile's due process rights flow from both Article I, § 9 of the Florida Constitution, and the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court itself determined that the applicable due process in juvenile delinquency embraces adequate written notice; advice as to the right to counsel, retained or appointed; confrontation; cross-examination; the privilege against self-incrimination; and the standard of proof beyond a reasonable doubt. *McKeiver*, 403 U.S. 528 (1971); *In re Gault*, 387 U.S. 1 (1967) (overruled on other grounds as stated in *Allen v. Illinois*, 478 U.S. 364 (1986)).

In Florida, the applicable due process standard in juvenile delinquency proceedings is fundamental fairness. *State v. D.H.*, 340 So. 2d 1163, 1166 (Fla. 1976). As such, judicial proceedings involving juveniles must include fair hearings, in which the juvenile's constitutional and legal rights are protected and enforced. § 985.01(1)(b), Fla. Stat. (stating a purpose of chapter 985 is "[t]o provide judicial and other procedures to assure due process through which children, victims, and other interested parties are assured fair hearings . . ., protection, and enforcement of their constitutional and other legal rights, while ensuring that public safety interests and the authority and dignity of the courts are adequately protected."). In that way, the Constitutions of the United States and Florida, the Florida legislature, and the courts have defined the juvenile delinquency as having features similar to criminal prosecutions but remaining separate and distinct from them.

Numerous examples exist of the differentiation between delinquency proceedings and criminal proceedings. *See, generally, D.H.*, 340 So. 2d at 1166 (violations of law should be treated as acts of delinquency and not as crimes); *M.F. v. State*, 563 So. 2d 171, 172 (Fla. 3d DCA 1990) (holding that an adjudication of delinquency is not a criminal conviction). The Florida Supreme Court explained that

> [a] child offender, even after being adjudged delinquent, is never held to be a criminal, even if the act would be considered a crime if committed by an adult. The key to this difference in approach lies in the juvenile justice system's ultimate aims. Juveniles are considered to be rehabilitatable. They do not need punishment. Their need lies in the area of treatment. Therefore, while a juvenile whose liberty the state seeks to restrain must be afforded a certain minimum standard of due process, it has never been held that he enjoys the full panoply of procedural rights to which one accused of a crime is entitled.

In Int. of C. J. W., 377 So. 2d 22, 24 (Fla. 1979) (citing *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967)). In establishing the authority of the Circuit Court over certain offenses, the legislature tracked Article V, Section 30(c)(3) of the Florida Constitution. In § 26.012(2)(c), Florida Statutes, the legislature vested the Circuit Court with jurisdiction over "all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985." In subsection 2(d), the legislature vested the Circuit Court with jurisdiction over "all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged." The Florida Constitution and legislature draw distinctions between criminal and juvenile delinquency.

The legislature itself established the juvenile delinquency system in Chapter 985 of the Florida Statutes. There the legislature established exclusive original jurisdiction of the circuit court over "proceedings in which a child is alleged to have committed . . . a delinquent act or violation of law." § 985.0301(1)(a), Fla. Stat. The statutes are filled with similar indications that juvenile delinquency cases are not simply criminal prosecutions.

Lawyers and courts have sometimes failed to take note of the difference. In Stand Your Ground proceedings, the discussion and citations are routinely to criminal cases and references to the criminal rules. This Court finds that juvenile delinquency cases are not criminal prosecutions. And, because of that, § 776.034(4), Florida Statutes, does not apply. However, this does not mean that children are not able to raise the underlying affirmative defenses prior to the adjudicatory hearing. Indeed, if they wish to employ the defense, they must raise it in a pre-hearing motion to dismiss. *See* Fla. R. Juv. P. 8.085(2).

Florida Rule of Juvenile Procedure 8.085

There is no doubt that affirmative defenses apply in delinquency cases. *See, e.g., G.T.J. v. State*, 994 So.2d 1182 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2616a]. The Child correctly relies upon a motion to dismiss to raise it. *See T.P. v. State*, 117 So.3d 864 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1529a]. Florida Rule of Juvenile Procedure 8.085(2) requires all defenses not raised by a plea of not guilty or denial of the allegations of the petition to be raised through such a motion.[6]

The remaining issues are (1) what is the burden of proof and (2)

who has it.

This Court is not without guidance on what the burden should be if § 776.032(4), Florida Statutes, does not apply. That provision was only added to section 776.032 in 2017. In *Bretherick v. State*, 170 So.3d 766 (2015) [40 Fla. L. Weekly S411a], the Florida Supreme Court answered the question about the burden in criminal cases under the then operative iteration of section 776.032 (2014). *Bretherick* concluded that at a pretrial immunity hearing "the defendant bears the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity." *Id*. at 768.

T.P. v. State, 117 So.3d 864 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1529a], is one of the few delinquency cases to even mention § 776.032, Florida Statutes. It never addressed § 776.032(4), which did not become law until 2017, nor even directly the application of § 776.032 to juvenile delinquency cases. These were simply not the issues in the case. What *T.P.* actually addressed was whether the child could raise a specific affirmative defense under § 776.013(3). In *T.P.*, the circuit court had found that the affirmative defense under Florida Statute § 776.013 did not apply, "misunderstanding the section to apply only to homes and vehicles." 117 So.3d 864, 866. The 4th DCA rejected this interpretation of the affirmative defense. The 4th DCA found that "the trial court erred in its legal conclusion that section 776.013 did not apply . . . [and] reverse[d] for the trial court to consider the motion to dismiss under a proper construction of the [section 776.013]." *Id*. The 4th DCA ordered the trial court to determine whether under the evidence presented the child could satisfy his burden of preponderance of the evidence. *Id*. In this way, though never squarely on the issue, the 4th DCA implied that section 776.032 applied and, although it did not say it explicitly, that the burden effectively tracked that established in *Bretherick*. Adhering to *T.P.*, the burden is then on the movant—the Child—and the burden is by preponderance of the evidence.

However, that is only be the initial burden. Here, this Court is persuaded by the dissent in *Bretherick*. The dissent argued that the burden should be the same as when a Stand Your Ground defense is presented at trial, because "the essential nature of the [underlying] factual question" is the same in both settings. *Id*. at 779 (Canady, J., dissenting). In other words, the burden should be on the State to "establish[ ] beyond a reasonable doubt that the defendant's conduct was not justified under the governing statutory standard."[7] *Id*. The majority in *Bretherick* rejected this, at least in part, because, requiring it would force the State to prove its case twice under the same burden. But those same concerns do not exist in juvenile delinquency cases. Because the adjudicatory hearing is a bench trial, the trial court need not rehear the entire case a second time. If the motion to dismiss is denied, the Court can rely upon the testimony it already heard, permitting the parties to call additional witnesses or offer additional evidence and to permit the parties to make additional appropriate arguments to complete the adjudicatory hearing. In other words, the duplication of effort in criminal prosecutions that concerned the Florida Supreme Court need not exist in juvenile delinquency. The logic and reasoning of the dissent applies even better in delinquency cases than it does in criminal prosecutions. Once the Child meets his initial burden, the burden of proof shifts to the State and that burden must be beyond a reasonable doubt, exactly as it would be during the adjudicatory hearing. *See, generally, G.T.J. v. State*, 994 So.2d 1182 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2616a].

Conclusion

The Child properly filed a motion to dismiss the petition under Florida Rule of Juvenile Procedure 8.085(2), raising the affirmative defense of justifiable use of force in self-defense. Because the Court finds that § 776.032(4), Florida Statutes, does not apply to juvenile delinquency cases, the initial burden is on the movant. His burden is by a preponderance of the evidence. If he satisfies his burden, the burden shifts to the State of Florida to rebut the affirmative defense. That burden is beyond a reasonable doubt.

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[1]The Motion actually asks the Court to dismiss the Information, Doc. 60 at 1, but, in delinquency and in this case, there is no Information, only a Petition.

[2]For the convenience of the reader, § 776.012(1), Florida Statutes states that "[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."

[3]This is true even in the style of the cases. The style of a criminal case is always styled State of Florida versus ____, defendant. *See, e.g*., Fla.R.Crim.P. 3.986 (forms related to judgment and sentence). In court, we refer to the Child, not the defendant.

[4]In juvenile delinquency cases, the style is "In the interest of ____, a child," or "In the interest of _____, children." *See* Fla.R.Juv.P. 8.025 (style of pleadings and orders).

[5]If the legislature wants juvenile delinquency to fall under the ambit of Fla. Stat. § 776.034(4), the statute could be amended, for example, to say "criminal prosecutions and juvenile delinquency cases."

[6]Florida Rule of Juvenile Procedure 8.085(2) gives children the right to seek a pre-adjudicatory hearing dismissal of the delinquency petition because of an affirmative defense. This is true regardless of § 776.032(1), Florida Statutes. As a result, the Court need not determine whether § 776.032(1) applies because the process involved in seeking relief under it would be exactly the same as that which exists under Rule 8.085(2). What is clear from the text of the Florida Statutes is that § 776.032(4) does not apply.

[7]In adopting § 776.032(4), Florida Statutes, the legislature largely adopted the *Bretherick* dissent but with a "clear and convincing" burden on the State as opposed to the more exacting trial burden of "beyond a reasonable doubt." If not for *T.P.*, the Court would have entirely adopted the burden from the *Bretherick* dissent.

* * *

Insurance—Homeowners—Bad faith—Civil remedy notice—Deficient notice—Motion to dismiss based on deficient CRN is denied—Although CRN includes numerous statutory provisions allegedly violated, CRN also recites facts surrounding alleged bad faith claim handling in narrative form—Argument that complaint should be dismissed because insureds failed to provide insurer with statutorily guaranteed time to investigate and pay claim is rejected as it is outside four corners of complaint—Claim based on insurer's "general business practices" is stricken, as there are no supporting factual allegations

LEXA DOWLING and KIMBERLY ARMSTRONG, Plaintiffs, v. FEDNAT INSURANCE COMPANY, Defendant. Circuit Court, 14th Judicial Circuit in and for Bay County. Case No. 21-432-CA. September 9, 2021. John L. Fishel, II, Judge. Counsel: William F. "Chip" Merlin and Shane S. Smith, Merlin Law Group, Tampa, for Plaintiffs. Sarah M. Baggett, Galloway, Johnson, Tompkins, Burr & Smith, P.L.C., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS MATTER is before the Court on Defendant's Motion to Dismiss Plaintiffs' Complaint and Memorandum of Law in Support, filed May 17, 2021. The Motion was heard on August 25, 2021. Having considered said Motion, court file and records, and being otherwise fully advised, this Court finds as follows:

PROCEDURAL BACKGROUND

This lawsuit arises out of a property insurance claim. On April 1, 2021, the homeowners filed the initial Complaint accusing Defendant of Unfair Practices and Violations of section 624.155 of the Florida Statutes (the "bad faith claim"). In their Complaint, Plaintiffs allege that after their property sustained damages due to Hurricane Michael, they timely notified Defendant of the loss, but Defendant improperly delayed their claim, denied the payment of the full amount of the benefits due under the policy, made unsatisfactory settlement offers, and otherwise engaged in unfair and deceptive practice in handling the claim. In support of their assertions, Plaintiffs attached as Exhibit B a civil remedy notice (CRN) sent on June 7, 2019, and as Exhibit C,

a subsequent CRN sent on October 20, 2020.

On May 17, 2021, Defendant moved to dismiss. In its Motion, Defendant claimed that Plaintiffs failed to provide it with the statutory guaranteed time to investigate and pay the claim as set forth in section 627.70131, Florida Statutes, and that the assertions in the two CRNs failed to specify the policy language and the facts and circumstances giving rise to the alleged violations. According to the Motion, Plaintiffs also did not identify any "cure," such as an exact amount, with reasonable specificity to put Defendant on notice of what could be done to remedy its alleged misconduct. Defendant also took issue with the allegations in paragraph 26 of the Complaint of the events that took place after the CRNs were filed and asserted that such did not support any claim for "general business practice."

ANALYSIS

A motion to dismiss tests the legal sufficiency of the complaint. *The Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006) [31 Fla. L. Weekly S212a]. The Court's consideration of a motion to dismiss is limited to the four corners of the challenged complaint. *Swerdlin v. Florida Mun. Ins. Trust*, 162 So. 3d 96, 97 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2164c]. All allegations in the complaint must be taken as true and all reasonable inferences must be construed in the non-moving party's favor. *Minor v. Brunetti*, 43 So. 3d 178, 179 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2013a].

In order to successfully plead a first-party cause of action for bad faith failure to settle a claim, an insured must fulfill the following requirements: (1) file a written Civil Remedy Notice; (2) obtain the favorable resolution of an underlying civil action for insurance benefits against the insurer; and (3) allege both that "there has been a determination of the existence of liability on the part of the insurer" and "the extent of the plaintiff's damages." *See, e.g., Demase v. State Farm Fla. Ins. Co*., 239 So. 3d 218, 221 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D679a].

In support of its position that Plaintiffs' CRNs were insufficient, Defendant relies primarily on the recent decision in *Julien v. United Prop. & Cas. Ins. Co*., 311 So. 3d 875 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D486d]. Defendant further argued that courts had dismissed similar bad faith suits where the CRN cited almost every provision in the statute. Indeed, in *Julien*, the court found that the CRN, which referenced fourteen statutory provisions and twenty-one sections of the Florida Administrative Code, was deficient. The *Julien* court also held that the circuit courts must independently review the CRN even if the Department of Financial Services made a specific determination about its sufficiency.

Notwithstanding that section 624.155, Florida Statutes, must be strictly construed,[1] after careful consideration of the parties' arguments and their written submissions, the applicable case law, and the CRNs attached to the Complaint, the Court finds that the deficiencies alleged by Defendant are not a proper basis for dismissal of the underlying proceeding. Indeed, a review of the CRNs shows that aside from including numerous statutory provisions that Defendant allegedly violated, Plaintiffs also recited the facts surrounding the alleged misconduct in a narrative form informing Defendant about their main concerns. In the attached Exhibit C, for example, Plaintiffs stated that they "promptly notified" Defendant of their loss and "[d]espite the consistent correspondence initiated by [Plaintiffs], [Defendant]'s inaction continued to exacerbate the damages caused," that "[o]ver 54 days" after the loss, "no field of scope had been submitted by the field adjuster," and Defendant "had only paid out $5,000 to the insured for damages that encompassed the entirety of the home." The same CRN also alleged that Defendant breached its duty in the adjustment of the claim, and despite the extensive damages to the property, its insurance adjuster grossly undervalued the claim at $21,507.63. (Ex. C to the Complaint).[2]

The Court agrees that some sections in the CRNs may not have been necessary. However, their inclusion in particular circumstances may be reasonable. For example, *in arguendo*, multiple policy provisions, even all of them, may appear relevant and applicable simultaneously in some bad faith claims. Moreover, as argued by Plaintiffs, at the time of filing the CRNs, the insureds do not have access to the insurance company's claims file to discover all the plausible ways in which a defendant and its agents may have acted in bad faith. However, the defendant's misconduct in handling a specific claim may seem apparent under the particular circumstances if the estimated damages are so grossly insufficient to cover the actual loss that nothing besides bad faith could explain it. *See, e.g., Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 9 (Fla. 2018) [44 Fla. L. Weekly S77b] (holding that the focus in a bad faith case is on the actions of the insurer in fulfilling its obligations to the insurer and when the financial exposure to the insured is a "ticking time bomb," any delay could be seen by the fact finder as evidence of bad faith); *see also Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991) (holding that where liability is clear, and injuries so serious, an insurer has an affirmative duty to initiate settlement negotiations).

While the Court is cautious that a motion to dismiss should not be converted to a motion for summary judgment, it must be mentioned that Plaintiffs also argued that by filing a *substantive* Response to their CRNs, Defendant waived any alleged statutory deficiencies, which it now claimed justified dismissal of the Complaint. Under similar circumstances, absent showing of any prejudice to the defendant, some courts have held that the strict compliance with the statutory notice requirements has been waived, that the Plaintiff has substantially complied with the requirements, and that the defendant has been sufficiently put on notice. *See Bay v. United Servs. Auto. Ass'n*, 305 So. 3d 294 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2380a]; *see also Zaleski v. State Farm Florida Ins. Co*., 315 So. 3d 7 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D416b].

The argument that the Complaint is due to be dismissed because Plaintiff failed to provide Defendant with the statutory guaranteed time required to investigate and pay the claim set forth in section 627.70131(5)(a), Florida Statutes, is rejected at this time because it is outside of the four corners of the Complaint. *See Landers v. State Farm Fla. Ins. Co*., 234 So. 3d 856, 859 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D200a] (holding that the plain language of the statute does not have time limitation for when a CRN may be filed, and it only provides that "no action shall lie" if the bad-faith allegation is corrected or the damages are paid within sixty days of the insurer receiving the notice); *see also Fortune v. First Protective Insurance Co.*, 302 So. 3d 485 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2092a] ("Even if a policy requires the mediation or appraisal process to occur prior to suit being filed, an appraisal is not a condition precedent to the insurer fulfilling its obligation to fairly evaluate the claim and to either deny coverage or to offer an appropriate amount based on that fair evaluation."). Nor does the applicable statute require the CRN to contain a specific cure amount. *See* § 624.155(3)(b), Fla. Stat. (2020); *see also Fortune*, 302 So. 3d at 491, (*citing Hunt v. State Farm Fla. Ins. Co.*, 112 So. 3d 547, 550-51 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D774a]). Furthermore, the Court finds that the applicable statute does not *require* inclusion of the "specific policy language" for the CRN to be valid, but instead, it calls for "references" to such "*if any*" (emphasis added). *See* § 624.155(3)(b)4., Fla. Stat.

Read together, the Complaint and the attached Exhibits allege each of the required elements for a bad faith claim. Nevertheless, the Court agrees that paragraph 26 of the Complaint should be stricken since there are no specific factual allegations to support a claim for Defendant's "general business practice."

Therefore, it is

ORDERED AND ADJUDGED that paragraph 26 of the Complaint is hereby **STRICKEN** without prejudice. The Motion to Dismiss Plaintiffs' Complaint is **DENIED**. Defendant shall have twenty (20) days from the date of this Order to file its Answer to the Complaint.

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[1]Under Florida law, *strict statutory construction* and *strict statutory compliance* are distinct concepts. When strictly construing a statute, courts are required to interpret statutes to discern their meaning and to conform their rulings as nearly as possible to the law as the legislature intended. *See Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013) [38 Fla. L. Weekly S45a]. In comparison, because those governed by statutes must *comply* with the law, in the cases of remedial statutes, the judiciary is expected to apply the rules of strict construction in a manner that does not frustrate access to the remedy provided by the legislature. *See, e.g., Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403, 406 (Fla. 2001) [26 Fla. L. Weekly S253a].

[2]According to Plaintiff, on November 6, 2020, the appraisal panel issued an appraisal award at a replacement cost value of $899,864.94 (Ex. D to the Complaint).

* * *

Declaratory judgments—Insurance—Class actions—Although class action suits are presented as actions for declaratory relief, where any declaratory relief rendered would necessarily serve to facilitate reimbursement of benefits, monetary recovery is predominant issue in cases—Because declaratory relief is not primary relief sought in cases, plaintiffs failed to sufficiently plead rule 1.220(b) criteria—Complaints dismissed with prejudice

911 DRY SOLUTIONS, INC., a/a/o Jorge and Hilda Serra, on behalf of itself and all others similarly situated, Plaintiffs, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE17-020781 (07). PROJEKT PROPERTY RESTORATION, INC., a/a/o Nadav Biton, on behalf of itself and all others similarly situated, Plaintiff, v. TOWER HILL PRIME INSURANCE COMPANY, Defendant. Case No. CACE18-002145 (07). PRIDE CLEAN RESTORATION, INC., a/a/o Kyhiara Cooper, on behalf of itself and all others similarly situated, Plaintiff, v. TOWER HILL SIGNATURE INSURANCE COMPANY, Defendant. Case No. CACE18-002165 (07). September 3, 2021. Jack Tuter, Judge. Counsel: Jose P. Font and Jamie Martin, Font & Nelson LLC, Fort Lauderdale, Plaintiffs. Bryan T. West and Marcy Levine Aldrich, Akerman LLP, Miami; and Todd E. Brant, Fort Lauderdale, for Defendants.

FINAL ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND DISMISSING PLAINTIFFS' COMPLAINTS WITH PREJUDICE

THIS CAUSE came before the Court upon Defendants' Motions to Dismiss filed in the above referenced actions. The Court, having considered the motions, having heard argument of counsel on June 24, 2021, and being otherwise duly advised in the premises, rules as follows:

Before the Court are three class action lawsuits with similar policy language. In these cases, Defendants have filed motions to dismiss Plaintiffs' class action complaints. Although these cases are not consolidated, the arguments raised in the motions and at the hearing are identical and pertain specifically to the complaints filed in the instant class actions.

The Court issues this order accordingly.

BACKGROUND

1. **Case No.: CACE17-020781**.

On November 15, 2017, 911 Dry Solutions, Inc. ("911 Dry") filed a two-count Class Action Complaint for breach of contract (count I) and petition for declaratory relief (count II) against Universal Property & Casualty Insurance Company ("Universal"). On January 18, 2018, Universal filed its Motion to Dismiss Class Action Complaint. On July 13, 2018, 911 Dry filed its one-count Amended Class Action Complaint for breach of contract against Universal. On August 7, 2018, Universal filed its Motion to Dismiss Amended Class Action Complaint. On March 25, 2019, the Court entered an Order granting Universal's Motion to Dismiss Amended Class Action Complaint without prejudice and with leave to amend.

On April 19, 2019, 911 Dry filed its one-count Second Amended Class Action Complaint for breach of contract against Universal. On May 21, 2019, Universal filed its Motion to Dismiss Second Amended Class Action Complaint. On October 21, 2020, the Court entered an Order denying Universal's Motion to Dismiss Second Amended Class Action Complaint. On November 4, 2020, Universal filed its Answer to the Second Amended Class Action Complaint.

On January 21, 2021, 911 Dry filed its Motion for Leave to Amend Complaint. Following a hearing, the Court issued an Order granting 911 Dry's Motion for Leave on March 2, 2021. In the "Amended Class Action Complaint", 911 Dry asserts a sole count for declaratory relief, withdrawing its breach of contract claim. On March 22, 2021, Universal filed its Motion to Dismiss Amended Complaint. 911 Dry did not file a written response in opposition.

2. **Case No.: CACE18-002145**.

On January 29, 2018, Projekt Property Restoration, Inc. ("Projekt") filed a two-count Class Action Complaint for breach of contract (count I) and petition for declaratory relief (count II) against Tower Hill Prime Insurance Company ("Tower Hill"). On March 2, 2018, Tower Hill filed its Motion to Dismiss Plaintiff's Complaint. On July 11, 2018, Projekt filed its one-count Amended Class Action Complaint for breach of contract against Tower Hill. On August 6, 2018, Tower Hill filed its Motion to Dismiss Plaintiff's Amended Class Action Complaint. On March 25, 2019, the Court entered an Order granting Tower Hill's Motion to Dismiss Plaintiff's Amended Class Action Complaint without prejudice and with leave to amend.

On April 19, 2019, Projekt filed its one-count Second Amended Class Action Complaint for breach of contract against Tower Hill. On May 23, 2019, Tower Hill filed its Motion to Dismiss Plaintiff's Second Amended Class Action Complaint. On October 21, 2019, the Court entered an Order denying Tower Hill's Motion to Dismiss Plaintiff's Second Amended Class Action Complaint. On November 20, 2019, Tower Hill filed its Answer to Plaintiff's Second Amended Class Action Complaint.

On January 21, 2021, Projekt filed its Motion for Leave to Amend Complaint. Following a hearing, the Court issued an Order granting Projekt's Motion for Leave on May 24, 2021. In the "Second Amended Class Action Complaint", Projekt asserts a sole count for declaratory relief, withdrawing its breach of contract claim. On June 14, 2021, Tower Hill filed its Motion to Dismiss "Second Amended Class Action Complaint". Projekt did not file a written response in opposition.

3. **Case No.: CACE18-002165**.

On January 29, 2018, Pride Clean Restoration, Inc. ("Pride") filed a two-count Class Action Complaint for breach of contract (count I) and petition for declaratory relief (count II) against Tower Hill Signature Insurance Company ("Tower Hill Signature"). On March 2, 2018, Tower Hill Signature filed its Motion to Dismiss Plaintiff's Complaint. On August 1, 2019, Pride filed its one-count Amended Class Action Complaint for breach of contract against Tower Hill Signature. On August 22, 2019, Tower Hill Signature filed its Motion to Dismiss Plaintiff's Amended Class Action Complaint. On October 21, 2019, the Court entered an Order denying Tower Hill Signature's Motion to Dismiss Plaintiff's Amended Class Action Complaint. On November 20, 2019, Tower Hill Signature filed its Answer to Plaintiff's Amended Class Action Complaint.

On January 21, 2021, Pride filed its Motion for Leave to Amend Complaint. Following a hearing, the Court issued an Order granting Pride's Motion for Leave on May 24, 2021. In the "Second Amended Class Action Complaint", Pride asserts a sole count for declaratory relief, withdrawing its breach of contract claim. On June 14, 2021,

Tower Hill Signature filed its Motion to Dismiss "Second Amended Class Action Complaint". Pride did not file a written response in opposition.

DISCUSSION

It is well settled that "the function of a motion to dismiss a complaint is to raise a question of law as to the sufficiency of the facts alleged to state a cause of action." *Hitt v. North Broward Hospital District*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). "The motion admits as true all well pleaded facts as well as all reasonable inferences arising from those facts." *Id.* "The allegations must be construed in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Id.*

In the motions, Defendants assert that it is well-established that a proposed class action is not appropriate under Florida Rule of Civil Procedure 1.220(b)(2), where declaratory relief is not the primary relief sought but rather the objective is the recovery of money. Defendants argue that Plaintiffs repeatedly allege in their complaints that the actions concern "payment" and "reimbursement." And that the proposed classes in these cases are defined as those "who are entitled to recover benefits/payments from [Defendants] in relation to the cost of Remediation Services that were incurred in relation to a loss." *See* ¶¶ 29 of the Operative Complaints. Thus, it is Defendants' contention that because the complaints assert a defective declaratory judgment claim, the complaints should accordingly be dismissed in their entirety. The Court agrees.

In support of their argument Defendants rely on *Freedom Life Insurance Company of America v. Wallant*, 891 So. 2d 1109 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D110c]. In *Wallant*, the Fourth District reversed in part the trial court's order certifying the class pursuant to Rule 1.220(b)(2), finding certification improper where "monetary issues predominate in the case". *Id.* at 1118. The Fourth District specifically held,

> [a]lthough the claims raised by Wallant and Borek request declaratory relief as an end in itself to a degree, the claims also request monetary damages. Additionally, the declaratory relief sought will serve to facilitate monetary recovery, because unless the dispute resolution provision is deemed unenforceable the class members will have no immediate method of recovery of monetary damages in court, and unless statutory violations are found, bases for monetary recovery will be lacking. Therefore, although declaratory relief is at issue, monetary recovery is the predominant issue, rendering class certification under Rule 1.220(b)(2) inappropriate.

Id. While the Court recognizes that *Wallant* was determined on class certification and here, the actions are before the Court on motions to dismiss, the Court finds that dismissal is nonetheless appropriate based on the allegations contained in the complaints.

In paragraphs 31 of the Complaints, Plaintiffs allege Rule 1.220(b)(2) as the basis for the class actions. Rule 1.220(b)(2), states "the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate." However, included in their class representation allegations, Plaintiffs allege,

> The Class Members are defined as [Defendant's] insureds, including assignees of [Defendant's] insureds such as [Plaintiffs] who are entitled to stand in the shoes of [Defendant's] insureds, **and who are entitled to recover benefits/payments from [Defendant] in relation to the cost of Remediation Services that were incurred in relation to a loss that [Defendant]**: (1.) has already accepted as covered; (2.) has already issued payment to the insured or assignee for the covered loss; (3.) has already limited reimbursement per the solely stated basis of lawfully doing so per the Policy Cap as set forth under the Additional Coverages section of the policy; (4.) has admitted that it maintained a policy of insurance under which Coverage A, plainly and unambiguously contains an "all risk" coverage provision for which no policy exclusion or limitation was asserted or exists; and (5.) knew, or should have known, that it was legally obliged to issue full payment for the self-admittedly necessary repair/remediation costs which were incurred by its insureds.

See ¶¶ 29 of the Complaints (emphasis added). Further, in paragraphs 42, Plaintiffs assert,

> **The operative legal declaration in relation to the Class Members is whether [Defendant] is required to provide for reimbursement of the Remediation Services as follows:** (1.) on an incurred cost basis per the Coverage A "Loss Settlement" payment provision, provided that an excluded cause of loss under Coverage A does not serve to preclude coverage; and (2.) if an excluded cause of loss is evidenced by [Defendant] (who carries the legal burden of so doing) as a valid basis of denying reimbursement under Coverage A, at a minimum amount of $3,000.00, or 1% of Coverage A limit of liability, as provided for under Additional Coverages, which does not incorporate the Coverage A exclusions in relation to a Peril Insured Against.

See ¶¶ 42 of the Complaints (emphasis added).

The Court, having considered the allegations of the complaints, finds that although guised as a suit for declaratory relief, monetary recovery is the predominant issue in these cases, *i.e.* any declaratory relief rendered would necessarily serve to facilitate monetary recovery. As a result, Plaintiffs fail to satisfy the preliminary pleading requirements set forth in Rule 1.220. Stated differently, because declaratory relief is not the primary relief sought in these cases as evident from the allegations themselves, Plaintiffs fail to sufficiently plead the Rule 1.220(b) criteria. Accordingly, the motions are granted on this basis. *See Murga v. United Prop. & Cas. Ins. Co.*, 941 So. 2d 482, 482 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2730a] ("Rule 1.220 of the Florida Rules of Civil Procedure governing pleadings in class action cases requires the plaintiff to allege the existence of a class; to define the alleged class; to specify the approximate number of class members; and to "demonstrate that the four prerequisites specified in rule 1.220(a) are satisfied and that the action meets the criteria for one of the three types of class actions defined in rule 1.220(b).").

Furthermore, the Court also finds that these cases should be dismissed with prejudice. These cases were filed over 3 ½ years ago. The most recent complaints represent Plaintiffs' third and/or fourth attempts at stating a cause of action against Defendants. Moreover, Plaintiffs' initial class action complaints sought breach of contract ***and*** declaratory relief. Plaintiffs thereafter amended their complaints to raise a sole claim for breach of contract, *withdrawing* their declaratory relief claims. However, in the operative complaints, Plaintiffs have now amended to raise a single claim for declaratory relief, *withdrawing* their breach of contract claims. Notwithstanding, the Court finds that amendment in these cases would be futile. As determined by the Court herein, where declaratory relief is not the primary objective of the action but rather the objective is the recovery of money, Plaintiffs' class action complaints for declaratory relief fail to satisfy the pleading requirements set forth in Rule 1.220. Such allegations contained in the Complaints cannot meet the pleading requirement of 1.220(b). Thus, the Court determines dismissal with prejudice is warranted. In light of the foregoing, the Court declines to address the additional arguments raised in the motions.

Accordingly, it is hereby:

ORDERED that Defendant, Universal Property & Casualty Insurance Company's Motion to Dismiss filed on March 22, 2021 is hereby **GRANTED** and Plaintiff, 911 Dry Solutions, Inc.'s Amended Class Action Complaint filed in Case No. CACE17-020781 is hereby

DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendant, Tower Hill Prime Insurance Company's Motion to Dismiss filed on June 14, 2021 is hereby **GRANTED** and Plaintiff, Projekt Property Restoration, Inc.'s Second Amended Class Action Complaint filed in Case No. CACE18-002145 is hereby **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Defendant, Tower Hill Signature Insurance Company's Motion to Dismiss filed on June 14, 2021 is hereby **GRANTED** and Plaintiff, Pride Clean Restoration, Inc.'s Second Amended Class Action Complaint filed in Case No. CACE18-002165 is hereby **DISMISSED WITH PREJUDICE**.

* * *

Corporations—Shareholder derivative actions — Dismissal—Attorney's fees—Award of attorney's fees and costs to defendant

RANIA BAHR, Plaintiff, v. FAWAZ ALCHIKH, et al., Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE17011928, Division 12. August 25, 2021. Keathan Frink, Judge. Counsel: Adam B. Swickle and Gabrielle D'Agonstino, for Plaintiff. Harry Hipler, Dania Beach, for Nizar Fanash; Alberto H. Orizondo, for Mohammad Ayham Zenati and Mohamed Badnejki; and Joseph Paglino, for Queen Beauty Supply, Inc., Defendants.

ORDER GRANTING NIZAR FANASH'S MOTION FOR ATTORNEY'S FEES AND COSTS

THIS MATTER having come before the Court on two (2) motion calendar hearings held via ZOOM at 8:45 A.M. EST on August 24, 2021 and at 8:45 A.M. EST on August 25, 2021, the Honorable KEATHAN B. FRINK, presiding, on the Motion for Attorney's Fees and Costs filed by Defendant, NIZAR FANASH, on January 7, 2021 (Dock. 69). The Court having reviewed the Motion and court file; having heard arguments from counsel for the Plaintiff RANIA BAHR (hereinafter "Plaintiff"), the Defendant's counsel, and co-defendants counsel in this action; and being otherwise fully apprised on the premises, the Court does hereby find as follows:

A. The pleadings, orders, and other papers filed and reflected on the record of this matter evidence that Plaintiff failed to state causes of action for her claims brought forth pursuant to Chapter 607, Florida Statutes (2017); that such failure resulted in orders dismissing all of Plaintiff's claims interposed via the original complaint and amendments thereto (Dock. 48, 60); and that Plaintiff ultimately failed to file pleadings interposing cognizable claims under Chapter 607, Florida Statutes (2017) in these proceedings; that the instant proceedings were ultimately dismissed on January 3, 2021 (Dock. 68) pursuant to Fla. R. Civ. P. 1.420(e) upon this Court determining that Plaintiff failed to prosecute this action or show record activity by way of filing pleadings, orders, or otherwise and thereby allowing this Court to grant attorney fees and costs in favor of Defendants. See *Norland v. Villages,* 851 So.2d 770 (Fla. 2nd DCA 2003) [28 Fla. L. Weekly D1547c]; *Baratta v. Valley Oak Homeowners' Ass'n,* 891 So.2d 1063 (Fla. 2nd DCA 2004) [29 Fla. L. Weekly D2620a].

B. Given's Plaintiff's ultimate failure to state causes of action brought forth pursuant to Chapter 607, Florida Statutes (2017) at the time of the final dismissal, that the instant proceedings brought forth under Chapter 607, Florida Statutes (2017) were commenced without reasonable cause;

C. Pursuant to section 607.07401(5), Florida Statutes (2017), Defendants are entitled to an award of attorneys' fees and expenses from Plaintiff incurred in defending these proceedings that were commenced without reasonable cause.

Based on said findings, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Pursuant to section 607.07401(5), Florida Statutes (2017), Defendant's Motion for Attorney Fees and Costs is GRANTED ***as to entitlement only.***

2. The Court reserves jurisdiction to determine the amount of the attorneys' fees and costs awarded to Defendants and collectable against Plaintiff upon conclusion of an evidentiary hearing to take place in the future for which this Court reserves jurisdiction.

3. The Court reserves jurisdiction to enter such further orders as are just and equitable.

* * *

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COUNTY COURTS

Criminal law—Driving under influence—Evidence—Blood draw—Consent—Voluntariness—Where defendant who was transported to hospital when he began to experience heart attack symptoms while awaiting breath test at jail consented to blood draw at hospital after being threatened with loss of his license under implied consent statute that was not applicable to him, consent was involuntary—Blood test results are not admissible under implied consent law where there is no evidence that administration of breath test was impractical or impossible—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. JUAN JOSE HERNANDEZ, Defendant. County Court, 4th Judicial Circuit in and for Nassau County. Case No. 45-2018-CT-000784-CTAY, Criminal Traffic Division. December 28, 2018. Wesley R. Poole, Judge. Counsel: Catherine Ann Lockhart, Office of the State Attorney, Yulee, for Plaintiff. Christopher T. Wilson, Harris Guidi Rosner, P.A., Jacksonville, for Defendant.

[Affirmed: FLWSUPP 2907JHER; 29 Fla. L. Weekly Supp. 495a.]

ORDER GRANTING AMENDED MOTION TO SUPPRESS

This cause came on for hearing on Defendant's Amended Motion to Suppress Blood Test Results. On the evidence presented, the Court finds the following salient facts:

a. Defendant, JUAN JOSE HERNANDEZ, JR., was arrested on July 18, 2018, by the Fernandina Beach Police ("FBPD") and charged with driving under the infuence (DUI). He was transported to the FBPD headquarters and was being observed at the booking desk, for the purpose of administering a breath alcohol test, when he exhibited signs of a possible heart attack, and was transported by the FBPD to the Baptist Medical Center—Nassau, a hospital facility located across the street and approximately 400 yards from the police station.

b. While at the hospital, the officers asked Defendant if he would consent to a blood draw to determine the content of alcohol in his system. Defendant told them he would. The officers then presented to Defendant a form "FERNANDINA BEACH POLICE DEPARTMENT BLOOD TEST IMPLIED CONSENT WARNING", (Defendant's Exhibit 1), and asked him to sign it. Defendant hesitated some three to four minutes before finally signing the form. Prior to signing the form, he asked questions of the officers such as whether he could call an attorney to get advice.

c. The implied consent form Defendant was asked to and did sign contains express language that:

> "If you fail to submit to the [blood] test I have requested of you, your privilege to operate a motor vehicle will be suspended for a period of one (1) year for a first refusal or eighteen (18) months if your privilege has been previously suspended as a result of a refusal to the test of your breath, urine or blood.
>
> Refusal to submit to the test I have requested of you is admissible in any criminal proceeding."

d. The implied consent form Defendant signed also contained the following legend underneath the form's title:

> "*To be used pursuant to Florida Statute 316.1932 when a person is at a medical facility for treatment and the administration of a breath or urine test is impracticable or impossible.*"

e. Defendant was never asked nor offered a breath test.

f. The FBPD officers proceeded with the blood draw based on Defendant's purported consent, and not based on Florida's Implied Consent law, Florida Statutes, Section 316.1932. They requested Defendant's signature on the form because it was "our [department] procedure." They did not consider requesting a breath test because the defendant consented to the blood test.

In order to be valid, a consent may not be coerced, by explicit or implicit means, by implied threat or covert force; *Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The question of whether a consent is voluntary is a question of fact to be determined from the totality of the circumstances; *Reynolds v. State,* 592 So.2d 1082, 1086 (Fla. 1992). It is not the presence or absence of any one factor alone that determines the validity of a consent to a search; the question turns on the particular circumstances of each case; *Montes-Valeton v. State,* 216 So.3d 475 (Fla. 2017) [42 Fla. L. Weekly S210a]. In the absence of an illegal detention or other illegal conduct on the part of the police, the voluntariness of a consent to a search must be established by a preponderance of the evidence; *Montes-Valeton,* supra, at p. 480.

Here, the police officers lacked probable cause to require a blood draw under Section 316.1933(1)(a), Florida Statutes. That section applies only when blood is being taken from a person based on probable cause that the person has caused death or serious bodily injury as a result of a DUI offense specified in the statutes; *State v. Murray,* 51 So.3d 593, 595 n.l (Fla. 5th DCA 2011) [36 Fla. L. Weekly D88b]. The implied consent warning used here should not have been given to the defendant. By doing so, he was improperly threatened with punishment; see, *Montes-Valeton,* supra, at p. 480. The fact that the officers improperly threatened Defendant with the suspension of his driver's license for refusing to give consent to the blood draw renders his consent involuntary; *State v. Slaney,* 653 So.2d 422, 430 (Fla. 3rd DCA 1995) [20 Fla. L. Weekly D717b] ("Where, as here, a DUI arrestee consents to a blood withdrawal after being improperly advised that he will lose his driver's license if he fails to give such consent, the ensuing consent is involuntary in nature because it was induced by a misrepresentation.").

The instant case is similar to *State v. Burnett,* 536 So.2d 375 (Fla. 2d DCA 1988). In *Burnett,* the defendant was arrested for DUI, transported to the Sarasota County Jail, and sustained injuries while at the jail, requiring the deputies to transport him to the hospital. One of the officers determined that a breath test would not be feasible due to Mr. Burnett's injuries, and read the "implied consent" warnings for a blood draw as used in the instant case. Burnett "consented" and later moved to suppress the results of the blood draw. The Court held that Section 316.1932(1)(c) prohibited the officer from advising the defendant of the implied consent warnings for a blood test and the consent was not voluntary and therefore invalid, and properly suppressed.

It is important to note that the officers did not contemplate nor consider the possible application of Section 316.1932(1)(c):

> (c)?Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible. As used in this paragraph, the term "other medical facility" includes an ambulance or other medical emergency vehicle. The blood test shall be performed in a reasonable manner. Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such test. A blood test may be administered whether or not the person is told that his or her failure to submit to such a blood test will result in the suspension of the person's privilege

to operate a motor vehicle upon the public highways of this state and that a refusal to submit to a lawful test of his or her blood, if his or her driving privilege has been previously suspended for refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor. Any person who is capable of refusal shall be told that his or her failure to submit to such a blood test will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of the person has been suspended previously as a result of a refusal to submit to such a test or tests, and that a refusal to submit to a lawful test of his or her blood, if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor. The refusal to submit to a blood test upon the request of a law enforcement officer is admissible in evidence in any criminal proceeding.

The evidence was clear that the officers proceeded solely on the basis that the defendant expressly consented to the blood draw. They did not consider the possibility that it may have been impossible or impractical to administer the breath test. In fact, after they arrived at the hospital, they had eliminated any consideration of the breath test as an alternative. While there was some testimony that it may have been impractical to administer a breath test, due to the time the defendant was in the hospital, the Court is not able to find such impraticality, when the officers themselves did not consider the same; see, *Frazier v. State,* 530 So.2d 986 (Fla. 1st DCA 1988)(breath test administered 5 hours after the offense was within a reasonable time).

For the reasons stated above, it is **ORDERED:**

That Defendant's Amended Motion to Suppress Blood Test Results is **GRANTED.** Any evidence, reference or argument relating to the blood draw taken from Defendant shall be excluded.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Claim for treatment provided to omnibus insured dismissed, as policy at issue was previously declared void *ab initio*

CENTRAL FLORIDA MEDICAL AND CHIROPRACTIC CENTER INC., a/a/o Robert Osbey, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CC-004271-O. February 16, 2021. Amy J. Carter, Judge. Counsel: Benjamin G. Partlow, Topkin & Parlow, PL, Deerfield Beach, for Plaintiff. Stephen D. Strong, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be considered by the Court upon Defendant's Motion to Dismiss and the Court having heard arguments of both parties, having reviewed the court file, Motion and applicable law and being duly advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

1. This is a personal injury protection ("PIP") action stemming from an automobile accident wherein Plaintiff has made a claim for benefits under a policy of insurance number FLAD129423582 ("Policy") for overdue benefits for treatment provided to Plaintiff as an omnibus insured.

2. In a prior action, Direct General filed for declaratory relief against the named insured, Claudie Osbey, in Orange County Circuit Court case number 2019-CA-13165. In that case, a Default Final Judgment was entered declaring the Policy (FLAD129423582) *void ab initio* and found that Direct General "has no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claims(s) for benefits that have been or will be made by any claimants under the contact." *See* Orange County Circuit Court Case No. 2019-CA-2093. ("Orange County Dec Action").

3. Plaintiff has argued that pursuant to Florida Statute 86.091, Direct General was required to add the Plaintiff in this matter, to the Orange County Dec Action. The court does not find this argument persuasive. The language in the statute is permissive and does not mandate the joining of any party unless that party is a county or municipality concerning the validity of an ordinance or charter, which is not the case here. *See Florida Statute § 86.091.*

4. Pursuant to Florida Statute § 90.202, this Court takes judicial notice of the Orange County Dec Action and the Final Judgement.

5. Even while taking all of the Plaintiff's allegations in the Complaint in this matter to be true, because of the Final Judgement in the Orange County Dec Action, Plaintiff will be unable to recover under the Policy because it has been declared *void ab inito.* The Plaintiff is unable to enforce a contract that does not exist.

6. Therefore, the Defendant's Motion is GRANTED.

* * *

Landlord-tenant—Eviction—Notice—Defects—Fifteen-day notice to vacate was fatally defective for failing to satisfy thirty-day written notice requirement of county ordinance—Complaint is dismissed

MARISELA RAMIREZ, Plaintiff, v. MERCEDES NUNEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-009210-CC-20, Section CL01. September 1, 2021. Gordon Murray, Judge. Counsel: Marisela Ramirez, Pro se, Plaintiff. Nestor Perez, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS EVICTION COMPLAINT

This Matter having come before the Court on Defendant's Motion to dismiss, and the Court have held a hearing on this matter, it is hereby:

ORDERED and ADJUDGED as follows:

1. Pursuant to F.S. § 83.59, "an action for possession cannot be commenced until the tenancy is properly terminated."

2. Miami Dade County Code of Ordinances Chapter 17—HOUSING, Sec. 17.03, provides in part "[a] residential tenancy without a specific duration in which the rent is payable on a monthly basis may be terminated by either the landlord or tenant by giving not less than 30 days written notice prior to the end of any monthly period."

3. Plaintiff's Complaint is based on a "Notice To Vacate" dated June 14, 2021, terminating the tenancy and demanding possession by June 30, 2021.

4. Plaintiff's Notice is deficient because it does not satisfy the thirty-day written notice requirement in the Miami Dade County Ordinance.

5. Defendant's Motion to Dismiss is GRANTED. The Court reserves jurisdiction as to the issue of attorney fees and costs.

* * *

Insurance—Personal injury protection—Attorney's fees—Insurer's post-suit payment of outstanding statutory interest entitles medical provider to award of attorney's fees and costs

NEW MEDICAL GROUP, INC., a/a/o Martha Solano, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-022160-SP-25, Section CG03. June 10, 2021. Patricia Marino Pedraza, Judge. Counsel: Adriana De Armas, for Plaintiff. Andrea Harris, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR ENTITLEMENT, REQUEST FOR ENTRY OF FINAL JUDGMENT WITH RESERVATION OF JURISDICTION, AND REQUEST FOR EVIDENTIARY HEARING TO DETERMINE QUANTUM OF PLAINTIFF'S ATTORNEY'S FEES AND COSTS, AND DEFENDANT'S MOTION TO DETERMINE PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before the Court on June 2, 2021, on

Plaintiff's Motion for Entitlement, Request for Entry of Final Judgment with Reservation of Jurisdiction, and Request for Evidentiary Hearing to Determine Quantum of Plaintiff's Attorney's Fees and Costs, and Defendant's Motion to Determine Plaintiff's Entitlement to Attorney's Fees and Costs, and the Court having heard argument of counsel, as well as having reviewed applicable law, and otherwise being fully advised in the premises, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff's Motion is **GRANTED** and Defendant's Motion is **DENIED** for the reasons set forth herein.

This case arises out of a motor vehicle accident that occurred in Miami-Dade County on December 26, 2017. The insured subsequently sought medical treatment from the Plaintiff for injuries arising from the subject automobile accident. Plaintiff obtained an assignment of benefits from the insured under the subject policy and timely submitted the bills for the services at issue in this matter. Following the timeframe set forth under Section 627.736(4)(b), Fla. Stat., Plaintiff submitted a valid Pre-Suit Demand Letter requesting complete payment for medical benefits as well as statutory interest, and penalty and postage. Defendant responded to Plaintiff's Pre-Suit Demand Letter and sent additional payment for the medical benefits, interest, as well as penalty and postage. Plaintiff then filed the instant suit for underpaid statutory interest.

After Plaintiff filed its lawsuit, Defendant issued a payment for outstanding statutory interest on February 15, 2021. Defendant stipulated it issued the payment for outstanding statutory interest after the November 27, 2020, lawsuit was filed. The parties further stipulated to all other issues in this case thereby leaving the issue of entitlement as the sole, remaining issue.

It is well-settled law in Florida that a payment made by an insurer after an action has been filed, but prior to judgment, constitutes a confession of judgment against the insurer and in favor of the insured, thereby entitling the insured to an award of reasonable attorney's fees and costs. *See Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217 (Fla. 1983); and *Lopez v. State Farm Mut. Auto Ins. Co.*, 139 So. 3d 402, 404 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1058a]. The question then is whether the post-suit payment of statutory interest issued by the Defendant entitles Plaintiff to attorney's fees and costs.

Section 627.736(4)(b), Fla. Stat., states "[p]ersonal injury protection benefits paid pursuant to this section are overdue if not paid within 30 days after the insured is furnished written notice of the fact of a covered loss and of the amount of same." Section 627.736(4)(d), Fla. Stat., further states "all overdue payments bear simple interest . . . calculated from the date the insurer was furnished with written notice of the amount of covered loss. Interest is due at the time payment of the overdue claim is made." Additionally, Section 627.736(10)(d), Fla. Stat. (emphasis added), states:

> **[i]f within 30 days after receipt of notice** by the insurer, **the overdue claim specified in the notice is paid** by the insurer **together with applicable interest and a penalty** of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, **no action may be brought against the insurer**.

Moreover, Section 627.736(8), Fla. Stat. (emphasis added), states:

> With respect to **any dispute under the provisions of ss. 627.730-627.7405** between the insured and the insurer, or between an assignee of an insured's rights and the insurer, **the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15)** . . . .

"A court's purpose in construing a statute is to give effect to the legislative intent, which is the polestar that guides the court in statutory construction." *Mendenhall v. State*, 48 So.3d 740 (Fla. 2010) [35 Fla. L. Weekly S631a]. Courts must also "give full effect to all statutory provisions and construe related provisions in harmony with one another." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992). *See also School Bd. of Palm Beach Cty. v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1223 (Fla. 2009) [34 Fla. L. Weekly S251a]. This Court must look to the plain and obvious meaning of the statute where no ambiguity exists. *See Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1230 (Fla. 2004) [29 Fla. L. Weekly S614a]. It is further presumed the Legislature knows the existing law, as well as the judicial construction of former laws, when it enacts a statute or when it amends some parts of a statute but not others. *See King v. Ellison*, 648 So. 2d 666 (Fla. 1994). *See also Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975).

In determining whether Defendant's post-suit payment of outstanding statutory interest entitles Plaintiff to reasonable attorney's fees and costs, this Court must interpret the plain and obvious meaning of the statutory language. Section 627.736(4)(d), Fla. Stat., states interest accrues on benefits not paid within 30 days of the insurer's receipt of the bill. This statutory interest is raised again in Section 627.736(10), Fla. Stat., where the Pre-Suit Demand Letter requirement explicitly states an insurer avoids liability if it issues complete payment, which includes not only the due and owing benefits sought by the provider but "**together with** applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250 . . ." in addition to postage. Fla. Stat. §627.736(10)(d). The Legislature's addition of "together with" in Section 627.736(10)(d), Fla. Stat., as it pertains to any outstanding statutory interest and penalty follows the purpose of the No-Fault Law in assuring swift payments for services rendered for injuries sustained in a motor vehicle accident. The Legislature then incorporated subsection (10) to Section 627.736(8), Fla. Stat., wherein it provides for reasonable attorney's fees in "any dispute under the provisions of ss. 627.730-627.7405 . . . ."

Fla. Stat. 627.736(8) does not say a dispute *as to benefits*.

Fla. Sat. 627.736(8) says "*any dispute*."

The exceptions of subsections (10) and (15) make sense. Section 627.736(10), Fla. Stat., is a notice requirement to the insurer—a last chance for the insurer to revisit the claim and issue any payments it owes to avoid litigation. The notice requirement in (10) specifically sets forth how the insurer can avoid liability. It does not state it can avoid liability by simply paying outstanding medical benefits only. It says it can avoid liability if it pays "the overdue claim specified in the notice. . .together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250 . . ." If the insurer pays the total amount sought in benefits "together with" outstanding interest and penalty, then an insured or an assignee of the insured cannot file a suit against the insurer. Similarly, 627.736(15), Fla. Stat., states all claims from the same healthcare provider must be brought in a single claim. Thus, Section 627.736(8), Fla. Stat., does not provide for attorney's fees and costs if multiple suits are filed for bills from the same healthcare provider unless good cause is show why multiple suits should be brought separately.

The Court also notes the Florida Legislature amended the No-Fault Statute to require the submission of a Pre-Suit Demand Letter approximately fifteen (15) years ago and despite having amended the statute several times since the notice requirement was enacted, it has not amended subsections (8) or (10).

Thus, a plain reading of Florida's No-Fault Law not only does not limit the type of dispute between an insured, or assignee of the insured, and an insurer, but it also entitles the Plaintiff to its reasonable attorney's fees and costs if a judgment is entered in its favor and against the insurer.

With regard to the instant case, this Court is bound by two cases in particular—*Magnetic Imaging Sys, I, Ltd., v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987 (Fla. 3d DCA 2003) [28 Fla. L. Weekly

D679a], and *United Auto. Ins. Co. v. 5-Star Rehab. Ctr., Inc., a/a/o Jesika J. Francisco*, 28 Fla. L. Weekly Supp. 797a (Fla. 11th Jud. Cir. Oct. 27, 2020) (App.). In *Magnetic Imaging*, the insurer issued a post-suit payment for outstanding statutory interest in a class action case regarding underpaid statutory interest. *Id.* at 988-89. After issuing the post-suit payment of statutory interest, the defendant disputed plaintiff's entitlement to attorney's fees and costs. *Id.* In reversing the trial court's ruling and finding the plaintiff was entitled to attorney's fees and costs, the Court stated that "current PIP law (as evidenced by sections 627.428(1) and 627.736(8)) 'is outcome oriented. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees and costs.' " *Id.* at 990 (quoting *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a]). Moreover, "[w]here an insurer makes payment of a claim after suit is filed, but before a judgment is rendered, such payment operates as a confession of judgment entitling the insured to attorney's fee award." *Id.* (citing *Ivey*, at 684-85).

More recently, the Eleventh Circuit in its appellate capacity affirmed plaintiff's entitlement to attorney's fees and costs where the defendant issued a post-suit payment for outstanding statutory interest. *5-Star Rehab.*, *supra*. In affirming entitlement, the Court noted Section 627.736(10)(d), Fla. Stat., provides an insurer an opportunity to avoid litigation if it issues complete payment including outstanding statutory interest as well as penalty and postage, and further noted that this very provision is referenced in Section 627.736(8), Fla. Stat. *Id.* Moreover, "[o]nce the final judgment below was entered in the Provider's favor, *Ivey* makes clear that 'attorney's fees shall be awarded to the insured.' " *Id.* (quoting *Ivey*, *supra*.).

In a similar case where the defendant-insurer stipulated to outstanding amounts but disputed the plaintiff's entitlement to attorney's fees and costs, Judge Melendez in *Doctor Ralph Miniet Practice a/a/o Yanet Rodriguez v. Geico Gen. Ins. Co.*, found:

> Neither §627.428 nor §627.736 require the amount at issue in litigation of a personal injury protection dispute derive specifically from the $10,000.00 in available personal injury protection policy benefits. In *Magnetic Imaging Sys. I, Ltd. v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987, 989 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D679a], the Third District held that a confession of judgment of PIP interest (not a policy benefits [sic] but a statutory benefit) triggered the award of fees under §627.428. In *Rodriguez v. Government Employees Ins. Co.*, the Fourth District held that a $0.00 judgment in favor of the insured on the insurer's claim mandated an award of fees under §627.428. 80 So. 3d 1042, 1044 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2788a]. Numerous courts have found entitlement to attorney's fees and costs when a judgment for penalty under Fla. Stat. §627.736(10) was obtained. *See USAA General Indemnity Company v. Cohen Chiropractic Group, P.A. a/a/o Emy Fahie*, 23 Fla. L. Weekly Supp. 522e (Fla. 17th Jud. Cir. (Aug. 15, 2015); *5-Star Rehabilitation Center, Inc. a/a/o Jessika J. Francisco v. United Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 91a (Fla. 11th Jud. Cir. County Ct. February 15, 2017); *MR Services I, Inc. d/b/a C & R Imaging of Hollywood v. State Farm Mutual Auto. Ins. Co.*, 21 Fla. L. Weekly Supp. 1069b (Fla. 17th Jud. Cir. County Ct. June 4, 2014).
>
> To allow an insurer to avoid exposure to §627.428 attorney's fees liability would remove any incentive for an insurer to pay policy benefits timely. As such, the Court finds that the penalty provision of the Florida No-Fault Law is both valid and enforceable and enforces same with an award of attorney's fess and costs to [p]laintiff.

25 Fla. L. Weekly Supp. 900a (Fla. Miami-Dade Cty. Ct. 2017). The Court is bound, and agrees with, *Ivey*, *Magnetic Imaging*, and *5-Star Rehab*.

As it is applied to the facts in this matter—which are stipulated to—Plaintiff submitted a valid Pre-Suit Demand Letter requesting the due and owing benefits for the services at issue along with statutory interest and penalty and postage. Defendant issued payment for the outstanding benefits and penalty but did not issue complete payment for outstanding statutory interest. Plaintiff filed suit against the Defendant arising from the dispute between outstanding amounts owed, which included statutory interest, and Defendant issued payment for the outstanding statutory interest only after Plaintiff filed suit. Based on the facts on this case, but for Plaintiff's suit, Defendant would have reneged its obligations to pay statutory interest pursuant to the No-Fault Statute.[1]

Despite case law on point with the instant matter, Defendant cites to two cases to dispute Plaintiff's entitlement to attorney's fees and costs—*Petty v. Fla. Ins. Guaranty Assoc'n*, 80 So. 3d 313 (Fla. 2012) [37 Fla. L. Weekly S34a] and *S. Fla. Pain & Rehab. Of West Dade v. Infinity Auto Ins. Co.*, Case No. 4D21-438 (Fla. 4th DCA Apr. 21, 2021) [46 Fla. L. Weekly D915a]. With regard to *Petty*, the facts in that matter are inapplicable to the facts before this Court. Specifically, *Petty* dealt with the interpretation of the Florida Insurance Guaranty Association ("FIGA") statute, which is significantly different from Florida's No-Fault Law. The FIGA statute deals with insolvent insurers and as a result limits liabilities to "covered claims," which are defined by the statute. It also has its own attorney fee provision, which is not governed by Section 627.428, Fla. Stat.

Similarly, the facts in *S. Fla. Pain & Rehab.*, are easily distinguishable from this matter. The remaining issue in that case was outstanding amounts for penalty and postage. Although this Court does not render any opinion regarding the reasoning in the Fourth District Court of Appeal's decision, the *S. Fla. Pain & Rehab.* opinion does not change binding case law on this Court.

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** that that Plaintiff's Motion is **GRANTED** and Defendant's Motion is **DENIED**. Final Judgment is entered in favor of the Plaintiff. The Court retains jurisdiction to determine quantum of Plaintiff's attorney's fees and costs.

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[1]During the hearing, Defendant referenced other matters before other courts wherein similar suits had been filed against United Automobile for failing to pay outstanding interest. Although those cases were not before this Court, the Court does note a concerning pattern on the part of the insurer as it seems to be skirting its obligations to swiftly issue payments under the No-Fault Statute and when it has failed to do so, further fails to comply with the letter of the law as it pertains to statutory interest. This Court is left to wonder if the Defendant no longer believes the No-Fault Statute's statutory interest requirement for late payments applies to them.

* * *

Insurance—Personal injury protection—Florida Insurance Guaranty Association—Fourth amended complaint filed by insured against FIGA, which has been substituted by operation of law for insolvent insurer in first-party lawsuit that was pending at time insurer was declared insolvent, is continuation of four-year-old action seeking to establish coverage and obtain PIP benefits, not brand-new lawsuit—FIGA's motion to dismiss amended complaint based on arguments that were either unsuccessfully raised or waived by insurer prior to insolvency is denied

MANUEL V. FEIJOO, M.D., et al., a/a/o Julio Bernal Valido, Plaintiff, v. WINDHAVEN INS. CO., et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-005240-SP-25, Section CG02. August 30, 2021. Elijah A. Levitt, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Caryn Bellus, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come before the Court on August 23, 2021, for hearing on Defendant, Florida Insurance Guaranty Association's ("FIGA" or "Defendant"), Motion to Dismiss the Fourth

Amended Complaint, and the Court, being fully advised in the premises, hereby denies Defendant's Motion. Within twenty (20) days of the date of this Order, Defendant shall file a response to the Fourth Amended Complaint.

Background and Procedural History

1. This action was filed on May 4, 2017, by Plaintiff Manuel V. Feijoo, M.D., *et al*, ("Plaintiff") seeking damages for breach of contract and common law fraud and for declaratory relief seeking to establish that insurance coverage existed under the subject insurance policy.

2. On October 3, 2017, Defendant's predecessor, Windhaven Insurance Company ("WIC" or "Windhaven"), answered count one (breach of contract) but moved to dismiss counts two (declaratory relief) and three (fraud).

3. On December 18, 2017, this court denied WIC's motion to dismiss as to count two (declaratory relief) and granted the motion as to count three (fraud) with leave to amend.

4. On November 20, 2018, Plaintiff filed its Amended Complaint, which pled count three (fraud) with greater specificity. Thereafter, Plaintiff sought leave to add a claim for punitive damages.

5. On April 22, 2019, WIC served its answer to counts one and two but continued to seek a dismissal as to count three.

6. On August 13, 2019, this Court entered an order on WIC's motion to dismiss and allowed Plaintiff to amend the jurisdictional allegations in the complaint to correct a scrivener's error. Plaintiff's amended complaint also added count four, seeking damages for alleged violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

7. On August 23, 2019, WIC served its answer to counts one (breach) and two (dec. relief) of Plaintiff's Second Amended Complaint and moved to dismiss counts three (fraud) and four (FDUTPA).

8. By August 23, 2019, WIC had answered count one (breach of contract) three times, and answered count two (declaratory relief) two times.

9. The court record reflects that WIC never sought to dismiss count one (breach), and its motion to dismiss count two (dec. relief) was denied on December 18, 2017. The balance of WIC's attacks on Plaintiff's pleadings were directed at counts three and four.

WIC's Insolvency

10. Before WIC's August 23, 2019, motion to dismiss counts three and four could be adjudicated, WIC became insolvent and the Florida Department of Financial Services (DFS) assumed responsibility as the receiver for the insolvent insurer.

11. On December 30, 2019, WIC was placed into liquidation, and FIGA was activated pursuant to its statutory mandate, subject to an automatic 6-month stay of all pending litigation. That stay was extended for another 6 months.

12. After entry of the December 30, 2019, Consent Order (a copy of which was filed with this court), this matter was placed on inactive status.

13. On February 5, 2021, after the automatic stay expired, Plaintiff filed a motion to amend the complaint in order to identify FIGA as the successor to WIC and the real party in interest. Plaintiff's Fourth Amended Complaint is identical to the previous complaint against WIC, save for the caption and introduction to include FIGA.

14. On February 8, 2021, this court granted Plaintiff's motion for leave to amend the complaint, deeming the Fourth Amended Complaint filed *nunc pro tunc* and instructing Plaintiff to serve it on FIGA via service of process.

15. The Fourth Amended Complaint was served on FIGA on March 16, 2021.

16. On April 16, 2021, FIGA filed its Motion to Dismiss all counts of Plaintiff's Fourth Amended Complaint, which is the motion now before the court.

17. In its motion, FIGA claims that the Fourth Amended Complaint fails to state a cause of action against FIGA; that many of the allegations contained in the Fourth Amended Complaint are false or unprovable; that the Fourth Amended Complaint does not contain any allegations that Plaintiff's claim is a "covered claim" as defined by the FIGA act; and, that Plaintiff failed to attach a copy of the insurance policy to the complaint. FIGA also contends that the Fourth Amended Complaint is a "brand new lawsuit."

18. On July 14, 2021, Plaintiff filed a notice withdrawing count three (fraud). On July 20, 2021, Plaintiff filed another notice withdrawing count four (FDUPTA). As a result, only counts one and two remain pending.

Analysis

19. In *FIGA v. Mendoza,* 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a], the Third District Court of Appeal described the statutory procedure for instances when an action is pending against an insurer that becomes insolvent during the litigation. The *Mendoza* court provided:

> *Statutory Process When FIGA is Appointed Guarantor When a Lawsuit is Pending against Insolvent Insurer:*
>
> FIGA is a statutorily created non-profit corporation whose purpose is to guarantee "covered claims" of insurers who have been declared insolvent. §§ 631.50-70, Fla. Stat. (2011). When an insurer is declared insolvent, DFS is appointed the receiver for that insolvent insurer. § 631.051, Fla. Stat. (2011). As part of DFS's receivership, FIGA administers the claim functions and guarantees the "covered claims" of the insolvent insurer. § 631.57, Fla. Stat. (2011). Pursuant to, and subject to the limitations of, section 631.57, FIGA is obligated to pay "covered claims."
>
> Significantly, section 631.57(1)(b) provides, in relevant part, that FIGA "[b]e deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent." § 631.57(1)(b), Fla. Stat. (2011).

Id. at 943; *see also Gonzalez v. Homewise Preferred Ins. Co.,* 210 So. 3d 260, 262 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D405a] ("[I]n cases where a lawsuit is pending at the time of insolvency, FIGA becomes the party defendant by operation of statute and there is no need for the filing of a new lawsuit against FIGA or for FIGA to be separately served in the pending lawsuit.").

20. When, as here, an insured has filed a first-party lawsuit against the insured's own insurance company prior to the insurer being declared insolvent, upon DFS's filing a delinquency petition against the insurer pursuant to Chapter 631, the lawsuit is stayed, automatically and permanently, as to the insolvent insurer. § 631.041(1), Fla. Stat. (2017).

21. With regard to FIGA, however, the lawsuit is only stayed automatically for a period of six months. § 631.67, Fla. Stat. (2017). The statute plainly and unequivocally sets forth the purpose of the statutory stay as to FIGA: "All proceedings in which the insolvent insurer is a party . . . shall be stayed for 6 months . . . to permit proper defense by the association [FIGA] of all pending causes of action as to any covered claims. . . ." § 631.67, Fla. Stat. (2017). Section 631.67 allows FIGA to request from the trial court that the stay be enlarged, shortened, or waived.

22. A "*covered claim,*" as defined, in pertinent part, by section 631.54(3), Florida Statutes (2017), means an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy to which this part applies, issued by an insurer, if such insurer becomes an insolvent insurer and the claimant or insured is a resident

of this state at the time of the insured event or the property from which the claim arises is permanently located in this state.

23. The *Mendoza* court further provided, "pursuant to section 631.53, we have an express mandate to construe liberally the statutory scheme governing claims against FIGA so as to promote the purposes articulated in section 631.51." *Id.* at 944.

24. Section 631.51(1) states that one of the purposes is to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies *to avoid excessive delay* in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer[.]" § 631.51(1), Fla. Stat. (2017). (Emphasis added).

25. In the instant case, immediately upon the declaration of WIC's insolvency, FIGA, by statutory authority, was deemed the policy holder's insurer with all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* § 631.57(1)(b), Fla. Stat. (2017).

26. Plaintiff's pending lawsuit against FIGA, the statutorily designated guarantor of Windhaven, was stayed for six months to allow FIGA sufficient time to prepare a proper defense against the claim. § 631.67, Fla. Stat. (2017).

27. The statutory stay that prohibited proceedings against WIC went into effect when DFS filed its petition against WIC, and that stay is permanent as to WIC because of the December 30, 2019, Consent Order requiring its liquidation. § 631.041(1), Fla. Stat. (2017).

28. Plaintiff's subsequent amendment, or substitution, to name FIGA as the insurer reflected what had already occurred by operation of law under section 631.57(1)(b) when WIC was declared insolvent.

29. FIGA contends that the Fourth Amended Complaint, an identical version to the prior complaint but naming FIGA as a defendant, is a "brand-new lawsuit" filed against FIGA. FIGA, therefore, seeks dismissal of counts one and two even though WIC's earlier motion to dismiss count two was denied in 2017, and WIC answered count one three times and count two twice.

30. Despite FIGA's argument that this is a "brand new law suit" the court finds that the Fourth Amended Complaint is not a brand-new lawsuit but rather a continuation of a 4-year-old action that is now pending against WIC's successor FIGA; it contains the same counts and the same allegations that WIC faced before its insolvency. The fact that Plaintiff served a copy of the Fourth Amended Complaint onto FIGA via process server does not make this a brand-new case, nor does it change the fact that this is the same action that has been pending for four (4) years seeking to recover unpaid PIP benefits and to establish the existence of insurance coverage. Instead, by operation of law, FIGA steps in and assumes the role once occupied by WIC.

31. According to the Florida Third District Court of Appeal, if FIGA had to be separately sued and served in pending cases, it is unclear exactly what proceedings would need to be stayed for six months under section 631.67. *Mendoza,* 193 So. 3d at 945.

32. "Presumably, had the Legislature intended for separate service on FIGA to be effectuated in order for the trial court to gain jurisdiction over FIGA in pending cases, the Legislature would have specified in section 631.67 a stay of 'joinder of FIGA' or a stay of 'service being obtained on FIGA,' in order to further the rationale of the six-month stay." *Id.* Section 631.67, Florida Statutes, is clear: pending lawsuits against insolvent insurers are stayed for six months to allow FIGA time to defend properly against those claims. Nothing in section 631.67 suggests any requirement that FIGA need be separately added and served as a prerequisite to FIGA defending such pending claims. *Mendoza,* 193 So. 3d at 945.

33. The Act also automatically extends to FIGA certain rights that only a party to those pending proceedings would have, including the right to "apply to have any judgment, order, decision, verdict, or finding based on the default of the insolvent insurer or its failure to defend an insured set aside . . . and . . . to defend against such claim on the merits." § 631.67, Fla. Stat. (2017).

34. In light of the authorities cited above, the moment WIC was declared insolvent, FIGA became the insurer in place of WIC and stepped into its shoes by operation of law. FIGA became the *de facto* defendant in these proceedings on December 30, 2019, subject to the automatic stay.

35. FIGA, also by operation of law, became obligated to the policy holder to the extent of the coverages afforded by the policy, provided that the claims fall within the statutory definition of a "covered claim" as defined by section 631.54(3).

36. As FIGA concedes that the subject policy included coverage for personal injury protection (PIP) benefits, subject to any policy defenses, and further agrees that PIP claims are "covered claims" within the FIGA Act, as evidenced by FIGA's representation that it made a payment towards Plaintiff's claim, no basis exists to contend that Plaintiff's claims are not "covered claims." Assuming *arguendo* that Plaintiff's claim is not a "covered claim" as defined by section 631.54(3), then that issue must be raised as an affirmative defense in a responsive pleading and not by motion to dismiss.

37. WIC apparently determined that count one was sufficiently pled and stated a cause of action and therefore answered count one (on three different occasions). To the contrary, WIC tested the sufficiency of count two (declaratory relief) on a motion to dismiss filed pursuant to Florida Rule of Civil Procedure 1.140, which was denied by this court on December 18, 2017. WIC then answered count two.

38. FIGA's April 16, 2021, Motion to Dismiss, which is pending before the court, seeks to test the legal sufficiency of the Complaint against FIGA and issues that WIC previously waived or had denied. The Court already denied a Motion to Dismiss the identical count two. WIC also never raised a failure to attach the insurance policy to the Complaint for which the defense is waived.

39. In *Williams v. Citizens Property Insurance Corporation,* 2021 WL 3640511 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1874a], the court held that a litigant is not entitled to file successive motions to dismiss. A motion directed at an amended pleading cannot raise objections to retained portions of an original pleading when such objections were available and not urged or unsuccessfully urged on motion to the original pleading. *Id.* at *3, *citing to Beach Dev. Corp. v. Stimson,* 159 So. 2d 113, 115 (Fla. 2d DCA 1964). "The obvious purpose of [Rule 1.140's] scheme is to require a defendant to include all of its then available defenses in a single motion to dismiss, so as to avoid the piecemeal litigation inherent in multiple filings directed toward a complaint's allegations. *Williams,* 2021 WL 3640511 at *3. Following the *Williams* holding, Defendant is not permitted to relitigate matters ruled upon by this Court. Thus, the legal sufficiency of the Complaint is established.

40. The Court reviewed Defendant's case law provided with its Motion and finds the cited precedent to be incompatible with the facts of the present case. The present case is not a negligence or other tort case, *Williams v. FIGA,* 549 So. 2d 253 (Fla. 5th DCA 1989), or involve the retroactive application of a statute, *FIGA v. Devon Neighborhood Association, Inc.,* 67 So. 3d 187 (Fla. 2011) [36 Fla. L. Weekly S311a], the cases from which Defendant extrapolates its arguments.

41. The present case more closely resembles the issues addressed in *Gonzalez v. Homewise Preferred Ins. Co.,* 210 So. 3d 260 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D405a] and *FIGA v. Mendoza,* 193 So. 3d 940 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D927a]. Based on these authorities and the FIGA Act, FIGA is WIC and has all the rights, duties, defenses, and obligations of WIC as if it had not become insolvent. FIGA's argument that it is not WIC is not supported by

Florida law.

Wherefore, FIGA's Motion to Dismiss is denied.

* * *

Insurance—Personal injury protection—Attorney's fees—Insurer's tender of 13-cent interest payment post-suit entitles medical provider to award of attorney's fees and costs under 627.428

ANGELS DIAGNOSTIC GROUP, INC., a/a/o Alejandro Morales, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-001220-SP-25, Section CG02. July 13, 2021. Elijah A. Levitt, Judge. Counsel: Adriana De Armas, for Plaintiff. Andrea Harris, for Defendant.

ORDER ON PARTIES' CROSS-MOTIONS REGARDING PLAINTIFF'S ENTITLEMENT TO ATTORNEY FEES AND COSTS

This cause came before the Court on June 21, 2021, on the parties' cross-motions regarding Plaintiff's entitlement to attorney's fees and costs, and the Court, being advised in the premises, hereby GRANTS Plaintiff's Motion and DENIES Defendant's Motion. Plaintiff is entitled to attorney's fees and costs for litigating Plaintiff's right to interest under section 627.736, Florida Statutes (2021). *See Magnetic Imaging Sys., I, Inc., v. Prudential Prop. & Cas. Ins. Co.,* 847 So. 2d 987 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D679a] (Insurer's tender of interest payment post-suit entitled the assignee medical provider to attorney fees under section 627.428, Florida Statutes (2002).).

It is further ordered that the parties shall schedule the hearing to determine the amount of fees as soon as practicable. In support of this Order, the Court provides the following:

RELEVANT PROCEDURAL HISTORY

1. The subject action involves a claim for personal injury protection ("PIP") insurance benefits, pursuant to section 627.736, Florida Statutes (2021), filed by Angels Diagnostic Group, Inc., (hereinafter "Plaintiff") as assignee of Alejandro Morales, against Defendant United Automobile Insurance Company (hereinafter "Defendant") arising out of a motor vehicle accident.

2. On January 14, 2021, pursuant to section 627.736, Plaintiff filed its Complaint for damages for breach of contract. Although the Complaint generally avers damages of up to $99.00, during the June 21, 2021, hearing, the parties informed the Court that the dispute involved 13 cents in unpaid interest.[1]

3. On or about March 30, 2021, Defendant issued a draft payment in the amount of 13 cents for accrued interest to Plaintiff, which Plaintiff received. *See* Exhibit attached to Plaintiff's Motion.

4. On April 6, 2021, the parties filed the subject Motions to Determine Entitlement to Attorney's Fees.

ANALYSIS

To render its decision, the Court looks to the plain language of the pertinent statutes. Section 627.736(8), Florida Statutes (2021), provides,

> APPLICABILITY OF PROVISION REGULATING ATTORNEY FEES.—With respect to any dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, or between an assignee of an insured's rights and the insurer, the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15), and except that any attorney fees recovered must:
>
> (a) Comply with prevailing professional standards;
>
> (b) Not overstate or inflate the number of hours reasonably necessary for a case of comparable skill or complexity; and
>
> (c) Represent legal services that are reasonable and necessary to achieve the result obtained.

Under the plain language of this section on attorney's fees, the section applies to "***any dispute***" under section 627.736, and the provisions of section 627.428, Florida Statutes (2021), govern. In the present case, Plaintiff, an assignee of the subject insured's rights, disputed that Defendant paid the correct amount of interest.

Section 627.736(10)(d), Florida Statutes (2021), provides a statutory right to interest on any overdue claim.

> If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer.

Id. Thus, as in the present case, if a plaintiff alleges that the overdue claim was not paid timely "***together with***" applicable interest, then an action may be brought against the insurer. *See id.* A failure to pay applicable interest also would constitute a dispute under section 627.736(8).

Having found that section 627.736(8) applies, the Court looks to any statutory references contained therein. The pertinent referenced statute in section 627.736(8) is section 627.428, Florida Statutes. Section 627.428(1), Florida Statutes (2021), allows the following on attorney fees:

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

Clearly, this section requires a judgment, so the Court looks to the facts of the present case to determine if a judgment exists. In the present case, after Plaintiff filed the lawsuit, Defendant paid the 13 cents requested by Plaintiff in its demand. A post-suit payment of a claim in an insurance case is the functional equivalent of a confession of judgment or verdict entitling the claimant to attorney's fees. *Wollard v. Lloyd's & Cos. of Lloyd's,* 439 So. 2d 217 (Fla. 1983); *Losicco v. Aetna Cas. and Sur. Co.,* 588 So. 2d 681 (Fla. 3d DCA 1991).

Indeed, on similar facts, binding precedent requires this Court to grant Plaintiff's Motion for fees. *See Magnetic Imaging,* 847 So. 2d at 987. In *Magnetic Imaging,* the insurer tendered a post-suit payment of $22.12, the amount purportedly due as outstanding interest, to the plaintiff. *Id.* at 989. The Third District Court of Appeal found this payment constituted a confession of judgment, which entitled the plaintiff to a fee award. *Id.* at 989-90. Thus, under governing precedent and pertinent statutes, the 13-cent interest payment in the present case constituted a judgment against Defendant.

The Court has ruled based on the plain language of the statute and binding precedent. Nonetheless, the Court must address the Fourth District Court of Appeal's analysis of the statutory framework of section 627.736 in *South Florida Pain & Rehabilitation of West Dade v. Infinity Auto Insurance Company,* No. 4D21-438 (Fla. 4th DCA Apr. 21, 2021) [46 Fla. L. Weekly D915a].[2] The Fourth District utilized the proper analysis of statutory interpretation but, remarkably, did not analyze all pertinent statutory language. To reiterate, section 627.736(10)(d) provides,

> If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer.

The Fourth District Court, for unknown reasons, omitted the words "together with applicable interest and a penalty. . ." from the statute.

Section 627.736(10)(d) speaks for itself but clearly indicates that no action may be brought against the insurer if the insurer timely pays the overdue claim ***together with*** applicable interest and a penalty. Thus, following logically, if an insurer does not pay the claim "***together with*** applicable interest and a penalty," then an action may be brought. *Id.* (emphasis added). The statute does not end with failure to pay the claim and does not require that the insurance contract contain a provision allowing fees for interest and penalty.

Based on the abundantly clear language of the section, the legislature intended for insurers to be sued if they do not pay the PIP claim together with applicable interest. Courts must not interpret a statute that would lead to an absurd or unreasonable result. *Dep't of Highway Safety and Motor Vehicles v. Patrick,* 895 So. 2d 1131 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D349a]. Words also may not be excised from the statute and must be enforced. *See Haworth v. Chapman,* 113 Fla. 591, 595 (Fla. 1933) (A statute must be read to take all parts into consideration and give them all effect.). The legislature did not intend to authorize insurers to withhold applicable interest and a penalty with impunity; an action may be brought if they do not pay them. § 627.736(10)(d), Fla. Stat. 2021. This Court must follow the law as written and does so in this Order.

Wherefore, instead of paying 13 cents in interest pre-suit, Defendant is liable to Plaintiff for Plaintiff's attorney's fees and costs for prosecuting the suit in which the 13-cent recovery was had.[3] Plaintiff's Motion for Attorney's Fees and Costs is granted.

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[1]The parties also informed the Court that Plaintiff made a valid demand for the 13 cents under section 627.736(10), Florida Statutes (2021), and Defendant failed to timely pay the 13 cents demanded.

[2]The Court also is bound by the Third District Court of Appeal's decision in *Magnetic Imaging*, so this analysis may be *dicta*.

[3]Twenty-one years ago, the Florida Supreme Court wrote, "Without a doubt, the purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the injured insured may get on with his [or her] life without undue financial interruption.' " *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683-84 (Fla. 2000) [25 Fla. L. Weekly S1103a] (quoting *Gov't Emps. Ins. Co. v. Gonzalez,* 512 So.2d 269, 271 (Fla. 3d DCA 1987)). Without a doubt, this purpose was not achieved in this case.

* * *

Landlord-tenant—Eviction—Notice—Defects—Although fifteen-day notice to vacate satisfied section 83.57(3), notice is fatally defective for failure to comply with county ordinance requiring thirty days' notice—Complaint is dismissed

DAVID PEREZ, Plaintiff, v. ARACELY RODRIGUEZ, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-026153-CC-25, Section CG03. September 2, 2021. Patricia Marino Pedraza, Judge. Counsel: Kathryn Mesa, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DETERMINE RENT AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before the Court on the Defendant's Motion to Determine Rent and Motion to Dismiss, it is **ORDERED AND ADJUDGED** as follows:

1. On August 5, 2021, Plaintiff filed their Complaint based on the termination of the month to month tenancy with a 15 day notice.

2. On August 11, 2021 Defendant filed a timely Answer, Affirmative Defenses, Motion to Dismiss, Motion to Determine Rent, and Demand for Jury Trial.

3. On September 1, 2021, the Court held a hearing on Defendant's Motion to Determine Rent and Motion to Dismiss. The motion to dismiss asserted that the case must be dismissed since Plaintiff did not give 30 days' notice as required by County Ordinance.

4. At the hearing it was stipulated that all rent through August 2021 was posted into the court. The court orders Defendant to post September's rent of $1,000 into the Court registry by September 2, 2021 at 3:00 pm. Plaintiff can file a motion to disburse these funds at a later time.

5. On Defendant's Motion to Dismiss, Defendant argued Plaintiff's 15 Day Notice to Vacate was legally insufficient pursuant to Miami Dade County Code of Ordinances Chapter 17—HOUSING, Sec. 17.03, which states that "[a] residential tenancy without a specific duration in which the rent is payable on a monthly basis may be terminated by either the landlord or tenant by giving not less than **30 days** written notice prior to the end of any monthly period."

6. Defendant further argued that a statutory cause of action cannot be commenced until Plaintiff has complied with all conditions precedent. *See Ferry Morse Seed Co. v. Hitchcock*, 426 So. 2d 958 (Fla. 1983). A proper and non-defective notice is a statutory condition precedent and the service of a defective notice by the Plaintiff gives the Court no power to grant a landlord relief based on the defective notice. *See Rolling Oaks Homeowners Ass'n v. Dade County*, 492 So. 2d 686 (Fla. 3d DCA 1986); *Investment and Income Realty v. Bentley*, 480 So. 2d 219 (Fla. 5th DCA 1985); *Cook v. Arrowhead Mobile Home Community*, 50 Fla. Supp. 2d 26 (Columbia Cty. 1991) (Opinion Answering Certified Question).

7. Plaintiff argued that this Ordinance was superseded by Florida Statutes 83.57(3), which requires only 15 days' notice to terminate a month-to-month tenancy. Plaintiff also asserted that this ordinance was an older ordinance; however, the court notes that this Ordinance became effective in February 2021.

8. While the court acknowledges that Florida Statute requires only 15 days' notice, local municipalities, including Miami Dade County, have the legal authority to require 30 days' notice.

9. Accordingly the Court finds that Miami Dade County Code of Ordinances Chapter 17—HOUSING, Sec. 17.03 is valid and is not superseded by Florida Statutes 83.57(3).

10. Defendant's Motion to Dismiss is hereby GRANTED and this case is dismissed. The Court reserves jurisdiction on the issue of fees and costs.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Claim for treatment dismissed, as policy at issue was previously declared void *ab initio*

JUBER IMAGING, INC., a/a/o Elieser Figueredo, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-004548-SP-21 Section HI01. February 25, 2021. Milena Abreu, Judge. Counsel: Gregory E. Gudin, Landau & Associates, for Plaintiff. Cara F. Morehouse, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before this Court on February 25, 2021, regarding Defendant's Motion to Dismiss, and the Court having heard arguments from both parties, reviewed the Motion, file, applicable law, and otherwise being fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. In this lawsuit, Plaintiff seeks payment of alleged overdue personal injury protection ("PIP") benefits under Defendant's policy of insurance numbered FLPA262701846 (the "Insurance Policy").

2. Defendant seeks dismissal because, in a prior action for declaratory relief, the Thirteenth Judicial Circuit Court in Hillsborough County deemed the Insurance Policy void ab initio, and ruled that [Direct General] has "no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claim(s) for benefits" (the "Default Final Judgment"). See Hillsborough County Circuit Court Case No. 2018-CA-009511.

3. Pursuant to Florida Statute § 90.202, the Court takes judicial notice of the Hillsborough County Circuit Court Case and Default

Final Judgment entered therein.

4. The Court in the above-captioned case relies on the Thirteenth Judicial Circuit Court opinion stemming from the Default Final Judgment.

5. The Court finds when taking all of Plaintiff's allegations as true in the Complaint, based on the Default Final Judgment, which the Court finds is applicable law, Plaintiff cannot recover under the Insurance Policy because it has been deemed void ab initio.

6. Therefore, Defendant's Motion to Dismiss is ripe and appropriate within the four corners of the Complaint.

7. The Court finds that Plaintiff has not properly pled the elements of Breach of Contract, as the Complaint's allegations that the policy was in effect are conclusory and factually wrong.

8. Although Plaintiff argues that the elements of Collateral Estoppel are not met, the Court finds that the doctrine of Collateral Estoppel does not come into effect, the Default Final Judgment is on the Insurance Policy, in addition to the Court's finding that the parties are the same under Florida's assignment law.

9. The Court finds that Plaintiff cannot enforce a contract that does not exist. Therefore, Defendant's Motion to Dismiss is hereby GRANTED.

* * *

Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Where insurer's failure to provide discovery responses reflects contumacious conduct rather than neglect, and it is clear that prior sanctions did not resonate as warning to deter future aberrant conduct, insurer's answer and affirmative defenses are stricken—Medical provider is entitled to default judgment

SPP REHABILITATION, INC., Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-007147-CC-23, Section ND01. August 19, 2021. Myriam Lehr, Judge. Counsel: Rowena M. Racca, Dawson Law Firm, Fort Lauderdale, for Plaintiff. Nicole Varela and Jesse Young, for Defendant.

ORDER GRANTING DEFAULT FINAL JUDGMENT AND ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE THE DEFENDANT'S PLEADINGS AS SANCTIONS

THIS CAUSE having come on for hearing on August 13, 2021, on Plaintiff's Motion to Compel Compliance with Court Order Entered on April 6, 2021 and for Sanctions, and the Court having received the arguments of the parties and having been duly advised in the Premises, the Court hereupon finds as follows:

Findings of Fact

1. This is an action for breach of contract arising out of Infinity Auto Insurance Company's ("Defendant") failure to pay Personal Injury Protection ("PIP") benefits to the insured's assignee, SPP Rehabilitation, Inc.

2. The Defendant denied PIP coverage alleging that the insured failed to cooperate in the investigation of the claim by failing to submit to an Examination Under Oath.

3. The Plaintiff served the Defendant with initial Interrogatories and Request for Production on April 25, 2018.

4. Without a response from the Defendant nor a request to extend the time to respond to discovery, Plaintiff properly sought an ex parte order compelling Defendant's discovery responses, which was entered on June 15, 2018. Specifically, the Order required the Defendant to file its discovery responses within ten (10) days of the Order, failing which sanctions may be imposed.

5. On August 22, 2018, when the Defendant failed to comply with the Court's Order, Plaintiff filed its Motion to Compel Compliance with Court Order and for Sanctions Pursuant to Florida Rule of Civil Procedure 1.380 attaching a copy of Plaintiff's correspondence to the Defendant requesting discovery responses to obviate a hearing on that motion.

6. After 16 months, the Defendant finally filed its discovery responses just a day prior to the hearing on the motion.

7. On December 6, 2019, this Court entered an Order awarding monetary sanctions to the Plaintiff due to the Defendant's dilatory tactic in the discovery process. At the hearing, Defendant's counsel failed to offer any reasonable justification for the Defendant's lack of cooperation with regard to providing discovery, ignoring the Plaintiff's motion to compel discovery and failing to comply with the Court's order.

8. On January 21, 2021, Plaintiff propounded Supplemental Interrogatory numbers 18, 19 to the Defendant.

9. On February 8, 2021, Plaintiff propounded another Supplemental Interrogatory question, number 20 to the Defendant.

10. Defendant failed to respond to these 3 interrogatory questions.

11. On April 6, 2021, an Order compelling the "Defendant to file its answers to supplemental interrogatories 18, 19 and 20 within "ten (10) days of the Order, failing which sanctions may be imposed," was entered pursuant to Plaintiff's properly filed Ex-Parte Motions to Compel regarding the same.

12. On March 25, 2021, Plaintiff requested this case to be scheduled for jury trial.

13. Without the Defendant's interrogatory responses nor a motion seeking an extension of time, on June 3, 2021, Plaintiff filed its Motion to Compel Compliance with Court Order Entered on April 6, 2021 and for Sanctions ("Motion for Sanctions") requesting the Court to sanction the Defendant including striking the Defendant's pleadings for its contumacious refusal to abide by the rules of discovery and court orders. The motion attaches Plaintiff's multiple correspondence to the Defendant's counsel dated March 22, 2021 and June 3, 2021 showing attempts by the Plaintiff to secure the answers to discovery without Court's intervention.

14. Defendant ignored the Plaintiff's motion, correspondence and this Court's Order.

15. On August 13, 2021, this Court heard the Plaintiff's Motion for Sanctions. Defendant's counsel provided an unjustifiable reason for its continued failure to file its discovery answers, i.e. that the attending defense counsel is merely covering for the defense counsel who has been recently assigned to this case.

16. Notwithstanding the unreasonable justification provided by defense counsel, a cursory review of the docket shows that the new defense counsel entered an appearance back in June 22, 2021, hardly "recent" at all. Furthermore, this hearing was coordinated on that same date, which provided sufficient time for Defendant to prepare for this hearing and make some showing of good faith effort to obey the Court's Order.

17. Ultimately, this Court finds that the Defendant was unable to offer any acceptable explanation for its continued violation of the Court's Order other than it can not do so.

Legal Analysis

18. The trial court has the inherent authority to impose sanctions arising out of "unprofessional or unethical litigation tactics undertaken solely for bad faith purposes." *Moakley v. Smallwood*, 826 So. 2d 221, 226 (Fla. 2002) [27 Fla. L. Weekly S357b]. In exercising this authority, however, a balance must be struck to "ensure that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert their clients' interests." *Id.,* at 226.

19. In addressing the obligations of attorneys and their duties to the court, the Third District Court of Appeals stated in *Visoly v. Security Pacific Credit Corp.,* 768 So. 2d 482, 492 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D2003a], that:

> The privilege to practice law requires attorneys to conduct themselves in a manner compatible with the administration of justice. While counsel does have an obligation to be faithful to their clients lawful objectives, that obligation cannot be used to justify unprofessional conduct by elevating the perceived duty of zealous representation over all other duties.

Id., at 492. (emphasis added).

20. The Florida Supreme Court has addressed the analysis that a court should implement in determining whether to dismiss an action as a sanction in *Kozel v. Ostendorf,* 629 So. 2d 817 (Fla. 1994), in which it set for the following factors to be considered when determining whether to strike pleadings:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

Id., at 818.

21. The application of these factors militates toward the sanction sought by the Plaintiff. First, the Defendant failed to provide the discovery responses to the Plaintiff even though the hearing had been scheduled for August 13, 2021 since June 22, 2021, and the lack of any reasonable excuse for not responding to the discovery in the intervening seven (7) weeks reflects contumacious conduct rather than neglect. Second, the Defendant was previously sanctioned for similar discovery related violation. Third, the counsel for Defendant is an employee of the Defendant insurance company so the client was aware of its discovery obligations. Fourth, the delays caused by the failure to comply with the Order compelling discovery thwarted Plaintiff's efforts to discern the basis for a material defense and prepare its case for trial. Fifth, the attorney for the Defendant offered no reasonable justification for noncompliance. If there are an insufficient number of attorneys and staff to handle its caseload, the Defendant cannot claim same as an excuse. This is most respectfully, the Defendant's internal staffing decision problem and not the Courts'. Lastly, the repeated pattern of the Defendant's failure to comply with discovery rules has caused unnecessary problems for judicial administration in that valuable court time has been utilized to require the Defendant to comply with discovery rules and despite a court order to do so, Defendant remains unwilling to provide discovery responses. Given the current mandate upon trial courts to monitor their cases for timely and expedient resolution, this conduct by Defendant created problems with judicial administration.

22. These factors all militate in favor of striking the Defendant's pleadings. *See also Adams v. Barkman*, 114 So. 3d 1021, 1024 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2260a] ("Circumstance in which [striking a party's pleadings] is justified include where a litigant or lawyer's behavior indicate a deliberate and contumacious disregard of the court's authority, bad faith, willful disregard or gross indifference to an order o the court or conduct which evinces deliberate callousness.") (citing to *Hart v. Weaver,* 364 So. 2d 524 (Fla. 2d DCA 1978).

23. The Court is mindful that the striking of pleadings is the harshest of sanctions. However, where an attorney disobeys court orders without reasonable explanation, including the failure to comply with an order compelling discovery by the date of the hearing seeking sanctions, it is clear that the prior sanction award did not resonate properly as a warning to deter future aberrant conduct.

In conclusion, as pronounced orally in court to the parties, this Court sees no viable alternative sanction and finds the striking of Defendant's pleadings and default judgment against the Defendant appropriate.

IT IS HEREUPON Ordered that the Plaintiff's Motion to Compel Compliance with Court Order Entered on April 6, 2021 and for Sanctions, is GRANTED. Defendant's Answer and Affirmative Defenses are hereby stricken from the record, and Plaintiff is entitled to a Default Judgment.

* * *

Insurance—Personal injury protection—Stay—Action for PIP benefits is stayed pending outcome of declaratory action seeking declaration that policy is void *ab initio* for material misrepresentation

ANGELS DIAGNOSTIC GROUP, INC., a/a/o Yamili Suarez, Plaintiff, v. IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-011828-SP-25, Section CG02. August 24, 2021. Elijah A. Levitt, Judge. Counsel: Adriana Santana de Armas, Miami, for Plaintiff. William J. McFarlane, III, McFarlane Law, Coral Springs, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS OR STAY PROCEEDINGS AND ORDER PLACING MATTER ON INACTIVE STATUS

This cause came before the Court on today's date of hearing on Defendant's Motion to Dismiss or, in the alternative, to Stay or Abate Proceedings, and the Court, being advised in the premises hereby denies the Motion to Dismiss and grants the Motion to Stay.

The Court hereby stays this matter as follows:

In the interests of justice and for judicial economy, the Court recommends that this matter be consolidated with Miami-Dade County Case No. 2019-009477-CC-05. Consolidation may only be approved by the Administrative County Court Civil Division Judge. Therefore, within ten (10) days of the date of this Order, the parties shall confer and contact Administrative County Court Civil Division Judge Gordon Murray's chambers at (305) 636-2260 to schedule a hearing as to the propriety of consolidating this matter with Case No. 2019-009477-CC-05. The Court stays the matter until such time as Administrative Judge Murray rules. If consolidation is denied, then this matter will be stayed for one (1) year from the date of this Order or until Case No. 2019-009477-CC-05 resolves, whichever comes first.

The Court finds that a stay is appropriate at this juncture as the declaratory action in Case No. 2019-009477-CC-05 may dispose of the claims in the present case. *See Indep. Fire Ins. Co. v. Arvidson,* 564 So. 2d 1254 (Fla. DCA 1990). If the policy is void *ab initio* for a material misrepresentation, an issue to be decided in Case No. 2019-009477-CC-05, then Defendant has no duty to provide coverage under the subject policy in the present case.

Further, the Court finds that a lack of a stay creates the risk of inconsistent verdicts and duplicative litigation. *See Int'l Surplus Lines Ins. Co. v. Markham,* 580 So. 2d 251 (Fla. 2d DCA 1991).

Wherefore, Defendant's Motion to Stay is granted. The Clerk of Court is hereby ordered to place this matter on inactive status pending further order of this Court or Administrative Judge Murray.

The Court notes that, prior to issuing this Order, the Court reviewed the parties' supplemental authority provided after the hearing.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Where PIP policy has been found to be void *ab initio*, action claiming benefits under policy is dismissed—Medical provider/assignee was not deprived of due process by not being included as party to declaratory action that found policy to be void based on material misrepresentation on policy application

TAMPA BAY REHABILITATION CENTER, INC., a/a/o Lazaro Luis Diaz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 11th

Judicial Circuit in and for Miami-Dade County. Case No. 2020-021949-CC-05, Section CC04. August 20, 2021. Diana Gonzalez-Whyte, Judge. Counsel: Marisol Estevez, Shuster and Saben, LLC, for Plaintiff. Cara F. Morehouse, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before this Court on August 18, 2021, regarding Defendant's Motion to Dismiss (the "Motion to Dismiss"), and the Court having heard arguments, reviewed the Motion to Dismiss, file, applicable law, and otherwise being fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. In this lawsuit, Plaintiff, as an assignee of benefits, filed a personal injury protection ("PIP") action stemming from an automobile accident that allegedly occurred on or about January 24, 2019, seeking PIP benefits under Defendant's policy of insurance numbered FLPA262701764 (the "Insurance Policy") between Lazaro Luis Diaz and Direct General Insurance Company.

2. Defendant filed the Motion to Dismiss because a Circuit Court in the Thirteenth Judicial Circuit Court declared the Insurance Policy void *ab initio*, pursuant to a material misrepresentation by Lazaro Luis Diaz on the Insurance Policy Application. *Direct General Insurance Company v. Lazaro Luis Diaz, et al.*, No. 19-CA-005974 (Fla. 13th Cir. Ct. 2019, Judge Dick Greco, Jr.) (the "Declaratory Action").

3. Accordingly, the Circuit Court ruled that [Direct General Insurance Company] has "no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claim(s) for benefits". *Id.*

4. Pursuant to Florida Statute § 90.202(6) and (12), the Court takes judicial notice of the Declaratory Action and Final Judgment entered therein on the Insurance Policy, and finds that Defendant's Motion to Dismiss is ripe and appropriate within the four corners of the Complaint.

5. Therefore, relying on The Thirteenth Judicial Circuit Court opinion, the Court finds that Plaintiff has not properly pled the elements of Breach of Contract, as there is no valid contract or a duty owed to Plaintiff.

6. Even when taking all of Plaintiff's allegations as true in the Complaint, based on the Final Judgment, which the Court finds is applicable law, Plaintiff cannot recover under the Insurance Policy because it has been deemed void *ab initio*. See *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 300 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D559a] (citing *Response Oncology, Inc. v. Metrahealth Ins. Co*., 978 F. Supp. 1052, 1058) (S.D. Fla. 1997).

7. Further, the Court recognizes the language in section 86.091, Florida Statutes, and finds when considering a party's rights, the case law should be reviewed in totality of the assignee-medical provider relationship.

8. The Final Judgment was entered by the Circuit Court as a determination of coverage under the Insurance Policy, to which the assignee medical provider was not a party to the transaction giving rise to the Insurance Policy. As such, an assignee medical provider is not an indispensable party to an action pertaining to material misrepresentation on an Insurance Contract to which they are not a party, its interest in the Insurance Policy did not arise until the purposed assignment of benefits, which was after the Insurance Policy Application and material misrepresentation took place, and the medical provider has no knowledge concerning the Insurance Policy Application or material misrepresentation. See *KC Quality Care, LLC a/a/o Estel Jean-Baptiste v. Direct General Ins. Co.*, Orange County Case No. 2020-SC-058727-O (9th Jud. Cir. Cty. June 11, 2021, Judge Elizabeth J. Starr); *Direct General Insurance Company vs. Cereena K. Humphrey*, Case No. 48-2019-CA-000385-O (9th Jud. Cir. Mar. 18, 2021, Judge Reginald K. Whitehead); *Direct General Insurance Company v. Cynthia Joseph*, Case No. 2018-CA-000049 (9th Jud. Cir. Feb. 4. 2020, Judge Michael Murphy).

9. Therefore, Plaintiff's due process rights are not implicated and have not been violated, as Plaintiff's interest in the policy arose through or flowed from an assignment of benefits, meaning, Plaintiff stands in the shoes of the assignor, and the insurance carrier is not a government actor somehow depriving the assignee-medical provider of its rights without notice and opportunity to be heard. See *Id.*

10. Additionally, it is well settled that an assignee does not possess any greater rights or benefits than the assignor. See *Shaw v. State Farm Fire and Cas. Co.*, 37 So.3d 329, 333 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1020a]; and *Law Office of David J. Stern, P.A. v. Sec. Nat. Servicing Corp.*, 969 So.2d 962, 968 (Fla. 2007) [32 Fla. L. Weekly S396a]. An assignee, like Plaintiff, takes an assignment with all the rights of the assignor, and subject to all the equities and defenses connected with or growing out of the obligation at the time of the assignment. *Id.*

11. Therefore, when taking Plaintiff's allegations as true in the Complaint, based on the Final Judgment, which the Court finds is applicable law, Plaintiff cannot recover under the Insurance Policy because it has been previously deemed void *ab initio* and, as the assignee, Plaintiff took assignment of the now voided Insurance Policy with that fault or defense, as that fault or defense existed at the time of assignment.

12. Defendant's Motion to Dismiss is hereby GRANTED.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Where court declared PIP policy void *ab initio* prior to execution of assignment of benefits to plaintiff medical provider, insured had no rights under voided policy to assign, and provider's suit for benefits is dismissed

PHYSICIANS GROUP, LLC, a/a/o Crystal Sanders, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020 SC 004998 NC. May 20, 2021. Dana Moss, Judge. Counsel: Nicholas A. Chiappetta, Martin | Chiappetta, Lake Worth, for Plaintiff. Stephen D. Strong, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS

This matter came before the Court on the Defendant's Motion to Dismiss Plaintiff's Amended Complaint, which attached thereto as Exhibit A and referenced therein is an assignment of benefits from Crystal Sanders to Physicians Group, LLC dated May 28, 2019. The Plaintiff, as assignee, seeks damages for Defendant's failure to pay Personal Injury Protection ("PIP") benefits to compensate Plaintiff for medical services rendered to Crystal Sanders, who claimed injured from an automobile accident on May 28, 2019. Plaintiff put forth in the amended complaint that Defendant insured Crystal Sanders and the policy was in full force and effect at the time of the accident, thereby obligating the Defendant to provide PIP benefits for Crystal Sanders' treatment.

The Defendant moved to dismiss the amended complaint arguing that the Circuit Court in Duval County, Florida declared Crystal Sanders' policy *void ab initio* in case 2018-CA-004154 on January 4, 2019, and attached a copy of said order to the amended motion to dismiss as Exhibit A.

Because the insured's assignment to Physicians Group, LLC occurred after Duval County declared her policy void, the Court concludes Crystal Sanders could have no rights under the voided policy to assign to Physicians Group, LLC. Therefore, the Court grants the Defendant's amended motion to dismiss.

ORDERED and ADJUDGED that the Defendant's Amended

Motion to Dismiss is granted.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Where PIP policy has been found to be void *ab initio*, action claiming benefits under policy is dismissed

AFO IMAGING, INC., a/a/o Pilar Roman, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-060966. July 23, 2021. Christine K. Vogel, Senior Judge. Counsel: Christina N. Rothstein, FL Legal Group, Tampa, for Plaintiff. Cara F. Morehouse, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER

THIS MATTER came before the Court on June 29, 2021 on the Defendant's Motion to Dismiss and the Defendant's Ore Tenus Motion to abate. The court has reviewed the Motion, all case law provided by counsel, and heard argument of Counsel.

This action is a personal injury protection ("PIP") claim arising from an automobile accident alleged to have occurred on April 25, 2020. Plaintiff has made a claim for benefits under an insurance policy issued by the Defendant as an assignee of the named insured, Pilar Roman.

After the filing of this action, the Defendant filed an action for Declaratory Judgement against the named insured, Pilar Roman, seeking to declare the policy in question *void ab initio* due to material misrepresentations and omissions on the policy application. The Declaratory Judgment action was filed in St. Lucie County, Florida (see circuit case no. 2020-CA-001115). That Court accepted jurisdiction over the parties and venue was established in St. Lucie County, Florida. The insured, Pilar Roman, made admissions under oath and signed a consent final judgement which was signed by the Court (this court has taken judicial notice of the Final Consent Judgment entered pursuant to Florida Statute 90.202). The Judgement states that Direct General Insurance Company has no duty to defend or indemnify any name insure or omnibus insured on the insurance contact for any claim for benefits that have been or will be made by any claimant.

It is well settled that an assignee does not possess any greater rights or benefits than the assignor (*see Shaw v. State Farm Fire and Cas. Co.*, 37 So. 3d 329, (Fla. 5th DCA 2010) [35 Fla. L. Weekly D1020a]). As the policy in question has been found to be *void ab initio,* this court finds that there is no policy or contract under which benefits or a breach of contract can be claimed.

The Defendant made an Ore Tenus Motion to Abate this action as a Motion for Rehearing is pending in St. Lucie County. That motion was filed by AFO Imaging, who was not a named party in that action.

It is, therefore

ORDERED

The Defendant's Ore Tenus Motion to Abate is

DENIED.

The Defendant's Motion to Dismiss is

GRANTED.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Medical provider's claim for unpaid postage, as well as its claim for entitlement to attorney's fees and costs in action for unpaid postage, was not frivolous where at time of hearing on opposing motions regarding entitlement to attorney's fees and costs there was conflicting circuit court case law on issue—Insurer is not entitled to attorney's fees and costs based on proposal for settlement that included $1 for PIP benefit—Offer was ambiguous as to whether "benefits" included postage, and plaintiff ultimately obtained $6.12 for postage—Proposal was not made in bad faith where at time of service of proposal insurer believed that no benefits were owed and correctly believed that provider was not entitled to fees and costs for litigating postage issue

CENTER FOR BONE AND JOINT SURGERY OF THE PALM BEACHES, P.A., a/a/o Santa Gomez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2018-SC-020367 (RE). August 11, 2021. Sarah L. Shullman, Judge. Counsel: Tara L. Kopp, Schuler, Halvorson, Weisser, Zoeller, Overbeck & Baxter P.A., West Palm Beach, for Plaintiff. Ashley L. Cole, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR ENTITLEMENT AND MOTION TO TAX ATTORNEYS' FEES AND COSTS, AND PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S PROPOSAL FOR SETTLEMENT

THIS CAUSE having come before the Court on July 16, 2021, and the Court having heard argument of counsel, having reviewed the papers and court file, and the Court being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED, as follows:

Defendant's Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs, pursuant to its Proposal for Settlement and Motion for Sanctions, is hereby **DENIED**. Plaintiff's Motion to Strike Defendant's Proposal for Settlement is hereby **DENIED** for the reasons set forth in further detail as follows:

FACTS AND BACKGROUND

On October 3, 2018, Plaintiff filed a lawsuit seeking payment for unpaid services and $5.66 in unpaid postage pursuant to Plaintiff's pre-suit Demand Letter. On November 19, 2018, Defendant served Plaintiff with its first 57.105 motion, alleging that Plaintiff should dismiss its lawsuit as benefits were exhausted.

On May 21, 2019, the Defendant served Plaintiff with a Proposal for Settlement in the amount of "$1.00 for Personal Injury Protection Benefits inclusive of any interest" and "$49.00 for Plaintiff's Attorney's Fees and Costs," for a total amount of $50.00. The Proposal for Settlement also provided: "*The claim or claims this Proposal is attempting to resolve*: Any and all causes of action for Personal Injury Protection benefits whatsoever that Plaintiff has asserted in the present action, including all damages that would otherwise be awarded in a final judgment in the action, subject to paragraph F of this Proposal. Plaintiff's Attorney's fees are part of the legal claim and are included in this offer."

On November 13, 2019, during ongoing litigation and without any agreement to settle, Defendant issued Plaintiff a check in the amount of $6.12 for the additional unpaid postage at issue in this lawsuit, which Defendant admitted it owed.

On December 19, 2019, Plaintiff filed its Motion for Final Summary Judgment Based Upon Defendant's Confession of Judgment, asking the Court to find that Plaintiff is entitled to reasonable attorney's fees and costs based upon Defendant issuing payment for the postage owed after this lawsuit had been filed. On March 26, 2020, the Defendant filed its own Motion for Final Summary Judgment Based Upon Exhaustion of Benefits. On July 13, 2020, Defendant served Plaintiff with a second 57.105 motion related to Plaintiff's claim for attorneys' fees and costs and filed same on August 4, 2020.

On October 1, 2020, this Court entered an Order granting Defendant's Motion for Final Summary Judgment and denying Plaintiff's Motion for Final Summary Judgment, finding that although it is undisputed that Defendant did not pay the correct postage pre-suit, section 627.428 applies only when judgment is rendered in favor of Plaintiff. As Plaintiff does not have a private cause of action for postage, and because Defendant complied with section 627.736(10)

by timely paying benefits, statutory interest, and penalty, no action should have been filed and no judgment may be entered for Plaintiff. Thus, section 627.428 does not apply, and Plaintiff is not entitled to attorney's fees. Thereafter, the Fourth District Court of Appeal held that an insurer's failure to pay penalty and postage after resolving a claim for PIP benefits did not entitle the provider to attorney's fees. *See S. Fla. Pain & Rehab. of W. Dade v. Infinity Auto Ins. Co.*, 318 So. 3d 6, 11 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D915a].

On October 20, 2020, Defendant filed its Motion for Entitlement and Motion to Tax Attorney's Fees and Costs (the "Motion for Entitlement"), alleging entitlement to reasonable attorney's fees and costs pursuant to its Proposal for Settlement as well as its second 57.105 motion. In response, Plaintiff filed a Motion to Strike Defendant's Proposal for Settlement and Memorandum in Opposition to Defendant's Motion for Entitlement to Attorney's Fees and Costs (the "Motion to Strike"), alleging that Defendant's Proposal for Settlement was ambiguous and not valid and enforceable, as the offer of $1.00 was for "benefits" and the lawsuit was only about postage. Additionally, Plaintiff argued that if the Court were to find that the Proposal for Settlement was valid, the Court should find that it was not made in good faith as Defendant knew Plaintiff was only seeking postage.

CONCLUSIONS OF LAW

After hearing arguments from both parties and reviewing all motions filed and case law provided by both parties, this Court finds as follows:

As to Defendant's Motion for Entitlement based upon its 57.105 motion, the Court finds that Plaintiff's claim for unpaid postage, as well as Plaintiff's claim for entitlement to attorney's fees and costs, was not frivolous. At the time of the hearing, there was circuit court case law in favor of both Plaintiff and Defendant. In a different action, this Court's predecessor ruled that Plaintiff could file a lawsuit for unpaid postage and was entitled to attorneys' fees and costs upon Defendant's payment of the postage during litigation. *See, e.g., Beaches Open MRI of Boynton Beach, LLC v. State Farm Mutual,* Case No. 502016SC011422XXXXMB RE (15th Jud. Cir.). It was not until after the hearing on the subject motions that the Fourth District Court of Appeal held that a plaintiff was not entitled to fees on such grounds. *See Infinity Auto.,* 318 So. 3d at 11.

As to Defendant's Motion for Entitlement based upon its Proposal for Settlement, the Court cannot find that Defendant's Proposal for Settlement was clear, explicit, and unambiguous. The Proposal offered $1.00 in Personal Injury Protection benefits; however, Defendant did ultimately issue $6.12 payment for postage. Thus, even though the Court found that Plaintiff was not entitled to fees and costs for unpaid postage, Plaintiff did not obtain a "zero" recovery. Further, the parties dispute whether the $1.00 offer for "PIP benefits" encompassed postage. Although Plaintiff's complaint originally sought payment for "unpaid services" as well as unpaid postage, and therefore the proposal appropriately offered $1.00 in benefits, Plaintiff later agreed that benefits were exhausted and only unpaid postage remained at issue. The timing of Defendant's knowledge as to this issue remains unclear. Nonetheless, Defendant, as part of its argument against entitlement to fees, argued that postage was not a "benefit," and the Court agreed. Thus, the Court finds that the $1.00 proposal is ambiguous as to whether "benefits" included postage.

Notwithstanding this finding, as to Plaintiff's Motion to Strike Defendant's Proposal for Settlement, this Court finds that at the time Defendant served its Proposal for Settlement, Defendant believed that no benefits were owed and that Plaintiff was not entitled to its attorneys' fees and costs for unpaid postage. Defendant ultimately prevailed on the latter issue. Therefore, this Court finds that there was no bad faith on the part of the Defendant.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs, pursuant to both its Proposal for Settlement and its 57.105 motion, is hereby **DENIED**. Plaintiff's Motion to Strike Defendant's Proposal for Settlement is hereby **DENIED**. Each party shall bear its own fees and costs.

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Officer who observed defendant asleep in vehicle in restaurant parking lot and who noted physical indicia of impairment upon contact with defendant had reasonable suspicion to detain defendant for DUI investigation—Twenty-four minute detention awaiting arrival of officer more qualified to conduct DUI investigations was not unreasonable—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. MARK WESLEY KNOWLES, Defendant. County Court, 16th Judicial Circuit in and for Monroe County. Case No. 2020-CT-524-A-K. August 24, 2021. Mark Wilson, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE is before the Court on the defendant's Motion to Suppress. The Court held an evidentiary hearing on the motion on August 12, 2021. Having considered the motion, the evidence adduced at the evidentiary hearing, the pertinent legal authority, and the arguments of the parties, the Court denies the motion.

On April 18, 2020, Sergeant Evan Calhoun of the Monroe County Sheriff's Office was dispatched to a pizzeria on Summerland Key after an employee reported that a man was passed out behind the wheel of his pickup truck in the restaurant's parking lot. The purpose of the call, as described by both the caller and Sgt. Calhoun, was to check on the man's welfare. Sgt. Calhoun arrived at 5:30 p.m.[1] Upon approaching the pickup, Sgt. Calhoun saw the defendant sleeping in the driver's seat. The windows of the truck were rolled down and the engine was not running, but the keys were in the ignition. The defendant failed to respond to Sgt. Calhoun's verbal greeting, so he rapped on the hood until the defendant awakened. Sgt. Calhoun asked the defendant if he was okay, and the defendant said he was. Sgt. Calhoun smelled the odor of an alcoholic beverage emitting from the cab of the truck and noticed the defendant's speech was slightly slurred and his eyes were watery, glassy, and red. Sgt. Calhoun also observed the defendant attempting to conceal a can of beer from his view. Sgt. Calhoun directed the defendant to exit the truck, which he did. A second deputy arrived at approximately 5:33 p.m. Based on his observations, Sgt. Calhoun suspected the defendant might be impaired, so he radioed for a "tango" (i.e., traffic) unit at 5:34 p.m. A third deputy arrived at 5:49 p.m. The traffic unit, Deputy Ryan Chlebanowski, arrived at 5:54 p.m. and began a formal DUI investigation that eventually resulted in the defendant's arrest.

The testimony at the evidentiary hearing established that all four deputies—Sgt. Calhoun, the two other deputies who arrived as backup, as well as Deputy Chlebanowski—had received training in DUI enforcement. Deputy Chlebanowski had received substantial additional training that made him better qualified to conduct DUI investigations. Still, all deputies agreed they were at least minimally qualified to perform DUI investigations and could have begun one in this case before Deputy Chlebanowski arrived. All witnesses agreed they waited on Deputy Chlebanowski's arrival because he was the most qualified to conduct it.

The defendant asserts he was unlawfully detained while the other deputies waited for Deputy Chlebanowski's arrival. As the timeline set forth above indicates, about four minutes elapsed after Sgt. Calhoun's initial contact with the defendant before he summoned a traffic unit to conduct a formal DUI investigation. Because Deputy Chlebanowski was some 17 miles away when he received the call, it

took him approximately 20 minutes to arrive at the scene and begin a formal DUI investigation. In total, then, Deputy Chlebanowski's DUI investigation did not begin until about 24 minutes after Sgt. Calhoun's first contact with the defendant. The legal question here is whether this delay was constitutionally reasonable.

The defendant relies principally on *Rodriguez v. United States,* 575 U.S. 348 (2015) [25 Fla. L. Weekly Fed. S191a], which held that the police may not, in the absence of reasonable suspicion of criminal activity, prolong a routine traffic stop beyond the time reasonably required to handle the matter for which the stop was made. *Id*. at 350. *Rodriguez* is inapposite here, however, because in the time necessary for Sgt. Calhoun to check on the defendant's welfare, he developed reasonable suspicion to believe the defendant was under the influence of alcohol.[2] In other words, Sgt. Calhoun developed reasonable suspicion of other criminal activity within the time reasonably required to address the matter for which the stop was made. This allowed Sgt. Calhoun to prolong the encounter to investigate whether the defendant was impaired. *See, e.g., Carter v. State,* 313 So. 3d 1191, 1193 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D662a] (police may prolong a traffic stop if there is a particularized and objective basis for suspecting the person stopped of criminal activity).

The more relevant precedent is *United States v. Sharpe,* 470 U.S. 675 (1985), which held that an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop, and where a defendant claims he was held too long, the relevant inquiry is whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. *Id*. at 684-86. The Supreme Court cautioned that a court making this assessment "should not indulge in unrealistic second-guessing." *Id*. at 686. The Court continued, "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. . . . [However], [t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Id*. at 686-87.

The only authority of which this Court is aware from the Florida District Courts of Appeal or the Florida Supreme Court on this precise issue is *Origi v. State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]. In *Origi,* the highway patrol stopped the defendant for speeding and the trooper noticed the defendant smelled of alcohol and had bloodshot and glassy eyes. *Id*. at 70. Based on these observations, the trooper called for another trooper who was a member of a DUI taskforce. *Id.* It took the second trooper ten minutes to arrive at the scene and begin a DUI investigation. *Id.* The defendant was eventually arrested for driving under the influence and a large quantity of controlled substances was discovered in his car. *Id*. The defendant challenged the legality of his detention until the second trooper arrived. *Id*. at 71. The district court held the ten-minute delay, which it described as a "short period," was reasonable. *Id*. The district court did not explain its conclusion in extensive detail. Presumably, the first trooper could have begun a DUI investigation before the second trooper arrived. But it was enough for the district court that reasonable suspicion existed to conduct a DUI investigation and that a ten-minute delay to await the arrival of a more experienced DUI taskforce member was reasonable.

The Court has canvassed authorities from other jurisdictions and found cases similar to *Origi.* For example, in *State v. Montgomery,* 462 S.W.3d 482 (Tenn. 2015), the Tennessee Supreme Court held that an officer was justified in holding a driver for 10-15 minutes while waiting for a backup officer to arrive and conduct a DUI investigation. *Id*. at 489. The defendant in that case made precisely the argument raised here: "The Defendant insists that Officer Reiman acted unreasonably because he could have conducted the field sobriety tests on his own instead of holding the suspects for a brief period pending the arrival of Officer Shoap." *Id*. The court rejected this argument, holding that it was reasonable for the first officer to wait for backup, mainly because the presence of a second officer would ensure the safety of the scene. *Id*.[3] The court cited to authorities from other states that reached similar conclusions. *See, e.g., Hartman v. State,* 144 S.W.3d 568 (Tex. Ct. App. 2004) (holding that a detention was not unduly prolonged where an officer delayed field sobriety exercises for 5-15 minutes while waiting for a backup officer with a video camera).

The State has directed the Court to a number of Florida trial court decisions that have addressed the same question. Judge Demers has collected many of these cases in his well-known treatise on Florida DUI law. *See* 11 David A. Demers, *Florida DUI Handbook* § 4:10 n. 5 (2020-21 ed.) (collecting cases in which detentions of up to one hour and 10 minutes were found to be permissible). In particular, the State cites to an opinion by Judge Demers himself, in which he held a 25-30 minute delay in waiting for a specialized DUI officer to arrive was not an unreasonable detention. *Sterbenz v. State,* 12 Fla. L. Weekly Supp. 612a (Fla. 6th Cir. Ct. Mar. 4, 2005).

Of the authorities cited in Judge Demers's treatise, *State v. Breese,* 27 Fla. L. Weekly Supp. 520a (Fla. 17th Cir. Ct. June 26, 2019), is most analogous to the facts of this case. In *Breese,* an officer discovered the defendant asleep behind the wheel of his car at an intersection. *Id*. The officer awakened the defendant and observed characteristic signs of intoxication. *Id.* A backup officer arrived a short time later. *Id.* The two officers then summoned a third officer, who was trained as a specialized DUI enforcement officer. *Id*. The DUI officer arrived 28 minutes after the first officer made contact with the defendant. *Id.* The court surveyed the authorities and held that detentions of similar lengths were not unreasonable. *Id*. The facts of *Breese* are indistinguishable from the facts of this case.

It appears to this Court that the weight of the authorities—both precedential and persuasive—would uphold a 24-minute detention on the facts of this case. But for the many cases that have approved delays of this length, the Court would find this to be a closer question.[4] But as the United States Supreme Court cautioned in *Sharpe,* the question is not whether some alternative means of conducting the investigation was possible, but whether the police acted unreasonably in failing to investigate or pursue it. *See Sharpe,* 460 U.S. at 687; *see also Zukor v. State,* 488 So. 2d 601, 607 (Fla. 3d DCA 1986) (while 20-20 hindsight may tell us the police could have chosen a less intrusive means of investigation, their failure to choose these alternatives does not make the alternative chosen unreasonable or unlawful).

For the foregoing reasons, it is ORDERED AND ADJUDGED that the defendant's Motion to Suppress is **DENIED**.

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[1]The encounter was captured in its entirety on Sgt. Calhoun's body-worn camera. Accordingly, there is no factual dispute about what occurred.

[2]At the evidentiary hearing, the defendant did not concede that reasonable suspicion existed, but his motion does not challenge that issue. In any case, the Court is well satisfied that Sgt. Calhoun's observations—the odor of alcohol, slightly slurred speech, watery, glassy, and red eyes, and the presence of an alcoholic beverage that the defendant apparently tried to conceal—establishes reasonable suspicion to believe that the defendant was impaired. *See, e.g., State v. Ameqrane,* 39 So. 3d 339, 341-42 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b] (collecting cases where similar observations established reasonable suspicion of DUI).

[3]The Court is aware that *Montgomery,* although explaining its decision in more detail than *Origi,* can itself be distinguished in small ways. For example, the vehicle in *Montgomery* contained two people, *id*., whereas the defendant in this case was alone in his car. And in this case, two backup officers arrived before Deputy Chlebanowski, thus reducing the risks to the others of beginning a DUI investigation before his arrival.

[4]It is undoubtedly true that either Sgt. Calhoun or the two backup officers could have begun a formal DUI investigation before Deputy Chlebanowski arrived. And it is equally true that in the approximate 20-minute period while waiting for Deputy Chlebanowski to arrive, no meaningful DUI investigation was conducted. The deputies

were simply waiting on an officer with advanced training in DUI enforcement to arrive. That being so, it is not entirely self-evident that "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Sharpe,* 470 U.S. at 686. But we are not writing on a clean slate here. The custom of summoning an officer with specialized DUI training is a widespread and longstanding practice in law enforcement (the reasons for which are obvious), and it has been sanctioned by courts across the nation for many years. If this well-established practice is to be found unconstitutional now, it is for the Florida district or supreme courts to say so.

* * *

Insurance—Automobile—Windshield repair—Appraisal— Disinterested appraiser—Complaint seeking declaration as to whether insurer's appointed appraiser is "disinterested appraiser" contemplated by policy satisfies all elements of declaratory action—Motion to dismiss is denied

AUTO GLASS AMERICA, LLC, a/a/o Rosanna Matucan-Carson, Plaintiff, v. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE19017629, Division 52. August 23, 2021. Giuseppina Miranda, Judge. Counsel: Emilio R. Stillo and Andrew B. Davis-Henrichs, Davie; and Mac S. Phillips, Fort Lauderdale, for Plaintiff. Chelsea Cangiano, Miami, for Defendant.

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

THIS CAUSE came before the Court for hearing on August 23, 2021 upon consideration of the Defendant's Motion to Dismiss Plaintiff's Amended Complaint and the Court's having reviewed the motion, the relevant legal authorities, and considering argument of counsel, the Court finds as follows:

On June 17, 2021 Plaintiff filed its Amended Complaint seeking Declaratory Relief disputing the appointment of Defendant's appraiser Auto Glass Inspection Service, Inc. (hereinafter referred to as "AGIS") relating to replacement of a windshield for the insured, Rosanna Matucan-Carson on or about March 17, 2019. Plaintiff did not attach a copy of the insurance policy to the pleading but quoted certain policy language that requires the appointment of a "competent and disinterested appraiser." The pleading goes on to allege that AGIS is not a"disinterested" appraiser as contemplated by the policy and seeks judicial declaration of same.

Defendant seeks dismissal for the following reasons:

1. Plaintiff's pleading fails to state a cause of action as the exhibits to the complaint negate the cause of action asserted.[1]

2. Plaintiff's lawsuit is premature and Plaintiff failed to meet all conditions precedent.

3. Plaintiff failed to satisfy the pre-suit requirement of making a timely written demand to replace Allstate's chosen appraiser.

Defendant's Motion to Dismiss attaches an appraisal agreement, a court order and emails, and a transcript of a deposition relating to other lawsuits. Defendant has also filed the Declaration of Jim Larson (president and CEO of AGIS).

A motion to dismiss a petition for declaratory judgment goes only to entitlement for such a judgment, not to the merits of the case. *Effort Enters. of Fla. v. Lexington Insurance Company*, 666 So.2d 930 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2442b].

It is clear to this Court, after a review of *Higgins v. State Farm Fire and Casualty Company*, 894 So.2d 5 (Fla. 2004) [29 Fla. L. Weekly S533a], and the cases that follow, that the Florida Supreme Court has receded from the strict application of declaratory actions described in the premier case of *Columbia Casualty Co. v. Zimmerman*, 62 So.2d 338 (Fla. 1952). The Supreme Court's 2005 decision relied heavily on the 4th District Court of Appeals reasoning in *State Farm Fire & Casualty Co. v. Higgins*, 788 So.2d 992 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D111a] when it concluded that "[w]e believe that declaratory judgments are and can increasingly be a valuable procedure for the resolution of insurance coverage disputes. . .". The Florida Supreme Court further concluded that "the Legislature clearly contemplated fact-finding in declaratory actions." This application of Chapter 86 and been consistently applied in recent cases. *See Security First Insurance Company v. Phillips*, 312 So.3d 502 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1426b] (finding a bona fide controversy existed between the parties as to whether the ground cover damage occurred before or after the inception of the insurance policy) and *Heritage Property and Casualty Insurance Company v. Romanach*, 224 So.3d 262 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1563a] (seeking a determination of whether the chosen umpire was competent and impartial as required by the insurance policy).

When analyzing Plaintiff's pleading, this Court must determine if all the elements of a declaratory action exist in order for Petitioners to proceed under Chapter 86. A declaratory action must have the following elements:

a. a bona fide, actual, present practical need for the declaration;

b. the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to the state of facts or present controversy as to the state of facts;

c. some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts;

d. there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;

e. the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers to questions propounded from curiosity.

City of Hollywood v. Lou Petrosino, 864 So.2d 1175 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D163a] (citing *City of Hollywood v. Fla. Power & Light Co*., 624 So.2d 285, 286-87 (Fla. 4th DCA 1993)(citing *May v. Holley*, 59 So.2d 636, 639 (Fla. 1952); *Robinson v. Town of Palm Beach Shores*, 388 So.2d 314 (Fla. 4th DCA 1980)).

When reviewing a Motion to Dismiss, the Court must view the complaint in the light most favorable to the plaintiff and must limit its consideration to the "four corners" of the complaint. *See Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (holding "[i]n determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.").

This Court finds that Plaintiff has met all the elements of a declaratory action to wit: Seeking a declaration dealing with a present, ascertained or ascertainable state of facts or present controversy as to the state of facts or present controversy as to the state of facts, ie: whether AGIS can serve as a disinterested appraiser.

This Court further finds that Defendant is asking the Court to look beyond the four corners of the complaint.

Accordingly, it is therefore, ORDERED AND ADJUDGED that:

1. Defendant's Motion to Dismiss is DENIED.

2. Defendant shall file and serve their responsive pleading within twenty (20) days of the date of this Order.

[1]Though Defendant's makes a strong point on this issue, in the light most favorable to the Plaintiff, the allegation of assignment has been sufficiently pled to withstand a motion to dismiss. *See Parkway General Hospital Inc. v. Allstate Insurance Company*, 393 So. 2d 1171 (Fla. 3rd DCA 1981).

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where charges submitted were greater than 80% of 200% of allowable amount under Medicare fee schedule, but less than 200% of allowable amount under fee schedule, insurer was required to pay 80% of 200% of fee schedule amount, not 80% of billed amount

ALLIANCE SPINE & JOINT II, INC., a/a/o Angie Cortez, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 20-012820 COSO (61). August 16, 2021. Corey Amanda Cawthon, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Rashad El Amin, for Defendant.

ORDER ON
Plaintiff's Motion for Summary Judgment

This cause having come before the Court on Plaintiff's Motion for Summary Judgement with respect to the issue presented in the declaratory count in Plaintiff's Statement of Claim which asks the Court to determine if Florida Statute 627.736 permits the Defendant to remit payment for services billed below 200% of the applicable Medicare Part B fee schedule at 80% of the billed amount or if the Defendant is required to remit payment based upon 80% of 200% of the applicable Medicare Part B fee schedule and if the Court grants same then to the amount due and owing, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is granted for the reasons set forth below.

The Plaintiff billed, in part, for 95831 and 95832 on January 14, 2016 and charged $66.00 per unit. The amount charged was greater than 80% of 200% of the Medicare Part B physician's fee schedule but less than 200% of the Medicare Part B physician's fee schedule. The Defendant remitted payment for said services at 80% of the billed amount.

The Defendant contends that their policy specifically elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1. The Plaintiff does not contest the Defendant's position that the at-issue policy elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1 for paying related and necessary bills.

The issue presented in the declaratory count (Count II) is whether Florida Statute 627.736 requires the Defendant to remit payment for charges that are less than 200% of the applicable Medicare Part B physician's fee schedule at 80% of 200% of the applicable Medicare Part B physician's fee schedule as a result of the Defendant's adoption of the fee schedule set forth in Florida Statute 627.736 or whether the Defendant is able to remit payment based upon 80% of the billed amount.

The Court finds that the fee schedule set forth in Florida Statute 627.736 which was adopted by the Defendant into their policy to remit payment for related and necessary treatment does not permit an insurer to remit payment based upon 80% of the billed amount. The Court finds that said fee schedule compels an insurer, who has adopted same, to remit payment for amounts charged that are greater than 80% of 200% of the Medicare Part B physician's fee schedule but less than 200% of the Medicare Part B physician's fee schedule at 80% of 200% of the Medicare Part B physician's fee schedule. See *Geico Ind. Co. v. Accident & Injury Clinic a/a/o Frank Irizarry,* 290 So.3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b] and *Geico Indemnity Company v. Muransky Chiropractic a/a/o Carlos Dieste,* 4D21-457, 2021 WL 2584107, (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a]. The *Irizarry* court in answering the certified question "Does the plain language of the PIP statute preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule?" held that "as for payment of the charges, the statute authorizes insurers to limit reimbursement to 80% of an amount fixed through a fee schedule, see 627.736(5)(a)1.a-f" and that "80% of the fee schedule" is "the required amount an insurer must pay" if the insurer elected the fee schedule method. *Id*. The Fifth District held that the only exception is when a provider's charge is less than 80% of 200% of the Medicare fee schedule amount and in such as case an insurer would have the option of paying 80% of 200% of the Medicare Part B physician's fee schedule or 100% of the billed amount. *Id*. The Fourth District Court of Appeals in *Muransky* cited the *Irizarry* opinion with approval and held that "80% of the fee schedule [is] (the required amount an insurer must pay)." *Id*.

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment as to the declaratory count is Granted. The Court finds that the Defendant, having adopted the fee schedule set forth in Florida Statute 627.736, is required to remit payment for charges that are greater than 80% of 200% of the applicable Medicare Part B physician's fee schedule but also less than 200% of the applicable Medicare Part B physician's fee schedule at 80% of 200% of the applicable Medicare Part B physician's fee schedule and that paying 80% of the billed amount is an improper underpayment.

Having found in favor of the Plaintiff on the declaratory count the Court addresses the breach of contract claim and further finds that the subject treatment is related and necessary (based on the evidence presented a reasonable jury could not return a verdict for the Defendant.); that reasonableness is not an issue as the policy adopts the fee schedule; and that the Defendant owes $4.14 in additional benefits.

The Court further finds that the Defendant did not serve a response to Plaintiff's motion and did not file their factual position regarding same (much less 20 days prior to the hearing on the instant motion as required by Florida Rule of Civil Procedure 1.510) and therefore even had the Court not agreed with Plaintiff's position (which this Court does agree with) the Court would be obligated to rule in favor of the Plaintiff because Plaintiff's motion and supporting materials show that the Plaintiff is entitled to the requested summary judgment relief.

Lastly, and putting aside that the Defendant failed to file an opposing factual position, the Defendant's argument that was presented during the hearing, that they can pay based upon 80% of the billed amount when the service is billed at an amount that is less than 200% of the Medicare Part B physician's fee schedule, is not even supported by their pleadings. The Defendant's only affirmative defense does not claim that the Defendant can pay the at-issue charges based upon 80% of the billed amount. Indeed, the Defendant's only affirmative defense claims that the policy contains an endorsement that provides for payment of Plaintiff's bills at 80% of 200% of the allowable amount under the participating physician's fee schedule of Medicare Part B. This is exactly what the Plaintiff contended herein and for which this Court found that the Defendant did not comply with their own affirmative defense.

The Plaintiff is directed to submit a proposed Final Judgment consistent with this ruling.

* * *

Insurance—Personal injury protection—Affirmative defenses—Summary judgment is granted in favor of medical provider as to affirmative defense asserting that, in event of judgment in favor of provider, PIP insurer is entitled to credit or set-off for any medical benefits paid under policy

PATH MEDICAL, LLC, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20010442, Division 61. June 29, 2021. Corey Cawthon, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Richard Bec, for Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE AND/OR FOR SUMMARY JUDGMENT AS TO DEFENDANT'S FOURTH AFFIRMATIVE DEFENSE

This cause having come before the Court for hearing on June 16, 2021 on Plaintiff's Motion to Strike and / or for Summary Judgment as to Defendant's Fourth Affirmative Defense, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby **ORDERED AND ADJUDGED**, as follows:

The Court hereby grant's Plaintiff's Motion for Summary Judgment as to Defendant's Fourth Affirmative Defense and holds that Defendant's fourth affirmative defense is without basis and inapplicable. The Court did not consider the Motion to Strike portion of Plaintiff's motion. The Court bases its ruling on the following findings:

1. The subject of Plaintiff's motion for summary judgment was Defendant's fourth affirmative defense which claimed, "In the event of a Judgment in favor of Plaintiff and against Defendant, and solely in that event, Defendant states that it is entitled to a credit or set-off for any medical benefits paid under the policy."

2. The Plaintiff, in accordance with In Re: Amendments to Florida Rule of Civil Procedure 1.510, SC20-1490, 2021 WL 1684095,[1] presented that summary judgment should be granted because (1) a right of set-off is not provided to insurance carriers in the No-Fault statutory scheme and therefore may not be used to deny the payment of benefits (*See Nunez v. Geico,* 117 So.3d 388 (Fla. 2013) [38 Fla. L. Weekly S440a]) and separately (2) that set-off is inapplicable to the given set of facts because the Plaintiff does not have any legal obligation to remit any amounts to the Defendant and set-off occurs when one of two debts, owed to opposing parties, as set forth in a contract, is applied against the second debt to reduce same (*See Everglade Cypress Co. v. Tunnicliffe,* 107 Fla. 675, 148 So. 192 (1933) and *Kellogg v. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.,* 807 So.2d 669 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2811a]). During the hearing, the Plaintiff further noted that the Defendant did not file anything in opposition to Plaintiff's motion much less the Defendant's factual position 20 days prior to the hearing as required by Rule 1.510.

3. During the hearing, the Defendant alleged that the basis of the fourth affirmative defense was an unspecified overpayment to the Plaintiff on another service.

4. The Court finds that the Defendant has not filed anything in opposition to Plaintiff's motion much less any evidence, setting forth the Defendant's factual position regarding their alleged entitlement to set-off and / or as to the unspecified overpayment, in accordance with the 20-day requirement set forth in Rule 1.510.

5. The Court separately finds that set-off under the present set of facts does not exist because the Plaintiff does not owe the Defendant anything and that set-off occurs when one of two debts, owed to opposing parties, as set forth in a contract, is applied against the second debt to reduce same. The Court further finds that the affirmative defense does not allege an overpayment much less the factual basis for same and instead asks for set-off "for any medical benefits paid under the policy."

Accordingly, it is ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment as to Defendant's Fourth Affirmative Defense is GRANTED.

[1]"[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). Alternatively, "[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).

* * *

Insurance—Coverage—Transportation expenses—Affirmative defenses that are conclusory, lack certainty, or lack any real allegations of ultimate facts are legally insufficient—Assertion that plaintiff has burden of proof is not affirmative defense—Motion to strike is granted

RON WECHSEL, D.C., INC., Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO21011552, Division 72. September 7, 2021. John Hurley, Judge. Counsel: Cris Boyar, Boyar and Freeman, P.A., Coral Springs, for Plaintiff. Brent Hanks, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

THIS CAUSE having come before this Court at the Hearing held on Plaintiff's Motion dated 6/16/21, and the Court having heard argument of counsel on September 3, 2021, and being otherwise fully advised in the premises, it is thereupon,

ORDERED and ADJUDGED that:

1. The Plaintiff filed suit against the Defendant for declaratory relief as to whether transportation was covered under the Defendant's policy of insurance and Florida law.

2. The Defendant filed an Answer and Affirmative Defenses on June 9, 2021.

3. The Plaintiff filed a timely Motion to Strike the affirmative defenses which allege:

a. Any liability of Defendant to the Plaintiff is subject to the terms, conditions, limitations, endorsements, exclusions and effective date of any applicable insurance agreement;

b. Any liability of Defendant to the Plaintiff is subject to the terms, conditions, and limitations of the Florida Motor Vehicle No-Fault law;

c. Defendant has paid all benefits reasonably due under any contract of insurance and the Florida Motor Vehicle law;

d. The Defendant asserts that pursuant to *Derius v. Allstate Indemnity Co.* 723 So.2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] and Florida Statute §627.736, it is the Plaintiff's burden to prove the medical expenses at issue were reasonable, necessary and related to the automobile accident set forth in the Complaint; and

e. Defendant reserves its right to amend its affirmative defenses.

4. The Defendant withdrew the defense (e) that stated Defendant reserves its right to amend its affirmative defenses.

5. As it relates to defenses (a) and (b) the Plaintiff argued these affirmative defenses were improperly pled because they lacked any ultimate facts and were insufficiently vague for failing to provide any details or specifics that would permit the Plaintiff to file an appropriate reply or even understand which provisions of the contract of insurance or the statute the Defendant was relying upon. Plaintiff argued it was not required to guess.

6. The Court finds affirmative defenses must, as a matter of law, be properly pled with sufficient particularity. Any affirmative defenses which are: conclusory in their content; lacking certainty; or lacking any real allegations of ultimate facts are legally insufficient. *See Cady v. Chevy Chase Savings and Loan Inc.*, 528 So.2d 136 (Fla. 4th DCA 1988).

7. As it relates to (c) the Plaintiff alleged in its complaint NO payments were made relative to the transportation claim and it is not relevant whether any other services were paid by the Defendant. The affirmative defense, as pled, fails to include any ultimate facts or details. The Defendant did not state at the hearing a payment was made for the transportation. If the Defendant made a payment for the transportation claims the Defendant is free to amend to state with sufficient specificity when it made payments and the amount paid for

the transportation claims.

8. As it relates to (d) the Plaintiff agreed it has the burden of proof. It is not appropriate to allege an affirmative defense that the Plaintiff has the burden of proof as this is not an affirmative defense as a matter of law. *See See Tropical Exterminators v. Murray*, 171 So.2d 432 (Fla. 2d DCA 1965).

9. Accordingly, the Court grants the Plaintiff's Motion to Strike. Paragraphs numbered 1 through 4 are hereby stricken without prejudice. The Defendant has 20 days from September 3, 2021 to amend.

* * *