Volume 29, Number 8, December 31, 2021

FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 565-629

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.

- **GUARDIANSHIPS—INCAPACITATED PERSONS—ADVANCE MEDICAL DIRECTIVES—DO NOT RESUSCITATE ORDERS—JUDICIAL APPROVAL. The Office of the Public Guardian petitioned the circuit court for authority to sign and administer a do not resuscitate order on behalf of a ward. The court's order included a detailed discussion of Senate Bill 994, which "made a significant change to the way guardians handle end of life decisions for their wards in Florida." Included in these changes was a requirement that all guardians obtain court approval prior to signing a DNR on behalf of the ward. The court discussed the process and analysis required for obtaining this approval, looking to Section 744.447, Florida Statutes (2020), which governs court authorizations for guardian actions in general.** *IN RE: GUARDIANSHIP OF MANNING. Circuit Court, Second Judicial Circuit in and for Gadsden County. Filed February 26, 2021. Full Text at Circuit Courts-Original Section, page 574a.*
- **PUBLIC RECORDS—TEXT MESSAGES. A county violated the Public Records Act and records retention schedules where county commission members and employees routinely and indiscriminately deleted text messages related to certain issues. The county's noncompliance with the Act was not absolved by the fact that two former county employees retained the text messages, which were ultimately discovered, or the fact that the county attorney misadvised commission members and employees that the messages could be deleted because the were "transitory."** *RAYDIENT LLC v. NASSAU COUNTY, FLORIDA. Circuit Court, Fourth Judicial Circuit in and for Nassau County. Filed August 24, 2021. Full Text at Circuit Courts-Original Section, page 578a.*

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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.
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MISCELLANEOUS	Other proceedings.

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Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of investigation and arrest—Deputy who observed that licensee exhibited erratic driving pattern and had watery bloodshot eyes, slurred speech, flushed face, and odor of alcohol had reasonable suspicion for DUI investigation and probable cause for arrest—Poor performance on field sobriety exercises provided further probable cause for arrest—No error in admitting results of HGN test into evidence at formal review hearing despite fact that deputy who administered test is not drug recognition expert—Hearing officer—Departure from neutrality—Hearing officer's statement that he "was not moved" by licensee's testimony and evidence does not demonstrate bias

SCOTT BINNS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. 2021-CA-0411, Division 59. September 3, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(KENNETH J. JANESK, III, J.) This matter comes before this Court on Petitioner, Scott Binns', Petition for Writ of Certiorari. [DIN 5]. The Court having reviewed the Petition, Respondent's response [DIN 17], Petitioner's reply [DIN 21], the record before this Court, oral arguments of Counsel, and being otherwise fully advised in its premises finds as follows:

This case revolves around a traffic stop conducted by St. Johns Sheriff's Deputy Truscio of Petitioner, which resulted to his arrest for Driving under the influence ("DUI"). Petitioner refused to submit to a breath test which resulted in the suspension of his driver's license ("DL"). Pursuant to Fla. Sta. §322.2615 and chapter 15A-6 of Florida's Administrative Code, a formal review hearing was conducted by Hearing Officer C. Wright. Petitioner appeared with counsel[1] and testified, along with Amanda Judd and Deputy Truscio. In addition, counsel submitted a photograph of Petitioner at jail as well as a video purported to demonstrate the lighting of the area where the field sobriety tasks ("FSTs") were conducted.

Petitioner moved to set aside the DL suspension on two grounds: 1. There was no probable cause for Petitioner's DUI arrest; and 2. There was no reasonable suspension to request Petitioner participate in FSTs. Petitioner further objected to the Hearing Officer considering the results of the Horizontal Gaze Nystagmus ("HGN") FST. Hearing Officer Wright denied both grounds and overruled the objection, sustaining Petitioner's one-year DL suspension. [DIN 7] Petitioner filed his Petition for Writ of Certiorari ("WRIT OF CERT") in accordance with Fla. R. App. P. 9.030(c)(3). [DIN 5].

In a Writ of Cert proceeding concerning an administrative action, the Court is required to determine three things: 1. whether procedural due process was accorded; 2. whether the essential requirements of law were observed; and 3. whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].[2] The court is not permitted to reweigh the evidence or substitute its judgment for that of the agency.[3]

Petitioner's DL was suspended for failure to submit to a lawful request for a breath, urine, or blood test; thus, the Hearing Officer Wright must determine by a preponderance of the evidence if there is sufficient cause to sustain the suspension in accordance with Fla. Stat. §322.2615(7). The hearing officer's scope of review is limited to the following issues:

1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages 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.

This Court finds there was reasonable suspicion for Deputy Truscio to conduct a DUI investigation of Petitioner. The Arrest Report, Offense Report, and Deputy Truscio's testimony established that Petitioner exhibited an erratic driving pattern, specifically an abrupt turn which nearly missed a passing vehicle, along with drifting back and forth within his lane. This justified the stop of Petitioner's vehicle. Deputy Truscio then properly requested Petitioner to exit his vehicle after the deputy observed Petitioner's watery bloodshot eyes, slurred speech, a flushed face, and smelled a moderate level of alcohol. Petitioner's driving pattern coupled with the indicia of impairment he exhibited, viewed in its totality, provided reasonable suspicion for Deputy Truscio to conduct a DUI investigation. *Origi v. State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a]. While Petitioner and his witnesses offered testimony to explain his driving pattern and condition the night he was stopped, the hearing officer was not required to accept the testimony, even if it was not rebutted. *Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008)[4] [33 Fla. L. Weekly D1625a].

The Court next finds there was probable cause to arrest Petitioner for DUI. The driving pattern and indicia of impairment demonstrated by Petitioner to establish reasonable suspicion also established probable cause to arrest him. *Dep't of Highway Safety & Motor Vehicles v. Possati,* 866 So. 2d 737 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a].[5] Petitioner's poor performance on the field sobriety exercises, namely the HGN test and walk and turn test, give further justification for Deputy Truscio finding probable cause to arrest Petitioner. Petitioner testified that he was unable to perform the walk and turn due to the darkness in the area where the FST was conducted, Deputy Truscio testified that the area would have been adequately lit or he would have provided sufficient lighting with his flashlight. The Petitioner provided a video of the area at the time the FSTs would have been conducted, but this was not recorded on the night of his stop. It was the hearing officer's role to weigh the evidence, assess its relevancy, and determine its credibility and credited the testimony and reports of Deputy Truscio.[6]

The hearing officer did not err in admitting the results of the HGN test into evidence. Petitioner relies on *State v. Meador,* 674 So. 2d 826 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a] in arguing that the HGN test results should not have been considered due to Deputy Truscio not being a Drug Recognition Expert (DRE). However, *Meador* does not require that a law enforcement officer be a DRE in order to perform the HGN test. The Court in *Meador* was addressing in the context of a criminal case the concern that the significance of the HGN would not be readily understandable to a jury. However, the sustaining of the suspension of Petitioner's driving privilege arose from an administrative proceeding conducted by a hearing officer who regularly decides the lawfulness of DUI arrests; thus, there is no risk of confusion concerning the significance of HGN results.

Consequently, the HGN test results were properly considered by the hearing officer.

This Court finds that Petitioner was accorded due process in the administrative proceeding below. Petitioner argues that the hearing officer's finding that he "was not moved" by the testimony of Petitioner and Amanda Judd, video of the FST location, and the jail photograph of Petitioner is evidence of the hearing officer's bias—a due process violation. Petitioner failed to point to any behavior before or during the administrative proceeding demonstrating bias against him. The hearing officer's statement[7] merely reflects the view that he did not find the testimony on behalf of Petitioner or his evidence persuasive. While Petitioner cites numerous cases discussing concerns regarding hearing officer bias, none of these cases give rise to any actual impropriety which can be imputed to the hearing officer's conduct in the administrative hearing below.

For the reasons discussed above, Petitioner has not carried his burden for a writ of certiorari to issue.

Therefore it is **ORDERED and ADJUDGED that**:

1. Petitioner's Writ of Certiorari is denied.

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[1]Petitioner's Counsel at the administrative hearing was different counsel that represents him in this writ.

[2]Citing *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624,626 (Fla. 1982).

[3]*See Department of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

[4]See Also *Dep't of Highway Safety and Motor Vehicles v. Marshall,* 848 So. 2d 482 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1553b]; *Dep't of Highway Safety and Motor Vehicles v. Dean,* 662 So. 2d 371 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D2179c].

[5]See Also *State v. Leifert,* 247 So. 2d 18 (Fla. 2d DCA 1971).

[6]Fla. Admin. Code R. 15A-6.013(7)(c).

[7]Both parties agreed during oral arguments that this statement occurred after Hearing Officer Wright heard all the testimony and saw all the evidence.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Hearings—Administrative rule and executive order in response to pandemic authorize hearing officer to conduct hearing telephonically despite venue requirements—Breath test—No merit to argument that law enforcement was required to admit agency Intoxilyzer inspection report into evidence to prove breath test results—Lawfulness of arrest—Trooper who conducted DUI investigation at scene of crash was authorized to make warrantless arrest of licensee where licensee admitted that she was driver of vehicle involved in crash, exhibited indicia of impairment, and performed poorly on field sobriety exercises

SABRINA CELAJ, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. 2021-CA-0240, Division 59. October 4, 2021. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(KENNETH J. JANESK, II, J.) This matter is before this Court on Petitioner, Sabrina Celaj's, Petition for Writ of Certiorari, filed on February 22, 2021. [DIN 5]. Having reviewed the Petition, Respondent's response thereto [DIN 14], Petitioner's reply [DIN 16], examined the record before this Court, heard oral argument, and being otherwise fully advised, the Court finds that the Petitioner has not demonstrated entitlement to certiorari relief.

On December 13, 2020 at approximately 12:15 a.m., Trooper K. Montgomery of the Florida Highway Patrol ("FHP") responded to assist Trooper D. Shorter with a traffic crash involving a possibly impaired driver. Trooper Shorter's crash report ultimately determined that Petitioner was at fault in the crash. In Trooper Shorter's report he documented that Trooper Montgomery conducted a criminal investigation for driving under the influence. Concerning this investigation at the crash scene, Trooper Montgomery documented the following in his arrest affidavit:

> I responded to State Road 5 (US 1) southbound, south of Pine Island Road, to assist Trooper D. Shorter with a traffic crash that involved a possible impaired driver. Upon my arrival I observed the southbound lanes blocked due to the traffic crash. I was advised that the defendant Sabrina Celaj, was driving a white 2013 Chrysler 300, bearing a Florida tag of [omitted], northbound in the southbound lanes of State Road 5. I was advised that Celaj was positively identified as the driver and she was alone in the vehicle. I was advised that Celaj struck a vehicle that was traveling southbound head on.

During his contact with Petitioner, Trooper Montgomery detected the strong odor of alcohol coming from Petitioner's breath. He also observed that Petitioner's eyes were watery and bloodshot, her face was flushed, her speech was mumbled and slurred, and that she had difficulty maintaining her balance, staggering as she walked. At this point at the crash scene, Trooper Montgomery informed Petitioner he was conducting a driving under the influence (DUI) investigation and the Petitioner stated she understood.

After Trooper Montgomery read Petitioner *Miranda,* she informed him that she believed the other vehicle hit her and she did not understand what had happened. *Id.* She further explained that she was alone in the vehicle and believed she was on the northbound side of the roadway. *Id.* The Petitioner admitted to drinking three shots at a friend's house. Petitioner consented to perform field sobriety exercises. She performed poorly on the horizontal gaze nystagmus exercise, due to her difficulty following the pen and maintaining her balance. Trooper Montgomery did not give Petitioner any further exercises due to her level of impairment. Upon Trooper Montgomery's request, Petitioner rated herself a 6 on a scale of 1 to 10, with 1 being sober and 10 being fall-down drunk. Trooper Montgomery asked the Petitioner if she thought she should be driving and she stated, "No." Trooper Montgomery then placed Petitioner under arrest for DUI.

Trooper Montgomery requested that the Petitioner submit to a breath test to determine its alcohol content and the Petitioner agreed. After the breath test machine was initially unable to administer the breath test due to radio frequency interference, the breath test was conducted, Petitioner provided breath samples, which showed a breath alcohol content of 0.226g/210L and 0.229g/210L. The Petitioner was issued a DUI citation which also served as notice of her driver license suspension for driving with an unlawful breath alcohol level.

Pursuant to Florida Statute §322.2615, and chapter 15A-6, Florida Administrative Code, on January 14, 2021, the Petitioner was granted a formal review held by Attorney Hearing Officer W. Michael Thurmond. No witnesses were called at the hearing, limiting the hearing to legal argument by Petitioner's counsel. Petitioner moved to invalidate the suspension on several grounds: (1) Due to the lack of an agency inspection report providing a record of the Intoxilyzer's monthly inspection; (2) due to failure to substantially comply with the administrative rules for breath alcohol level testing; (3) due to insufficient evidence that the arrest took place before the request for a breath test; (4) due to there being no reasonable suspicion to initiate a DUI investigation; and (5) due to there being no competent substantial evidence that Petitioner was driving or was in actual physical control of a vehicle. Attorney Hearing Officer Thurmond denied Petitioner's motions and now serve as the basis of the Petition. On January 22, 2021, Attorney Hearing Officer Thurmond entered a Final Order of License Suspension denying the Petitioner's motions and sustaining the suspension of her driving privilege.

In a first-tier certiorari proceeding concerning an administrative

action, the court is required to determine three things: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). When exercising certiorari review, the court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. *See Department of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

In a case where a person's license is suspended for driving with an unlawful breath alcohol level of 0.08 or higher, the hearing officer must determine by a preponderance of the evidence if there is sufficient cause to sustain the suspension. §322.2615(7), Fla. Stat. The hearing officer's scope of review is limited to the following issues:

> 1. Whether the arresting law enforcement officer had probable cause to believe that the person was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages 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.

Petitioner asserts the hearing officer departed from the essential requirements of law and denied her due process when the hearing was not conducted at the nearest Department hearing office assigned to the county where the arrest occurred or where the notice of suspension of disqualification was issued. Petitioner also argues that the hearing officer did not comply with the essential requirements of law and denied her due process by finding the Department met its burden to prove an unlawful breath test result. Finally, Petitioner argues that hearing officer's order was not based on competent substantial evidence, failed to observe the essential requirements of law, and failed to accord her due process by finding that Petitioner was lawfully arrested.

Respondent argues that the telephonic hearing was properly held in Clearwater, Florida in accordance with its administrative rules. Respondent also argues that the breath alcohol test affidavit constitutes presumptive proof of the breath test results. Finally, Respondent argues there was competent substantial evidence to support the hearing officer's conclusion that there was sufficient probable cause that Petitioner was in actual physical control of a motor vehicle.

Issue I

This Court finds that the Department complied with the essential requirements of law and afforded Petitioner due process in the conduct of the telephonic administrative hearing from Clearwater, Florida. The administrative rules allow the Department to conduct telephone hearings without venue limitations as follows:

Hearings shall be held at the nearest Department Hearing Office assigned to the county where the arrest occurred, or the notice of suspension or disqualification was issued. The Hearing Officer is authorized to conduct all hearings using communications technology approved by the department:

> Hearings shall be held at the nearest Department Hearing Office assigned to the county where the arrest occurred or the notice of suspension or disqualification was issued. The Hearing Officer is authorized to conduct all hearings using communications technology approved by the department.

Fla. Admin. Code R. 15-6.009 (2013). The first sentence in this provision, which contains the venue requirement, clearly contemplates an "in person" hearing. The second sentence permits telephonic and other Department-approved communications technology, without venue limitations. The Notice of Proposed Rule published when the rule was amended on April 7, 2013, notes the intent of adding the second sentence and provides the following:

> PURPOSE AND EFFECT: The Department seeks a proposed change to this rule in order to clarify jurisdiction for hearings at Bureau of Administrative Review (BAR) offices. This proposed language could provide cost-savings by providing greater flexibility for Hearing Officers and witnesses to appear telephonically in lieu of personal appearances at BAR offices.

There would be no greater flexibility afforded to hearing officers, along with witnesses, if there the venue requirement applied to this portion of the administrative rule. Hearing officers would still be obligated to conduct all hearings in the nearest Department Hearing Office, even they are telephonic. Such a construction would defeat the stated intent of the rule amendment and should not be read to do so. *Dep't of Highway Safety & Motor Vehicles v. Patrick,* 895 So. 2d 1131, 1136 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D349a].

Even if the rule could be read to include a venue requirement for telephonic hearings, Executive Order 20-52 issued by the Office of the Governor in response to the COVID-19 pandemic, and extended by Executive Order 21-45, gave the Department the authority to suspend the venue requirement. Executive Order 20-52 states the following:

> Each State agency may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of that agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency. This includes, but is not limited to, the authority to suspend any and all statutes, rules, ordinances, or orders which affect leasing, printing, purchasing, travel, and the condition of employment and the compensation of employees.

§ 4(B) (emphasis added). Given the increased challenges facing counts and tribunals due to the pandemic, the Department had the authority to suspend the venue requirement to fulfill its statutory mandate to schedule requests for hearings within 30 days pursuant to § 322.2615(9), Fla. Stat.

Additionally, Petitioner was able to have a hearing and present her arguments. While she argues for the first time in the reply that different local rules may not be known to the out-of-town hearing officer which may impact the proceedings, she fails to point to any such rule or procedure which impacted the administrative proceedings. Also, the appearance of the hearing officer in Clearwater did not impact her ability to file her appeal in the county where she resides pursuant to §322.31, Fla. Stat., which she has done.

Issue II

This Court finds that the hearing officer complied with the essential requirements of law by finding the Department met its burden to prove an unlawful breath test result. Petitioner's argument that law enforcement was required to admit an agency inspection report into evidence is without merit. While Petitioner cites several cases involving the admission of an agency inspection report, none of those cases state that the admission of such a report is mandatory. Rule 15A-6.013(2), Fla. Admin. Code, states that reports on the maintenance of a breath testing instrument may be considered by the hearing officer but does not require their submission. Section 322.2615(2)(a) mandates that law enforcement submit the following documentation to the Department:

> Except as provided in paragraph (1)(a), the law enforcement officer ***shall*** forward to the department, within 5 days after issuing the notice of suspension, the driver license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical

> control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; the results of any breath or blood test or an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; and the notice of suspension.

An agency inspection report is not one of the required documents, but the results of a breath test is a required document. Law enforcement in this case submitted the breath alcohol test affidavit. Section 316.1934(5), Fla. Stat. lists the required information which must be included in a breath alcohol test affidavit for admission without further authentication. This includes the type of test, time of collection, numerical results, type of permit held, and dates of the most recent maintenance. The hearing officer correctly found that the breath alcohol test affidavit in this case contained all the information required by statute and properly considered it in making his determination. The Department had no requirement to submit an agency inspection report. The breath alcohol test affidavit provided conclusive proof of Petitioner's impairment without further authentication. *Dep't of Highway Safety and Motor Vehicles v. Mowry,* 794 So. 2d 657, 659 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1773a].

Issue III

This Court finds there was competent substantial evidence to support the hearing officer's finding that Petitioner was lawfully arrested. Contrary to Petitioner's assertion, the Trooper Montgomery did not rely on a conclusion statement from Trooper Shorter established probable cause to arrest Petitioner. First, the evidence in the record supports that Trooper Shorter informed Trooper Montgomery that Petitioner was the driver of a vehicle involved in the crash. Trooper Montgomery's arrest affidavit states he arrived at the scene to assist Trooper Shorter with a traffic crash and was advised that Petitioner was driving a white 2013 Chrysler 300. It was reasonable for the hearing officer to infer from this sentence that Trooper Shorter arrived at the scene first, then informed him that Petitioner was driving a vehicle involved in the crash based on the circumstances at the scene and obvious implications from them as detailed in the arrest affidavit. *See Dep't of Highway Safety & Motor Vehicles v. Silva,* 806 So. 2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a].

Further, Trooper Montgomery conducted an investigation at the scene of the crash, thus enabling him to make a warrantless arrest of Petitioner. To make a warrantless arrest, all the elements of the offense must occur in the presence of law enforcement. §901.15, Fla. Stat. A traffic crash, however, is an exception to the warrantless arrest rule. Section 316.645, Fla. Stat., states the following:

> A police officer who makes an investigation at the scene of a traffic crash may arrest any driver of a vehicle involved in a crash when, based upon personal investigation, the officer has reasonable and probable grounds to believe that the person has committed any offense under the provisions of this chapter, chapter 320, or chapter 322 in connection with the crash.

Trooper Montgomery conducted a DUI investigation at the scene of the crash. In the process of that investigation, Petitioner informed Trooper Montgomery that she was a driver of one of the vehicles, demonstrated several indicia of impairment, and performed poorly on field sobriety exercises. This provided Trooper Montgomery probable cause to arrest Petitioner for DUI.

While Petitioner cites to *State v. Hemmerly,* 723 So.2d 324 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2666b], for the proposition that the investigation at the scene of the crash must be the crash investigation itself, neither *Hemmerly* nor §316.645, Fla. Stat. impose such a limitation. The Court in *Hemmerly* addressed the basic issue of whether a warrantless arrest was valid when law enforcement performed a crash investigation, which developed evidence leading to Petitioner's arrest for DUI and driving with a suspended license. *Id.* at 325, 326. The Court ruled that law enforcement's crash investigation, pursuant to §316.645, Fla. Stat., constituted an exception to §901.15, Fla. Stat. *Id.* at 326. The Court did not address the question of whether the investigation at the scene of a crash is limited to a crash investigation.

However, several courts have addressed the issue of the nature of the investigation at a crash scene. The Court in *State v. Mayer,* 22 Fla. L. Weekly Supp. 941b (Fla. Volusia Cty. Ct. Mar. 5, 2015), held that §316.645, Fla. Stat. allows for an arrest by the DUI investigator even if that isn't the person conducting the crash investigation. In making this holding the Court stated the following:

> The personal investigation required by section 316.645 need not be the official crash investigation; instead, it is sufficient that the officer conduct the DUI investigation at the scene of a motor vehicle accident. *Bolan v. State,* 18 Fla. L. Weekly Supp. 1081a (Fla. 6th Cir. Ct. Aug. 18, 2011); *Sowinski v. State,* 12 Fla. L. Weekly Supp. 1140a (Fla. 17th Cir. Ct. July 27, 2005). As *Bolan* and *Sowinski* note, the plain language of section 316.645 does not require that the personal investigation performed by the arresting officer be the crash investigation. Courts may not read into a statute an element that does not exist. *State v. Campbell*, 17 Fla. L. Weekly Supp. 822a (Fla. Volusia Co. Ct. Apr. 29, 2010). The Court finds that *Bolan* and *Sowinski* correctly state the law.

Likewise, in the case at bar, Trooper Montgomery's DUI investigation at the crash scene met the exception to the warrantless arrest requirements of §901.15, Fla. Stat.

For the reasons discussed above, Petitioner has not carried her burden for a writ of certiorari to issue.

It is therefore **ORDERED**: The Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Witnesses—Failure of subpoenaed witness to appear—Where subpoenaed witness appeared via phone on two occasions but could not be placed under oath due to lack of videoconferencing capability and fact that witness was not in presence of notary, hearing was continued to allow licensee to enforce subpoena, but licensee decided not to pursue enforcing subpoena on witness who had returned to his home in Puerto Rico, licensee was not denied due process—Witness's testimony that licensee was driver of vehicle that struck his vehicle was not necessary to uphold suspension where crash investigation, police reports and officers' testimony confirmed that licensee, who was sole occupant of his vehicle, was in actual physical control of vehicle—Telephonic oath—Where hearing officer violated licensee's due process rights by improperly swearing in officers telephonically without means to verify their identity, but licensee rejected hearing officer's offer of new hearing to remedy error, licensee waived entitlement to relief—Petition for writ of certiorari is denied

NICOLE STEVENSON, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-464, Division G. September 25, 2021. [Rehearing Denied October 12, 2021.] Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. 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 Nicole Stevenson's Petition for Writ of Certiorari filed January 18, 2021, as amended February 18, 2021. The petition, which seeks review of the Department's December 17, 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 two arguments in support of the petition: 1) that Petitioner's right to due process was violated by her inability to confront and cross-examine a witness, and 2) that the hearing officer violated Petitioner's due process rights by not properly placing witnesses under oath. As to the first issue, because Petitioner elected not to further pursue service of a subpoena in Puerto Rico to secure the witness's testimony, relief is denied as to this issue. As to the second issue, where the remedy for due process violations is a new hearing, and where, after the hearing officer agreed with Petitioner that the witnesses were incorrectly sworn Petitioner was offered and rejected a new hearing, relief is denied as to this issue. 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 she 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 one 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).

FACTS AND PROCEDURAL HISTORY

On February 15, 2020 officers were dispatched to the scene of an accident near the intersection of Armenia and Columbus in Tampa. At this location, Armenia is a one-way street with traffic going southbound. Petitioner, who was driving northbound on Armenia, collided with another driver, Mr. Vargas-Torres. Tampa Fire and Rescue ("TFR") was already on the scene. They advised the officers that they had confiscated Petitioner's keys because she had attempted to drive away from the scene, and that Petitioner was the vehicle's sole occupant. According to Officer Cabale, the victim, Mr. Vargas-Torres, indicated that Petitioner turned off of a street south of Columbus onto Armenia and started driving northbound into southbound traffic. She crossed Columbus through a red light without getting hit. She then continued driving the wrong way and struck the victim's southbound vehicle. She backed up and hit the victim's vehicle again, multiple times. The victim, Mr. Vargas-Torres, identified Petitioner as the driver and confirmed that she was alone in her vehicle. Petitioner remained in the driver's seat until police arrived. The victim and TFR personnel identified Petitioner to law enforcement as the driver who struck Mr. Vargas-Torres's vehicle.

While Officer Cabale interviewed Mr. Vargas-Torres, Officer Pendzick spoke to Petitioner. Officer Pendzick noted the odor of alcohol about Petitioner and observed that she was slow to retrieve documents. Petitioner admitted that she had consumed five Tito's (vodka) that evening. Officer Pendzick cited Petitioner for driving in the wrong direction and failure to provide proof of insurance. The officers requested a DUI investigation. Officer Bailey, a certified drug recognition expert and DUI investigator, performed the DUI investigation.

Officer Bailey indicated that he was told Petitioner had been driving the wrong way on a one-way street, and that she hit another vehicle, damaging it. He said Petitioner had been positively identified as the driver. He noted that her speech was slurred, she had a strong odor of alcohol about her, she was unsteady on her feet, she was swaying, belligerent, and had extreme difficulty following directions. He performed a horizontal gaze nystagmus test and determined Petitioner met six out of six indicators for impairment. His report indicated that Petitioner insisted on performing field sobriety tests (FSTs), so he allowed her to choose a location. The location was well-lit, dry, and free of debris. She performed the walk-and-turn test and one-leg stand, both of which she performed poorly. She exhibited extreme difficulty in following directions. Officer Bailey performed a computer check on her license, which revealed two prior DUI convictions. He arrested her on suspicion of DUI. When asked to provide a breath sample to determine her blood alcohol level, Petitioner refused. Her license was administratively suspended. Thereafter, she requested formal review of the suspension.

The first of four hearings took place on April 15, 2020. The hearing officer received without objection all the documentation required by §322.2615(2)(a), Florida Statutes, including the following: the driver license; an affidavit stating the officer's grounds for belief that the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances; an affidavit stating that a breath, blood, or urine test was requested by a law enforcement officer or correctional officer and that the person refused to submit; the officer's description of the person's field sobriety test, if any; and the notice of suspension.

Officers Pendzick and Bailey appeared and were sworn in by telephone. There was no video by which the hearing officer could confirm the officers' identities. Petitioner's counsel objected on this ground. The hearing officer noted the objection and proceeded with the hearing. Officer Pendzick testified that she is a traffic crash investigator who has investigated hundreds of crashes. She said she had been dispatched to the scene of the subject accident at 7:53 p.m. and arrived about 8:02 p.m. on February 15, 2020. She observed Petitioner sitting in the driver's seat of her vehicle. Rescue personnel advised Officer Pendzick that Petitioner might be under the influence, and that she had admitted to drinking. Thereafter, Officer Pendzick made contact with Petitioner to assess her condition. She said that Petitioner repeated that she was sorry several times. Upon being asked to step out of the car, Petitioner was unsteady on her feet. The officer assisted Petitioner to safety while rescue personnel moved the vehicles. Thereafter, the officer advised Petitioner she would be safer at her car so she escorted her back to the car, whereupon she requested Petitioner to provide the vehicle's registration and insurance. Petitioner was unable to locate these documents and instead provided random paperwork to the officer.

Officer Pendzick also testified that Officer Cabale, a fellow officer who interviewed Mr. Vargas-Torres because he did not speak English, relayed to Officer Pendzick what Mr. Vargas-Torres had told him. Mr. Vargas-Torres had told him that he was traveling southbound, and Petitioner's vehicle was traveling northbound, hit him, and that

Petitioner was driving and was the only person in the vehicle. She added that fire and rescue personnel advised her that they had taken Petitioner's keys because she had attempted to drive away.

Officer Bailey, a certified drug recognition expert who conducted the DUI investigation, also appeared for this hearing. He testified that he gave Petitioner her Miranda warning. Although he indicated that Petitioner invoked her right to remain silent, she insisted on performing FSTs. She was unable to follow instructions and performed the FSTs poorly. Based on the information provided by the other officers and his personal observations, Officer Bailey arrested Petitioner for DUI and requested that she provide a breath sample. She refused.

Petitioner, through counsel, determined that Mr. Vargas-Torres's testimony was required to put her behind the wheel, so the April 15, 2020, hearing was continued to enable her to subpoena him, which she did. At the rescheduled hearing on June 2, 2020, both Mr. Vargas-Torres and an interpreter attended via telephone, but Mr. Vargas-Torres was not in a position to be sworn in by a qualified individual who could identify him as required by this circuit's decision in *Eckert v. Dep't of Highway Safety and Motor Vehicles*, 28 Fla. L. Weekly Supp. 285a (13th Jud. Cir. May 26, 2020). Based on the *Eckert* ruling, the hearing officer permitted Petitioner an opportunity to re-subpoena the officers who had appeared at the first hearing and were sworn in telephonically in contravention of the subsequent decision in *Eckert.* Petitioner rejected that offer, but the hearing was nonetheless continued again to allow Mr. Vargas-Torres to appear by video conference.

The next hearing was scheduled for June 18, 2020. Although Mr. Vargas-Torres could be reached at the number he had previously provided, he had not received a subpoena for this date. He advised the tribunal that he had been in Tampa vacationing at the time of the accident and that he had returned to his home in Puerto Rico. Although his phone had videoconferencing capability, it was not through an application the Department used. Moreover, he evidently did not understand that he had to be in the presence of a notary to be sworn in. The hearing officer advised Petitioner's counsel that the proceeding could be continued again to allow Petitioner to apply to the court to enforce the subpoena for Mr. Vargas-Torres's visual appearance. He also reiterated his offer to allow Petitioner to re-subpoena the officers who had previously testified. Again, Petitioner refused the offer to re-subpoena the officers who had previously testified. But the hearing was continued to allow Petitioner the opportunity to enforce the subpoena for Mr. Vargas-Torres.

The hearing resumed for a final time on December 8, 2020. Here it was learned that Petitioner had obtained a court order enforcing the subpoena to Mr. Vargas-Torres. Service of the subpoena was attempted at the local address and failed. When Petitioner investigated serving Mr. Vargas-Torres in Puerto Rico, it was learned the cost would be nearly $700. Apparently, Petitioner was unwilling to incur this expense, and the hearing proceeded without Mr. Vargas-Torres's testimony. Thereafter, Petitioner made several motions, which the hearing officer took under advisement.

The hearing officer issued a written order on December 17, 2020. It denied all of Petitioner's motions except the motion related to excluding statements made to medical personnel related to medical diagnosis. Ultimately, the hearing officer upheld the suspension finding competent, substantial evidence that Petitioner operated a motor vehicle while under the influence where evidence established that Petitioner was behind the wheel, and was in possession of the key fob in a vehicle with a push-to-start ignition, and the victim advised a police officer that Petitioner was the driver who had struck his vehicle, along with observations about her physical condition.

DISCUSSION

Petitioner first contends that her right to due process was violated by her inability to confront and cross-examine a witness—the victim, Mr. Vargas-Torres. Petitioner contends that Mr. Vargas-Torres is the only witness that can identify her as the driver of her car and as such, his testimony was required to uphold the suspension. "Procedural due process requires both fair notice and a real opportunity to be heard . . . 'at a meaningful time and in a meaningful manner'." *Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So.3d 766, 771 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D583a] (quoting others).

Four administrative hearings were held in this case. Mr. Vargas-Torres appeared by phone, without video capability, at the second and third hearings. After counsel's objection due to the inability to properly swear in Mr. Vargas-Torres in accordance with the subsequent ruling in *Eckert*, the hearing officer rescheduled the hearing to allow Petitioner an opportunity to enforce the subpoena. The Court finds that Petitioner was afforded procedural due process where she had two opportunities to confront and cross-examine the witness, despite the fact that he could not be properly placed under oath, and was given ample time to enforce the subpoena so as to compel Mr. Vargas-Torres's visual appearance. Petitioner chose not to fully enforce that subpoena. Moreover, as discussed in further detail below, the Court finds that Mr. Vargas-Torres's testimony was not necessary to support a finding that Petitioner was in actual physical control of her vehicle. As such, the Court finds that the hearing officer was not required to do anything more or different to afford Petitioner procedural due process, especially where Mr. Vargas-Torres's testimony was not necessary to uphold the suspension of Petitioner's driver's license.

Petitioner contends that without Mr. Vargas-Torres's testimony, there is not competent, substantial evidence to support a finding that she was in actual physical control of the vehicle. The Court disagrees. The case of *State Dep't. of Highway Safety & Motor Vehicles v. Saxlehner*, 96 So.3d 1002 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1932a] is instructive. In the underlying proceedings which led to the opinion in *Saxlehner*, counsel for the driver argued at the administrative review hearing that the suspension should be invalidated because the officer who conducted the initial stop failed to appear, and he was the only officer who observed Saxlehner behind the wheel. *Id.* at 1004. The hearing officer disagreed, but allowed the driver an opportunity to seek enforcement of the subpoena. The hearing officer later sustained the suspension of Saxlehner's driver's license. On petition for writ of certiorari, the circuit court granted the petition finding that the only evidence presented to establish that Saxlehner was driving or in actual physical control of the vehicle came from the two officers who did not personally make the observation (but rather were told the information from the third officer who did not appear at the review hearing), amounting only to hearsay evidence. *Id.*

The Department then sought second-tier certiorari review, arguing that the circuit court failed to apply the correct law and failed to acknowledge and apply statutory and case law which allows for admission of evidence under the Fellow Officer Rule. The appellate court agreed and found that the circuit court failed to apply the correct statutory and administrative provisions governing formal review hearings for driver's license suspensions. The appellate court pointed out that in the context of administrative review hearings on driver's license suspensions, "[n]either the statute nor the administrative regulation prohibits the admission of hearsay evidence." *Id.* at 1007. "Nor do these provisions require non-hearsay evidence to corroborate any hearsay evidence admitted at the hearing." *Id.* (contrasting with the procedures governing administrative hearings under Chapter 120).

Just as in *Saxlehner*, in this case, competent, substantial evidence was presented to support a finding that Petitioner was in actual physical control of her car. Namely, the reports submitted by law enforcement, including the crash investigation and police reports, as

well as the testimony of Officers Pendzick and Bailey, confirm that Petitioner was the driver who caused the accident. Those documents and testimony further report that TFR personnel took away Petitioner's keys to prevent her from driving away. Officers Pendzick and Bailey both personally observed Petitioner still behind the wheel of her car upon arrival on the scene. Petitioner was the only person in her car. The hearing officer was permitted to rely on this documentary and testamentary evidence and did not need corroborating, non-hearsay evidence to support its finding that Petitioner was in actual physical control of the vehicle. *See Saxlehner*, 96 So.3d at 1007. Nor does the source of the documentary and testamentary evidence—whether learned through or provided by other law enforcement personnel, fire rescue personnel, a victim or mere observer—impact the conclusion that such hearsay evidence is permissible in administrative review hearings for driver's license suspensions. Given the foregoing, the Court concludes that Mr. Vargas-Torres's testimony at the administrative hearing was not necessary to uphold the suspension in light of the other evidence which supported the hearing officer's decision.

Next, Petitioner contends that the hearing officer violated Petitioner's due process rights by not properly placing witnesses under oath, namely the two testifying law enforcement officers. It is well-settled that the appropriate remedy for a due process violation is remand for a new hearing. *See Lillyman v. Dep't of Highway Safety & Motor Vehicles*, 645 So. 2d 113, 114 (Fla. 5th DCA 1994); *Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So.3d 616 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D507a]; *Dep't of Highway Safety & Motor Vehicles v. Icaza*, 37 So.3d 309 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D850a]; *Tynan v. Dep't of Highway Safety & Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a]. As noted above, the *Eckert* decision, which requires a hearing officer taking testimony by electronic means to verify the identity of the witness, was issued after the first administrative hearing in this matter. The hearing officer acknowledged this and permitted Petitioner an opportunity to re-subpoena the testifying officers so that they could be sworn in accordance with *Eckert*. Petitioner, through counsel, rejected this offer. Yet now, Petitioner asks this court to set aside the suspension because she rejected the remedy which was previously offered to her.

The Court finds that Petitioner has waived her entitlement to relief. *See generally State v. Silvia*, 235 So.3d 349 (Fla. 2018) [43 Fla. L. Weekly S70a] (finding that criminal defendant's valid waiver of postconviction proceedings precluded him from claiming a right to relief under subsequent case law). Public policy concerns further support the Court's ruling. While not explicitly addressed by the parties, the Court notes case law which provides that where a remand is directed but the driver's license suspension has expired, no further action can be taken by the Department. *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815, 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a].[1] Whether or not the suspension in this case has now expired, the Court cannot support a situation whereby parties might exploit the shelf life of a suspension by rejecting the remedy that would be available on certiorari review that was offered at the administrative hearing level, and notably offered at a time that conserves judicial resources.

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]*Cf. Gordon v. State Dep't of Highway Safety & Motor Vehicles,* 166 So.3d 902, 905 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1368b] (disagreeing with the Second District that the validity of the license suspension is moot once the term of the suspension expires. As the Department notes, the license suspension has other consequences. A license suspension remains on a driving record for many years into the future.).

ORDER DENYING REHEARING

Petitioner's motion for rehearing is DENIED. Fla. Admin. Code R. 15A-6.012 ("A driver who requests subpoenas to be issued is responsible for the service of such subpoenas and payment of any costs and fees.")[1]

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[1]The court notes that Petitioner's assertion that Fla. Admin. Code R. 15A-6.012 "Authorizes the hearing officer to issue a subpoena and have it served as (sic) his expense" is in direct contradiction to what the rule states.

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CIRCUIT COURTS—ORIGINAL

Torts—False arrest—Malicious prosecution—Summary judgment—Evidence—Self-serving testimony—Action alleging that defendant planted evidence or lied about existence of the evidence forming the basis for plaintiff's arrest for possession of controlled substances—Defendant's motion for summary judgment is denied—Plaintiff's testimony at deposition and via affidavit on which plaintiff relies is sufficient record evidence to create a genuine issue of material fact that precludes summary judgment where a reasonable jury could return a verdict for plaintiff

NEDRA PETERSON, Plaintiff, v. MORRIS A. YOUNG and MARCUS DIXON, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 16-CA-642. November 8, 2021. David Frank, Judge. Counsel: Marie Mattox, Tallahassee, for Plaintiff. Joe Longfellow, III, and Ramsey Revell, Tallahassee, for Marcus Dixon, Defendant. Michael P. Spellman and Dawn Whitehurst, Sniffin & Spellman, P.A., Tallahassee, for Morris A. Young, Defendant.

ORDER DENYING DEFENDANT DIXON'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on November 4, 2021 and again on November 8, 2021 on Dixon's Motion for Summary Judgment, and the Court having reviewed the motion, response, supporting and opposing materials, and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

Defendant arrested and detained plaintiff for possession of a controlled substance (cocaine rock and marijuana residue) and tampering with evidence.

Plaintiff filed a lawsuit with two state court claims against defendant—false arrest / imprisonment and malicious prosecution.

Probable cause is a defense to false arrest. *Lewis v. Morgan*, 79 So.3d 926, 929 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D444c]; *Verde v. Pasco County Sheriff*, No. 8:20-CV-317-CEH-JSS, 2021 WL 597939, at *4 (M.D. Fla. Feb. 16, 2021) (citation omitted).

The absence of probable cause for the original proceeding is a required element of a malicious prosecution case. *Inlet Beach Cap. Invs., LLC v. Enclave at Inlet Beach Owners Ass'n, Inc.*, 236 So. 3d 1140, 1142 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D159a].

As to sovereign immunity, the existence of probable cause and the facts supporting probable cause "contradict any suggestion of malicious intent or bad faith." *Fernander v. Bonis*, 947 So.2d 584, 589 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D154a] (citation omitted).

Plaintiff's refutation of probable cause lies in the allegation that defendant either planted the evidence or the evidence never existed in the first place and defendant lied to bring the charges.

Of course, an officer who plants evidence to make an arrest would be properly exposed to a claim of false arrest and malicious prosecution and would not be entitled to sovereign immunity because the action would be outside the scope of employment, in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *Allen v. Frazier*, 132 So.3d 361, 363 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D313b].

The summary judgment record evidence upon which plaintiff relies is her own testimony at deposition and via affidavit. That essentially creates a "he said she said" situation. The deputy says he saw and seized illegal drugs. Plaintiff says there were never illegal drugs in her vehicle.

That means, the heart of this matter is the classification of the plaintiff's testimony. If the testimony is acceptable summary judgment evidence, there would be a genuinely disputed material fact that would preclude summary judgment. If it is not, summary judgment would be the proper course.

The (new) standard that must be applied is as follows:

> And third, those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

In re Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d 72, 75-76 (Fla. 2021) [46 Fla. L. Weekly S95a]

Florida courts have addressed the veracity of "self-serving" summary judgment evidence. "A non-conclusory affidavit which complies with [Federal Rule of Civil Procedure 56] can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *Raissi v. Valente*, 247 So.3d 629, 632 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1124a], citing *United States v. Stein*, 881 F.3d 853, 858-59 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C877a].[1]

Defendant argues that plaintiff's testimony of planted or non-existent evidence is late to the party, out of line with everything else we know about the facts, and simply should be disregarded.

The record before the Court says otherwise.

The plaintiff's testimony is not "blatantly contradicted by the record." Indeed, several other record facts logically support the plaintiff's version of the incident:

> Plaintiff stated the planting of evidence or lying allegation from the very first moment possible—in the original complaint that was filed—and has consistently argued that throughout the case.
>
> Sgt. Anderson, the first person on the scene after defendant, testified that she submits field tests as evidence. Defendant disposed of the field tests and failed to enter them as evidence.
>
> Sgt. Anderson never saw the defendant perform the field tests.
>
> There is at least some evidence that Frye, the passenger in the vehicle with whom defendant tussled, and defendant know each other.
>
> Plaintiff provided a plausible explanation regarding the passing of a napkin from Frye to her during the incident
>
> Just prio to the incident, the plaintiff had left a correctional center with her vehicle, where her vehicle could have been randomly tested for illegal drugs at any time.
>
> There were at least some inconsistencies between the testimony offered by the defendant and that given by Sgt. Anderson. For example, defendant testified that Sgt. Anderson watched him do the field tests.

See memoranda submitted and transcript for citations to the record.

To be considered sufficient record evidence to create a genuine issue of material fact that would preclude summary judgment, plaintiff's testimony on planted evidence or lying must be such that a reasonable jury could return a verdict for her. It is.

Accordingly, it is ORDERED and ADJUDGED that defendant's motion is DENIED.

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[1]Assuming the evidence is not such that it must be outright discarded, "If there is a conflict between the parties' allegations and evidence, the nonmoving party's evidence is presumed to be true and all reasonable inferences must be drawn in the nonmoving party's favor. JAMES B. WILSON, Plaintiff, v. PINELLAS COUNTY, a political subdivision of the State of Fla., Defendant., No. 8:20-CV-135-TPB-SPF, 2021 WL 5163229, at *1 (M.D. Fla. Nov. 5, 2021).

* * *

Guardianships—Advance medical directives—Do not resuscitate—Judicial approval—Discussion of process and analysis required for court to approve a guardian's request to sign and administer a DNR on behalf of a ward

IN RE: GUARDIANSHIP OF DONNIE MANNING, an Incapacitated Person. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 17-GA-232. February 26, 2021. David Frank, Judge. Counsel: Karen P. Campbell, Tallahassee, for Petitioner.

ORDER ON PETITION FOR AUTHORIZATION TO CONSENT TO WITHHOLDING OR WITHDRAWAL OF LIFE-PROLONGING PROCEDURES AND HOSPICE SERVICES

This cause came before the Court for hearing on February 23, 2021, and the Court having reviewed the petition and the court file, heard argument of petitioner, and being otherwise fully advised in the premises, finds

The North Florida Office of the Public Guardian ("guardian") petitions this Court for authority to sign a do not resuscitate order ("DNR") for its Ward, Donnie Manning. The Court continued the hearing and writes to give the guardian some clarification on how to proceed.

Effective July 1, 2020, Senate Bill 994 made a significant change to the way guardians handle end of life decisions for their wards in Florida. One of the amendments requires all guardians to obtain court approval prior to signing a DNR on behalf of a ward.

The question is, how precisely does the guardian and the trial court execute this new law? There is a procedure established for "expedited judicial intervention" when things go wrong or are disputed. There is no equivalent for this new DNR scenario. There are some procedural aspects that have not been addressed. These matters likely will be ironed out over time by the Legislature or by court rules. Nonetheless, the guardian needs an answer now.

When called upon to fill in the gaps in these situations, a trial court relies upon the principles of statutory construction. The Florida Supreme Court described the process in *Bautista v. State*:

> Our purpose in construing a statutory provision is to give effect to legislative intent. Legislative intent is the polestar that guides a court's statutory construction analysis. In attempting to discern legislative intent, we first look to the actual language used in the statute. If the statutory language is unclear, we apply rules of statutory construction and explore legislative history to determine legislative intent. To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute.

863 So.2d 1180, 1185-86 (Fla. 2003) [28 Fla. L. Weekly S849a] (citations and internal quotations omitted).

The Law Prior to the 2020 Amendments

Long story short, as to guardian "proxies," there was no requirement that a court order be obtained prior to acting; not for DNR's or any of the other tough end of life decisions. The authority given a guardian for these decisions flowed from Chapters 744 and 765 Florida Statutes. For the historical context and a fuller treatment of Florida law governing the authority and process for withholding or withdrawing life-prolonging procedures, see this Court's order in *In Re: Guardianship of Lizbeth Young*, Case No. 15-GA-14, Second Judicial Circuit in and for Liberty County, Florida, 28 Fla. L. Weekly Supp. 673a (June 15, 2020). The guardian of an incapacitated ward could be given the authority to "consent to medical and mental health treatment," Fla. Stat. §744.3215(3)(f) (2020), and to "make health care decisions," including the decision to "withhold or withdraw life-prolonging procedures," Fla. Stat. §765.401 (2020). The only prerequisite was that the person be properly appointed plenary guardian or have the limited guardian's authority to make such decisions for the ward.[1]

As a safeguard, there was and is a procedure, unaltered by the 2020 amendments, that allows "any interested adult person" to file a petition for "expedited judicial intervention." This procedure is set forth in Florida Statute 765.105 and Florida Probate Rule 5.900. Its purpose is to provide a forum for quickly litigating objections to a proxy's actions and other challenges to end of life decisions. See Fla. Stat. §765.105 and Meta Calder, *Chapter 765 Revisited: Florida's New Advance Directives Law*, Florida State University Law Review, Volume 20 Issue 2 Article 2 (1992).

A common theme and purpose thorough the development of this law in Florida was to uphold and balance the dignity of life and state and federal constitutional rights of a person or a person's proxy to make end of life choices, given severe medical prognosis. *Id*.

Florida courts addressing end of life decisions articulated the public policy that: "The decision to terminate artificial life supports is a decision that normally should be made in the patient-doctor-family relationship. Doctors, in consultation with close family members are in the best position to make these decisions." *John F. Kennedy Mem'l Hosp., Inc. v. Bludworth*, 452 So.2d 921, 926 (Fla. 1984). There was also a desire to keep court intervention at a minimum to avoid delay and to keep decisions where they are most appropriately made. *Id*. The Florida statutes in this area that were promulgated over time reflect these guiding principles.

The Law After the 2020 Amendments

First, it is helpful to note what has not changed. The process a proxy, including a guardian, follows to withhold or withdraw life-prolonging procedures, except for DNR's, has not changed. The procedure for challenging medical or proxy decisions has not changed.

The one component of end of life decisions for guardian proxies that has changed is DNR's. According to new subsection (2) of Florida Statute 744.441, guardian proxies must now get a court order giving them authority to sign a DNR, regardless of whether they believe it would be a good idea to have court approval, and regardless of whether the proxy's decisions are being challenged. The amendments also tightened provisions governing guardian qualification and supervision.

The biggest concern of the Legislature and the Governor that motivated the unanimous passage of these amendments was a surge in reported guardian abuses, especially the case of one professional guardian who was under a state criminal investigation for months over how she handled a Brevard County ward who died at a Tampa hospital while under her care. State investigators allege she ordered his feeding tube to be capped and a DNR to remain in place against the recommendations of doctors, and against the wishes of the ward and the ward's family. She is also being investigated for how she handled the ward's finances. *DeSantis signs Bill Reforming Guardianship System Inspired by Fierle Case*, Orlando Sentinel, June 18, 2020.

As trial courts implement and execute the amendments as written by the Legislature, it is important to remember intent and purpose. The concern of the Legislature was grave indeed—professional guardians ending life when they should not have, stealing, and other abuses. To address this concern, a trial court's review of a guardian's request to sign a DNR should provide a reasonable and appropriate level of scrutiny.

The specific section of the amendments that modified a guardian's authority regarding DNR's provides:

> A plenary guardian or a limited guardian of a ward may sign an order not to resuscitate as provided in s. 401.45(3). When a plenary guardian or a limited guardian of a ward seeks to obtain approval of the court to sign an order not to resuscitate, if required by exigent circumstances, the court must hold a preliminary hearing within 72 hours after the petition is filed, and:

(a) Rule on the relief requested immediately after the preliminary hearing; or

(b) Conduct an evidentiary hearing not later than 4 days after the preliminary hearing and rule on the relief requested immediately after the evidentiary hearing.

Fla. Stat. 744.441(2) (2020).

The relevant portion of the statute referenced in Section 744.441(2) is Section 401.45(3)(a) which reads:

Resuscitation may be withheld or withdrawn from a patient by an emergency medical technician or paramedic if evidence of an order not to resuscitate by the patient's physician is presented to the emergency medical technician or paramedic. An order not to resuscitate, to be valid, must be on the form adopted by rule of the department. The form must be signed by the patient's physician and by the patient or, if the patient is incapacitated, the patient's health care surrogate or proxy as provided in chapter 765, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709. The court-appointed guardian or attorney in fact must have been delegated authority to make health care decisions on behalf of the patient.

Other than Section 401.45, it appears there are no statutes that substantively address DNR's.[2] Most of the statutes that address end of life decisions refer to the larger umbrella category of "life-prolonging procedures." [3]

A Trial Court Procedure That Applies the Law as Written and Upholds Its Legislative Purpose

The matter before the Court is a guardian's request for authority, no longer automatic, to sign and administer a DNR on behalf of a ward.

There is no dispute or challenge, so the current petition is not traveling under Probate Rule 5.900. The Court, therefore, looks to the statute governing court authorizations for guardian actions in general. That statute, titled "Petition for authorization to act," provides:

(1) Application for authorization to perform, or confirmation of, any acts under s. 744.441 or s. 744.446 shall be by petition stating the facts showing the expediency or necessity for the action; a description of any property involved; and the price and terms of a sale, mortgage, or other contract. The application must state whether it conforms to the general terms of the guardianship report and whether the ward has been adjudicated incapacitated to act with respect to the rights to be exercised.

(2) No notice of a petition to authorize a sale of perishable personal property or of property rapidly deteriorating shall be required. Notice of a petition to perform any other acts under s. 744.441 or s. 744.446 shall be given to the ward, to the next of kin, if any, and to those interested persons who have filed requests for notices and copies of pleadings, as provided in the Florida Probate Rules, unless waived by the court. Notice need not be given to a ward who is under 14 years of age or who has been determined to be totally incapacitated.

Fla. Stat. §744.447 (2020).

This appears to be the most applicable process for the current matter.

For our purposes, the two most relevant requirements in Section 744.447 are: "facts showing the expediency or necessity for the action;" and "whether the ward has been adjudicated incapacitated to act with respect to the rights to be exercised."

A good starting point then would be a review of the ward's incapacity, the circumstances of the guardian's appointment, and the qualifications of the guardian.[4]

A good second step would be a review to confirm that the foundational requirements for withholding or withdrawal of life-prolonging procedures have been met. The good news here is that Florida Statute 765.401 and statutes referenced within provide guidance in this regard. Although the statute does not address DNR's specifically, it does outline the criteria a proxy uses to determine whether a "life-prolonging procedure" should be withheld or withdrawn. See *In Re: Guardianship of Lizbeth Young* for a more detailed discussion of the criteria.

Timing is an important factor for a trial court's review pursuant to the amendments. A Probate Rule 5.900 hearing addresses whether a pending, current decision to withdraw or withhold a procedure should be approved. A court's DNR review, however, is by its nature a less comprehensive, prospective analysis. The Court must assess the situation to determine whether the guardian is properly appointed and qualified, understands his or her responsibilities, is applying the appropriate criteria given the medical profile of the ward, and that there are no signs of abuse. Once approved by the Court, the guardian will be authorized at that point to use her judgment as to the appropriate time to sign and deliver the DNR.

There are two additional safeguards. First, Florida Administrative Code 64J-2.018 provides that a DNR may be revoked at any time by the patient, if signed by the patient, or if applicable the patient's health care surrogate or proxy, or court appointed guardian, or person acting pursuant to a durable power of attorney. The revocation may be in writing, by physical destruction, by failure to present it, or by orally expressing a contrary intent.

Second, the Probate Rule 5.900 procedure for challenging a proxy's decisions or actions can still be invoked by "any interested adult person," even after a court issues the order giving the guardian authority for a DNR. (Although this option likely would only occur if there were relevant information not presented to the court during its review of the DNR.)

Finally, the Court notes that the petition in this case is titled Petition for Authorization to Consent to Withholding or Withdrawal of Life-Prolonging Procedures and Hospice Services. At the hearing, the guardian clarified that she seeks the Court's approval to sign a DNR for Mr. Manning. She is not seeking a complete review of his situation for approval to withhold or withdraw the wider range of life-prolonging procedures, something she still has the inherent authority to do without court order, minus the DNR.

Accordingly, it is ORDERED and ADJUDGED that:

1. The guardian shall contact the Court's Judicial Assistant and set the continued hearing of this matter for a date no later than four days from the date of this order.

2. At a minimum, the guardian will be prepared to discuss the following at the hearing:

(a) The ward's incapacity, the circumstances of the guardian's appointment, and the qualifications of the guardian.

(b) Whether the ward had a living will or advance directive or a health care surrogate and what actions the guardian has taken to confirm the same.

(c) In the absence of the items in (a) above, whether there is evidence of the decision the ward would have made if competent.

(d) In the absence of the items in (a) and (b) above, how the guardian will determine the best interests of the ward.

(e) Whether the ward has a reasonable medical probability of recovering capacity.

(f) Whether the ward has an end-stage condition, the patient is in a persistent vegetative state, or the patient's physical condition is terminal.

3. The guardian will establish with admissible evidence that the ward's primary physician and at least one other consulting physician examined the ward and documented and signed the findings listed in (e) and (f) above in the ward's medical record.

4. The guardian shall give notice of the petition to the ward, to the next of kin, if any, and to those interested persons who have filed

requests for notices and copies of pleadings, as provided in the Florida Probate Rules, unless waived by the court.

[1]Although not required where there is no dispute or challenge to the guardian's actions, a guardian may still decide to petition the court for approval to exercise the guardian's authority to withhold or withdraw life-prolonging procedures. In that scenario, the Court believes the proper approach is the same that will now be used to review a guardian's request to sign a DNR.

[2]The closest an authority comes to substantively addressing DNR's is Florida Administrative Code regulation 64J-2.018. The relevant provisions of the regulation address: the DNR order format (DH Form 1896, Florida Do Not Resuscitate Order Form, December 2004), DNR order patient identification devices, persons authorized to sign the form or device, and verification of the identity of the patient.

[3]"Life-prolonging procedure" means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain. Fla. Stat.§765.101(12) (2020). A DNR is a request and order to withhold or withdraw cardiopulmonary resuscitation, which includes artificial ventilation, cardiac compression, endotracheal intubation and defibrillation, in the event of cardiac or respiratory arrest. DH Form 1896, Revised December 2004.

[4]The Court would add here confirmation that no family members are available and willing to serve as guardian. For example, in the present matter, at least one family member expressed a desire to care for the ward. One can wonder why the family did not engage sooner, nonetheless; the phrase better late than never comes to mind. If eligible, a family member could take over from a private professional or public guardian. Fla. Stat. §§744.467 and 744.471 (2020).

* * *

Insurance—Uninsured motorist—Trial—Continuance—Discovery—Witnesses—Treating physicians—Insurer's motion seeking continuance of trial based on its difficulty arranging a rule 1.360 compulsory medical examination of plaintiff is denied where court set trial during precise term requested by insurer when the court granted insurer's first motion for continuance, and any difficulty in obtaining a qualified CME expert and doing a CME are result of insurer's own dilatory conduct—Additionally, out an abundance of caution, the court will extend discovery deadline up to time of pretrial conference—Request to strike plaintiff's witnesses for failure to comply with pretrial requirement that summary of expected testimony be provided is unwarranted—While descriptions provided by plaintiff for his doctors' expected testimony are not robust summaries, they did provide defendant enough information to anticipate testimony related to the diagnosis, treatment, and prognosis of plaintiff's injuries—Treating physicians are not experts for discovery or any other purpose

ALPHONSO BARNES, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-CA-848. November 8, 2021. David Frank, Judge. Counsel: Roosevelt Randolph and Linje Rivers, Tallahassee, for Plaintiff. David Gagnon and John Kennenich, Jacksonville, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR CONTINUANCE AND DENYING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S WITNESSES

This cause came before the Court for hearing on November 5, 2021 and the Court having reviewed the motions, responses, and court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

Introduction

Defendant seeks a second continuance of the trial of this case, currently set for January 10, 2022, due to difficulty arranging a Rule 1.360 compulsory medical examination ("CME") of the plaintiff, and also seeks to strike plaintiff's witnesses for plaintiff's alleged failure to comply with disclosure requirements.

This case does not involve numerous pretrial motions raising difficult or novel legal issues or legal issues that are inextricably intertwined that will be time-consuming to resolve; does not require management of a large number of separately represented parties; does not require coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; does not require pretrial management of a large number of witnesses or a substantial amount of documentary evidence; does not require substantial time to complete the trial; will not require special management at trial of a large number of experts, witnesses, attorneys, or exhibits; will not require substantial post-judgment judicial supervision; and there are no other analytical factors identified by the Court or a party that tend to complicate comparable actions and which are likely to arise in the context of the instant action.

In other words, the present case does not qualify for treatment as complex litigation under the rules. To understand the merits of defendant's requests, a chronology is helpful.

Chronology of Pertinent Litigation Activities

The complaint is a one count uninsured motorist injury claim and was filed on December 1, 2020. It was never amended and remains the operative complaint today. There are two parties, one plaintiff and one defendant. The plaintiff is not seeking damages for lost wages or lost earning capacity. It also appears that the negligence of the uninsured driver is undisputed.

Defendant answered the complaint on January 20, 2021. Many of the matters alleged were admitted.

Defendant served interrogatories on January 20, 2021, which included the following questions:

> 10. Describe each injury for which you are claiming damages in this case, specifying the part of your body that was injured, the nature of the injury, and, as to any injuries you contend are permanent, the effects on you that you claim are permanent.
>
> 14. List the names and business addresses of each physician who has treated or examined you, and each medical facility where you have received any treatment or examination for the injuries for which you seek damages in this case; and state as to each the date of treatment or examination and the injury or condition for which you were examined or treated.
>
> 15. List the names and business addresses of all other physicians, medical facilities, or other healthcare providers by whom or at which you have been examined or treated in the past 10 years; and state as to each the dates of examination or treatment and the condition or injury for which you were examined or treated.
>
> 19. Do you intend to call any expert witnesses at the trial of this case? If so, state as to each such witness the name and business address of the witness, the witness's qualifications as an expert, the subject matter upon which the witness is expected to testify, the substance of the facts and opinions to which the witness is expected to testify, and a summary of the grounds for each opinion.

Plaintiff responded to the interrogatories on February 25, 2021. Defendant never moved to compel better answers to these questions, nor did it complain about improper objections or attempts to withhold information.

On the same day, defendant served a request for production of documents that included the following:

> 7. All medical bills, doctor bills, hospital bills, drug bills, nursing bills, ambulance bills, and bills for similar expenses incurred as a result of and related to the injuries which are or may be the subject matter of this lawsuit.

Plaintiff responded to this request for documents on February 25, 2021. Defendant never moved to compel a proper response, nor did it complain about improper objections or attempts to withhold information.

On February 1, 2021,[1] defendant noticed production from the following non-parties: American Health Imaging Tallahassee; several entities at Capital Regional Medical Center; Shaun E. Laurie, MD, PA; Southeast Neurological Specialists; Stand-Up MRI of Tallahas-

see, P.A.; several entities at Tallahassee Memorial Healthcare; and The Ghazvini Center.

At this point, in approximately February of 2021, defendant should have had a good understanding of the plaintiff's alleged injuries and medical profile. With this in mind at the hearing, the Court asked defendant what actions defendant took in March of 2021 to lay the groundwork for its desired CME of the plaintiff. The answer was defendant did nothing. When asked about April, the answer was that defendant did nothing. When asked about May. . . .

On April 30, 2021, the Court set this case for trial on November 15, 2021.

On May 6, 2021, defendant filed a notice of conflict and request for amended trial order seeking a continuance. In the motion, defendant states, "Undersigned counsel represents to the Court they are available in January of 2022, March of 2022, and May of 2022, and would respectively ask this matter to be rescheduled during one of those trial periods."

Defendant took the deposition of the plaintiff on July 22, 2021.

On August 9, 2021, the Court re-set the case for trial on January 10, 2022, *as requested by defendant*.

Defendant waited until September 8, 2021 to first contact plaintiff regarding coordination of a CME, and until October 11, 2021 to advise the plaintiff that it had made the determination that no Tallahassee expert would be available. Plaintiff's Response at 1. The plaintiff promptly agreed to go all the way to Gainesville for the CME to accommodate the defendant.[2] Plaintiff's Response at 2. Defendant has not followed up on this accommodation. *Id*.

Plaintiff timely filed his witness and exhibit lists on October 4 and 15, 2021.[3]

Discovery cutoff is December 14, 2021.

The Motion for Continuance

Defendant requests a continuance on the ground that it is having difficulty arranging a CME. Specifically, defendant asserts that, so far, there is not a single qualified medical professional located within a reasonable distance of Quincy, Florida available for a CME. The reasonable distance included all the way to Gainesville by agreement.

Our Florida Supreme Court's directives on active differential case management require trial court judges "To maximize the resolution of all cases. . .to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e),[4] which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown." Florida Supreme Court Administrative Order No. AOSC21-17, Amendment 2, In Re: Covid-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts, November 4, 2021.

As a preliminary matter, before the analysis even begins, defendant provided no facts to substantiate the assertion of unavailability. There was no discussion of the pool of qualified medical professionals in Tallahassee, the surrounding counties, or Gainesville, Florida's medical hub. Did defendant talk to 25 neurologists out of a total of 30? Did defendant talk to two doctors familiar to its law firm and no more? We don't know.

It is also important to note that defendant mischaracterized a litigant's "right to conduct a CME." At the hearing, defendant took aggressive umbrage with the Court, arguing that it had an unwavering, absolute right to a CME, presumably like a criminal defendant's right to remain silent.

CME's are not automatically given to any litigant requesting one. They are subject to strict requirements, including that the medical condition of the person must be in controversy, there must be good cause for the examination, and the time and place must be reasonable. Fla.R.Civ.P. 1.360. Indeed, compelling a litigant to undergo a physical examination was considered an extraordinary measure and affront to personal liberty at common law and in our federal courts until the early 1900's. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891).

Defendants conduct trials where the plaintiff's physical condition is at issue without CME's every day in this state, relying on evidence such as medical records and the cross examination of treating physicians and the plaintiff. *Baan v. Columbia County*, 180 So.3d 1127, 1134 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2707a] (expert's testimony was "the product of reliable principles and methods" without an actual examination). See also *Nova University, Inc. v. Katz*, 636 So.2d 729 (Fla. 4th DCA 1993), as clarified on denial of reh'g (Feb. 16, 1994).

Regardless, the real issue here is the principle of "self-inflicted wound." At this point, the difficulties of obtaining a qualified CME expert and doing a CME of the plaintiff are the bed defendant has made and upon which it must now sleep. Such difficulty is not good cause for an exception to the strict policy governing continuances mandated by the Florida Supreme Court and this Court will not disregard them. *HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1293 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a] (The court noted that ,"the [trial] court found no circumstances showing that HSBC Bank's failure to produce a witness for trial resulted from events beyond its control.")

If there were any doubt that defendant understood the basics of plaintiff's alleged injuries and medical profile prior to his deposition on July 22, 2021, defendant would have had all the information it needed on that day. Despite this, *defendant waited until September 8, 2021 to begin coordination of a CME with the plaintiff*. This situation is self-inflicted. *Id*. at 1292 ("Plaintiff's counsel knew a week or more in advance that his client would not be supplying a witness for trial. While rule 1.460, Florida Rules of Civil Procedure, acknowledges that a continuance may be sought on grounds of nonavailability of a witness, continuances are generally disfavored and require a showing of good cause," citing Fla. R. Jud. Admin. 2.545(e), "no abuse of discretion is presented by the trial court's determination that HSBC Bank's reason for failing to provide a witness for trial—the overscheduling of its employees or representatives in other cases—did not constitute good cause for a continuance.")

Again, the currently set January 2022 trial term is the precise term requested by defendant when the Court granted the first continuance.

All this and there still is plenty of time for a CME. Discovery cutoff is more than a month away. Even better, in an abundance of caution to ensure there is no prejudice to defendant, the Court will extend the discovery deadline for taking depositions and conducting a CME up to the time of the pretrial conference. But to be clear, without additional facts dictating otherwise, should defendant not obtain a CME prior to trial after all of this, it will not be the fault of the plaintiff or the Court and will not be good cause for a continuance. See everything discussed above.

The Motion to Strike Plaintiff's Witnesses

Defendant complains that plaintiff has listed "all of the doctors" as witnesses and has not complied with the pretrial requirement that a summary of the expected testimony be provided for each. Because of this, defendant requests a cruise missile where a BB gun would suffice.

The cruise missile is the striking of a witness, especially a key witness such as a treating physician. The BB gun is the less drastic cure that will be ordered by the Court. *State Farm Mutual Automobile Ins. Co. v. Nob Hill Fam. Chiropractic*, No. 4D21-204, 2021 WL

4448514, at *5 (Fla. 4th DCA Sept. 29, 2021) [46 Fla. L. Weekly D2129c] (only willful failure to comply or extensive prejudice to the opposition will justify the drastic remedy of striking a witness as a sanction for an alleged discovery violation); *Harrell v. Aztec Environmental, Inc.*, 921 So.2d 805 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D644b].

The Court will order the plaintiff to promptly file a narrowed down witness list that includes only the witnesses who actually will be called at trial and to provide more detail to the descriptions of their expected testimony. The discovery period for depositions will also be extended.

Although this resolves the matter and eliminates any possible prejudice to defendant, the Court believes it is important to discuss two issues.

First, at the hearing, defendant expressed what appeared to be a sense of being overwhelmed at the last minute by surprise witnesses or testimony flung by the plaintiff. That is not what the record in this case and facts presented at the hearing indicate. The witnesses were timely disclosed and there was no evidence or indication that they were a surprise, or that a very detailed description of their testimony, akin to an interrogatory answer, was necessary to comprehend their role.[5]

The witnesses listed were the plaintiff, a trooper, six treating medical professionals (neurologist, radiologist, etc.), and five before-and-after witnesses. There are thirteen total; not an overwhelming array of witnesses. In fact, these are routinely the standard (minimum) witnesses in automobile accident cases.

Second, defendant may misunderstand the distinction between retained experts and treating physicians. The plaintiff has not retained any experts to express opinions at trial. He has indicated he will call his treating medical professionals to cover the matter of medical damages for which they have a factual basis.

The Florida Supreme Court has explained the distinction:

> Again, the determination turns on the role played by the witness: if the treating physician gives a medical opinion formed during the course and scope of treatment in fulfillment of their obligation as a physician, then the physician is a fact witness, albeit a highly qualified one. If, however, the treating physician gives an opinion formed based on later review of medical records for the purpose of assisting a jury to evaluate the facts in controversy, the physician acts as an expert witness, and should be considered as such.

Gutierrez v. Vargas, 239 So.3d 615, 624 (Fla. 2018) [43 Fla. L. Weekly S143b].

The law in this state continues to be that treating physicians are not deemed retained experts for discovery or any other purposes. *Dodgen v. Grijalva*, No. SC19-1118, 2021 WL 4782479, at *4 (Fla. Oct. 14, 2021) [46 Fla. L. Weekly S319a] ("nothing in Worley suggests its decision was intended to apply to any witnesses other than those attempting to make [their] patient[s] well").

The sections of this Court's Order Setting Pretrial Conference and Jury Trial that contain requirements for "experts" refer to retained experts. Plaintiff has not violated any of these provisions.

Defendant focuses instead on the Order's requirement that the parties file:

> A complete list of all lay and expert witnesses, including lay rebuttal witnesses, who may be called at trial, the telephone number and address of the witness, *a summary description of the witness' expected testimony*, designating those witnesses to be called as experts. (Emphasis added).

It is true that the descriptions provided by the plaintiff for his doctors' expected testimony—e.g., "Neurologist—Treating Physician"—are not robust "summaries." They did, however, provide defendant enough information to anticipate testimony related to the diagnosis, treatment, and prognosis of plaintiff's injuries. The request to strike is unwarranted.

Accordingly, it is ORDERED and ADJUDGED that

1. Defendant's motion for continuance is DENIED.

2. Defendant's motion to strike or limit plaintiffs' witnesses is DENIED.

3. Plaintiff will file an amended (narrowed down) witness list with the names of witnesses the plaintiff is reasonably certain will testify at trial within five (5) days from the date of this order. The amended list will include more detailed summaries of the expected testimony of each witness, especially any testimony by treating physicians that would cross the line between factual treatment testimony and classic expert opinions.

4. The discovery deadlines for conducting depositions and a CME are extend to the day before the pretrial conference.

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[1]The fact that defendant sent out its records subpoenas prior to receiving plaintiff's discovery responses indicates that defendant knew about plaintiff's injuries and medical treatment even before the lawsuit was filed.

[2]This is significant regarding coordination of the CME because Florida law and the standard operating orders of at least four Florida circuits require CME's to be conducted in the county where the case is being tried, or possibly an adjacent county for good cause. *Blagrove v. Smith*, 701 So.2d 584, 585 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2374a] and Standing Orders for the Seventh, Ninth, Thirteenth, and Fifteenth Circuits.

[3]Thirteen witnesses were listed: Alphonso Barnes, Trooper D.L. Sanders Liability and Damages, Dr. Shaun Laurie (Primary Care Treating Physician), Dr. Albert Lee (Causation/Damages - Treating Physician), Dr M. Peter Ghazvini (Chiropractor Causation/Damages - Treating Physician), Dr. Bruce Rodan (Radiologist Treating Physician), Dr. Roland Jones, Neurologist—Treating Physician), Dr. Heyser (Treating Physician), Lorraine Barnes, AlXavier Barnes, Gwendolyn Smith, Aliza Barnes, and Theodis Jordan.

[4]As another preliminary matter, defendant also has not complied with Rule 2.545 in that the motion was not "signed by the party requesting the continuance."

[5]Of course, defendant could have propounded interrogatories if it was confused about the role of any listed witness, and undoubtedly has or will depose many of them.

* * *

Counties—Pubic records—Text messages between members of county commission and county employees related to disagreement with plaintiffs over development are public records—County violated Public Records Act and records retention schedules where commission members and employees routinely and indiscriminately deleted texts—County's noncompliance with Act is not absolved by fact that two former county employees retained text messages and those messages were ultimately discovered or fact that county attorney misadvised commission members and employees that they could delete messages because they were "transitory"—County also violated Act by failing to undertake reasonable search for requested messages where county denied existence of any messages without contacting former county manager to determine if she might have messages and did not make request to former manager until more than three months after receipt of public records request—Public meetings—Government in Sunshine Law—Motion for summary judgment as to allegations that county commission members violated Sunshine Law by meeting without notice while in Tallahassee for legislative session and at private dinners after commission meetings is denied where there is disputed issue of material fact as to whether substantive matters related to plaintiffs and development were discussed at those meetings—Motion for writ of mandamus is moot because court cannot compel production of messages that do not exist because they have been deleted

RAYDIENT LLC (d/b/a RAYDIENT PLACES + PROPERTIES LLC), and RAYONIER INC., Plaintiffs, v. NASSAU COUNTY, FLORIDA, a political subdivision of the State of Florida, Defendant. Circuit Court, 4th Judicial Circuit in and for Nassau County. Case No. 2019-CA-000054, Division B. August 24, 2021. James H. Daniel, Judge. Counsel: Christopher P. Benvenuto, William E. Adams, Staci M. Rewis, and S. Kaitlin Guerin, Gunster Yoakley & Stewart, P.A., West Palm Beach, for Plaintiffs. Gregory T. Stewart, Heather J. Encinosa, and Heath R. Stokley, for Defendant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Plaintiffs filed a three count Amended Complaint alleging that Nassau County violated both section 119.07(1)(a) of Florida's Public Records Act and section 286.011(1) of Florida's Government in the Sunshine Act. In Count I, Plaintiffs seek a writ of mandamus compelling production of requested public records. In Counts II and III, Plaintiffs request declaratory judgments against Nassau County finding that the county violated both the Public Records Act and the Government in the Sunshine Act, respectively.

Plaintiffs' claims center on three specific areas. First, Plaintiffs allege the county failed to reasonably respond to their public records request for text messages sent by members of the Board of County Commissioners (BOCC) and other county employees related to a large residential development known as Wildlight. Second, Plaintiffs also maintain that members of the BOCC, without providing reasonable notice to the general public, held closed-door private discussions regarding the Wildlight development while they were attending the February 2018 legislative session in Tallahassee. Finally, Plaintiffs contend that members of the BOCC and other county employees at private dinners following BOCC meetings regularly discussed county business, including the Wildlight development. For the reasons stated below, the court grants summary judgment as to Count II, but denies Plaintiffs' motion in all other respects.

A. Summary Judgment Standard

In their motion, Plaintiffs argue the record evidence in this case demonstrates there are no material facts in dispute concerning both of the alleged violations and they are entitled to the requested relief as a matter of law. Florida has now adopted the federal summary judgment standard as of May 1, 2021. Fla. R. Civ. P., 1510 ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard. . . ."); *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. There is scant Florida law applying the new standard, but it has been applied countless times in other federal and state courts. The following passage provides a good overall description of what Florida courts must now do when considering a motion such as the one filed by Plaintiffs in this case:

> Under Rule 56, Federal Rules of Civil Procedure, the party opposing the motion for summary judgment must come forward with "specific facts showing that there is a genuine issue for trial." Significantly, the trial court is allowed to assess the proof and "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)).

Lopez v. Wilsonart, LLC, 275 So.3d 831, 833, n.1 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1808a]. "A fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020). "In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000).

B. Count II—Public Records Act Violations

"In Florida, access to public records is constitutionally guaranteed and enforced through the Public Records Act." *Lake Shore Hosp. Auth. v. Lilker*, 168 So.3d 332, 333 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1567a]; *see also* Art. I, §24(a), Fla Const.; Ch. 119, Fla. Stat. Section 119.07(1)(a) of the Public Records Act states "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." "Florida courts have articulated that the purpose of the Public Records Act, in broad terms, is 'to open public records to allow Florida's citizens to discover the actions of their government.' " *Board of Trustees v. Lee,* 189 So. 3d 120, 124 (Fla. 2016) [41 Fla. L. Weekly S146a] (quoting *Bent v. State*, 46 So.3d 1047, 1049 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2167a]). To further that goal, the Public Records Act must be construed liberally in favor of openness and the constitutional guarantee of access to the public's business. *See Dettelbach v. Dep't of Business and Professional Regulation*, 261 So.3d 676, 681 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2720a].

In an action such as this to enforce the provisions of Chapter 119, a plaintiff has the burden to prove he or she made a specific request for public records, the government agency received the public records request, the requested public records exist, and the government agency improperly refused to produce them in a timely manner. *See Grapski v. City of Alachua*, 31 So.3d 193, 196 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D205b]. Here, Plaintiffs sent a public records request to Nassau County on October 12, 2018 requesting an extensive list of itemized documents and correspondence concerning the ongoing disagreement between Plaintiffs and Nassau County over the Wildlight development. There is also no dispute that Nassau County received this request and did, in fact, provide some of the requested items.

The focus of Count II, however, involves 147 pages of text messages between BOCC members, the county manager and attorney, and various other county employees that the county did not initially provided to Plaintiffs. The October 12, 2018 letter from Plaintiffs unambiguously requested all text messages ("For purposes of this request, the term "correspondence" means any writing of any kind, including but not limited to, . . . text messages. . . .") between several named BOCC officials and county employees dating back to June 1, 2016 concerning the East Nassau Community Planning Area (ENCPA), the creation of a stewardship district for the ENCPA, the municipal services taxing unit in the ENCPA, and House Bill 1075. The undisputed facts show that the county represented to Plaintiffs on multiple occasions that these text messages did not exist. The messages, however, eventually came to light, first, in connection with a grievance filed by a former employee against the county and subsequently through a response to a subpoena served by Plaintiffs on another former county employee in this litigation. Once the messages surfaced in the employee grievance proceeding, the county forwarded those to Plaintiffs, but by this time Plaintiffs had copies of many of the texts through means other than their public records request.

Although the requested text messages exist, they must qualify as public records before the county has any obligation to produce them. Section 119.011(12), Florida Statutes, defines "public records" as "all documents, papers, . . ., books, tapes, . . . or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Nassau County is an "agency" as defined by section 119.11(2), Florida Statutes (" 'Agency' means any state, county, district, authority, or municipal officer, department, division, board. . . .") Furthermore, as employees and elected officials working for an "agency," any text message communications between the BOCC and county employees are public records if the agency employee or official "prepared, owned, used, or retained the text message within the scope of [their] employment or

agency." *O'Boyle v. Town of Gulf Stream*, 257 So.3d 1036, 1040-41 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2386a].

Without question, the 147 pages of text messages were "prepared, owned, used, or retained" by members of the BOCC and county employees within the scope of their employment or work on behalf of the county. All but a tiny fraction address the conflict between Plaintiffs and the county over the ENCPA, the stewardship district, the municipal services taxing unit, and House Bill 1075. The specific relevance of these subjects to the transaction of official county business need not be explained in full detail. Suffice it to say that all of these matters were before the BOCC during the time period covering Plaintiffs' public records request and the subject of disagreement between both sides over which entity was responsible to pay for the maintenance and upkeep of new parks and recreational facilities in the ENCPA.[1]

Thus, for purposes of summary judgment, there is no genuine issue of material fact over whether Plaintiffs made a public records request, the county received the request, and the requested records were public records that actually did exist. The only issue contested by the parties in this summary judgment proceeding was whether or not Nassau County unreasonably or improperly refused to produce the 147 pages of text messages in a timely manner. On that issue, Plaintiffs have shown that the following facts are undisputed:

• Plaintiffs sent their public records request on October 12, 2018. Plaintiffs requested, among other things, the county provide certain text messages related to the dispute surrounding the Wildlight development. In its initial response, the county provided no text messages whatsoever.

• BOCC members, the county manager, and county employees routinely and frequently communicated by text message with each other about county business.

• The county had no record retention policy for text messages covering the period of time for Plaintiffs' public records request.

• The members of the BOCC, several county employees, and the county manager routinely deleted text messages from their phones. Some used a setting on their phones to automatically delete text messages after 30 days. Others would manually from time-to-time delete text messages to "clear space."

• Once deleted from their phones, the substantive text messages were unable to be retrieved from the cellular phone service provider. The provider still retained a record that the subscriber sent or received a text message from a particular number, but the content of the message was no longer available.

• None of the BOCC members saved any of the text messages requested by Plaintiffs in their October 2018 public records request.

• On November 6, 2018, the county manager held a meeting with several county employees where they discussed Plaintiffs' public records request. The county manager explained that "transient" communications by text message did not need to be retained for any period of time. There was disagreement among the attendees over whether some of the text messages related to Plaintiffs' public records request should be classified as "transient" and could be deleted.

• On November 15, 2018, Plaintiffs' counsel sent a letter to the county requesting it to provide the text messages related to Plaintiffs' public records request. In that letter, Plaintiffs' counsel indicated they knew that these text messages exist. The county responded to Plaintiffs' letter that same day by stating "We are not aware of any text messages."

• Plaintiffs followed up on November 16, 2018 with an email to the county manager about the county's failure to provide the requested text messages. On November 20, 2018, the county responded by stating "The county has responded to the public records [sic] dated October 12, 2018 as set forth in our responses previously sent."

• At no time during the process of responding to Plaintiffs' public records request did anyone from the county inform Plaintiffs that BOCC members and county employees routinely deleted text messages from their phones or that the county had no records retention policy for text messages.

• On January 7, 2019, former county employee Justin Stankiewicz filed an employee grievance over his dismissal and included approximately 30 pages of text messages between BOCC members, the county manager, and other county employees that were responsive to Plaintiffs' October 2018 public records request.

• After the county received Plaintiffs public records request in October of 2018, the county did not contact the former county manager, Shanea Jones, to inquire about text messages in her possession until January 30, 2019.

• On February 6, 2019, Plaintiffs filed their complaint in this action. On February 7, 2019, the county sent an email to Plaintiffs stating it had received text messages from "an outside source" and would produce those text messages as a supplemental response to Plaintiffs' public records request. The county produced the 30 pages of text messages from the grievance proceeding.

• Once litigation began, Plaintiffs sent a subpoena to Shanea Jones. In response to the subpoena, she produced 147 pages of text messages responsive to Plaintiffs' public records request. Some of the records were previously supplied by the county in its January supplemental response, but others were newly discovered.

Based upon this record, no reasonable trier of fact could conclude that the county properly responded to Plaintiffs' public records request by producing the requested text messages in a reasonable and timely manner. An unlawful denial of access to public records can occur in a myriad of ways. *See Morris Publishing Group, LLC v. State of Florida*, 154 So.3d 528, 533 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D226a]. In this case, the county's actions fell short of the requirements of Chapter 119 in two respects.

A. Indiscriminate Deletion of Text Messages

First, the routine and indiscriminate destruction of text messages by BOCC members and certain county employees, regardless of the content of each message, violated section 119.021, Florida Statutes. This statute initially directs that "the Division of Library and Information Services of the Department of State shall adopt administrative rules that establish retention schedules for public records." §119.021(2)(a), Fla. Stat. Pursuant to this legislative direction, the division adopted rule 1B-24.003 of the Florida Administrative Code to address the retention of public records by public agencies.[2] Under rule 1B-24.003, the division publishes retention schedules on its website for all public agencies and the administrative rule then specifically incorporates by reference those published schedules. The published schedules incorporated into the administrative rule provide the ***minimum*** retention requirements for various types of public records and section 119.021(2)(b) then mandates that "[e]ach agency shall comply with the rules establishing retention schedules and disposal processes for public records which are adopted by the records and information management program of the division." §119.021(2)(b), Fla. Stat.

Rule 1B-24.003(1)(a) specifically directs that the general records schedule for state and local government agencies (identified as GS1-SL) is found at http://www.flrules.org/Gateway/reference.asp?No=Ref-12098. GS1-SL classifies correspondence and memoranda generated by state and local government agencies like Nassau County into two groups identified as "Administrative" and "Program and Policy Development." "Administrative Correspondence and Memoranda" are defined as "correspondence and memoranda of a general nature that are associated with administrative practices or routine office activities and issues but that do not create policy or procedure, document the business of a particular program, or act as a receipt." GS1-SL directs that these types of records should

be retained by a state or local agency for three fiscal years. "Program and Policy Development Correspondence and Memoranda" are described as "correspondence and memoranda documenting policy development, decision-making, or substantive programmatic issues, procedures, or activities." GS1-SL requires these records be retained by a state or local agency for five fiscal years.

In the instant case, the overwhelming majority of the 147 pages of text messages fall within one category or the other. Therefore, in accordance with GS1-SL, the county should have retained these text messages for three or five fiscal years depending on their classification. When Plaintiffs submitted their public records request in October of 2018, at minimum the county should have been in a position to produce for inspection any text messages dating back to October of 2015 that were part of the 147 pages of messages given to Plaintiffs' in response to their subpoena of Ms. Jones. All but two of the 147 pages of texts were created after that date and should have been available for Plaintiffs to inspect if the county had adhered to the mandated retention schedules.[3]

Even without the retention schedules contained in GS1-SL, the county's approach to the retention of text message communications was unreasonable and inconsistent with the goal behind the Public Records Act. "The general purpose of the Florida Public Records Act is to open public records so that Florida's citizens can discover the actions of their government." *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994). If county employees or officials conduct the public's business using text messages, automatically deleting text messages after thirty days without regard to their subject matter simply does not give the citizens of Nassau County a reasonable opportunity "to discover the actions of their government."

For purposes of the county's compliance with the Public Records Act, it makes no difference that two former county employees retained these text messages and the messages were ultimately discovered at a later date. It has long been the policy of this state that each government official has a duty to preserve public records and that such records belong to the government agency, not the individual. *See Bell v. Kendrick*, 6 So. 868, 869 (1889) ("[W]henever a written record of the transactions of a public officer is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that written memorial, . . . and, when kept, it becomes a public document—a public record—belonging to the office, and not to the officer.") This duty on the part of individual government officials to preserve public documents and records is not somehow altered because those items are stored on their private account or privately-owned device. In such situations, an agency still has a duty to produce public documents in response to a valid public records request no matter their location. *See O'Boyle*, 257 So. 3d at 1041 ("Where specified communications to or from individual state employees or officials are requested from a governmental entity—regardless of whether the records are located on private or state accounts or devices—the entity's obligation is to conduct a reasonable search that includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to a proper request.") However, if employees or officials have no individual responsibility under the Public Records Act to retain public records stored on their private devices or accounts in accordance with published retention schedules, then there is no way to ensure that a governmental agency will be able to fulfill its obligation to retrieve those public records in response to a public records request. It was only by chance that the documents requested in this case still existed in October of 2018 and compliance with the Public Records Act should not depend on happenstance.

Summary judgment is also appropriate despite record evidence that the county attorney advised BOCC members and county employees they could delete these text messages because the documents were "transitory" and eligible for deletion after a short period of time. "Transitory" messages are defined in the GS1-SL retention schedule in the following manner:

> "Transitory" refers to short-term value based upon the content and purpose of the message, not the format or technology used to transmit it. Examples of transitory messages include, but are not limited to, reminders to employees about scheduled meetings or appointments; most telephone messages (whether in paper, voice mail, or other electronic form); announcements of office events such as holiday parties or group lunches; recipient copies of announcements of agency sponsored events such as exhibits, lectures or workshops; and news releases received by the agency strictly for informational purposes and unrelated to agency programs or activities. Transitory messages are not intended to formalize or perpetuate knowledge and do not set policy, establish guidelines or procedures, certify a transaction, or become a receipt.

The GS1-SL retention schedule further directs that agencies need only retain "transitory" documents "until obsolete, superseded, or administrative value is lost." The overwhelming majority of the content contained within the 147 pages of text messages, however, cannot be characterized as "transitory." The messages are clearly intended to formalize or perpetuate knowledge among BOCC officials and county employees about the ENCPA, the stewardship district, the municipal services taxing unit, and HB 1075, as well as to discuss policy and procedures related thereto. The content of these messages goes well beyond mere reminders about meetings or appointments, telephone messages, announcements of agency sponsored events, and equivalent matters. Any claim that these messages were "transitory" and eligible for deletion after a short period of time is unfounded.

When county employees and officials delete public records stored on privately-owned devices or accounts, records documenting the public's business may be lost for all time. By random chance, Plaintiffs were able to recover 147 pages of text messages by other means, but this in no way absolves the county of its obligation to ensure that all employees and officials properly retained those records in accordance with published retention schedules. The Public Records Act demands government agencies be vigilant in their retention of public records, particularly if their employees and officials transact government business using their own personal devices and accounts. Automatically deleting text messages after thirty days or arbitrarily "clearing space" from a personal device, without any concern for the content of the messages, is inconsistent with the mandate in section 119.021(2)(b) that agencies comply with the retention schedules adopted by the Division of Library and Information Services. More importantly, it directly undermines the overall purpose of the Public Records Act which is to "fulfill the constitutional requirement of making public records openly accessible to the public." *Lee,* 189 So. 3d at 125. For this reason, Plaintiffs are entitled to summary judgment declaring the county violated Section 119.07(1)(a), Florida Statutes.

B. Failing to Undertake a Reasonable Search for Public Records

In addition to employees and officials indiscriminately deleting text messages after thirty days or an otherwise arbitrarily chosen period of time, the county violated the Public Records Act by failing to undertake a reasonable search for the requested public records. Once an agency receives a request to inspect public records, records custodians must respond promptly and in good faith by determining if they possess the requested records, retrieving those records, assessing if any exemptions apply, and making non-exempt records available. *See Siegmeister v. Johnson,* 240 So.3d 70, 73-74 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D415a]. This obligation is no different for text messages or other public documents stored on private

accounts or devices. *See O'Boyle*, 257 So. 3d at 1041.

> Where specified communications to or from individual state employees or officials are requested from a governmental entity—regardless of whether the records are located on private or state accounts or devices—the entity's obligation is to conduct a reasonable search *that includes asking those individual employees or officials to provide any public records stored in their private accounts* that are responsive to a proper request.

Id. (emphasis supplied). If public agency employees and officials transact public business on their privately-owned accounts or devices, then the agency has an affirmative duty in response to public records requests to do what is reasonably necessary to promptly retrieve any public documents from those employees or officials.

In this case, the county did not discharge its obligation to conduct a reasonable search. No one directly asked Ms. Jones to provide any text messages responsive to Plaintiffs' public records request until January 30, 2019. This was over three months after the date of Plaintiffs' original request and the county by then had advised Plaintiffs three times that it had no relevant text messages. The county maintained this position even when Plaintiffs' counsel insisted in November of 2018 that these text messages did, in fact, exist. As the former county manager when Plaintiffs and the county were involved in a very public dispute related to the ENCPA, Ms. Jones should have been one of first county employees approached by the county's records custodian, particularly when she was specifically identified in Plaintiffs' public records request as one of the senders or recipients of the requested text messages. Moreover, the record is clear that the county denied the existence of any text messages relevant to Plaintiffs' request *before* the county ever contacted Ms. Jones. There is no reasonable explanation contained in the record evidence as to why it took the county three months to ask Ms. Jones if she had any text messages and why the county repeatedly denied their existence without first speaking to her. The county's failure to conduct a reasonable investigation amounted to an additional violation of Section 119.07(1)(a) of the Public Records Act.

C. Count III—Government in the Sunshine Act Violations

Section 286.011, Florida Statutes, commonly referred to as the "Government in the Sunshine Law," provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels. The intent of the Government in the Sunshine Law is to "cover any gathering of some or all of the members of a public board at which such members *discuss any matters on which foreseeable action may be taken by the board;* and it is in the entire decision-making process that the legislature intended to affect by the enactment of the statute." *Wolfson v. State*, 344 So. 2d 611, 614 (Fla. 2d DCA 1977) (emphasis supplied). The law "aims to prevent the evil of closed-door operation of government without permitting public scrutiny and participation, and if *any two or more* public officials meet in secret to transact public business, they violate the Sunshine Law." *Transparency for Florida v. City of Port St. Lucie*, 240 So. 3d 780, 784 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D850a] (emphasis supplied). When two or more board or commission officials meet to discuss matters currently under consideration, or those matters that will be in the foreseeable future, section 286.011, Florida Statutes directs that the board or commission must provide reasonable notice to the general public.

Here, Plaintiffs have alleged BOCC members violated the Sunshine Law by meeting without notice to discuss matters related to the ENCPA while gathered in Tallahassee for the 2018 legislative session. Plaintiffs also contend that county officials committed further violations by frequently meeting for dinner after BOCC meetings at the home of one of the commissioners where they continued to discuss issues concerning the county's on-going dispute with Plaintiffs over the ENCPA. Plaintiffs have set forth record evidence to support their claims. Several witnesses provided sworn testimony through affidavit and deposition that BOCC members and county employees in both settings openly discussed the county's ongoing dispute with Plaintiffs over the obligation to maintain parks and recreational facilities in the ENCPA. This issue was at that time, without question, one in which the BOCC might take action in the foreseeable future and the BOCC provided no notice to the general public about these meetings.

However, Nassau County has met its obligation to bring forward record evidence in opposition to Plaintiffs' evidence which creates a genuine issue of material fact over the subject matter discussed at these meetings. The county does not dispute that BOCC members and county employees met without notice in Tallahassee and after BOCC meetings, but the sworn affidavits and testimony submitted in opposition to Plaintiffs' motion expressly deny that they discussed substantive matters related to Plaintiffs and the ENCPA. The court must assess the conflicting proof to determine whether there is a genuine dispute of material fact and, in a light most favorable to the county, the record evidence is such that a reasonable jury might return a verdict in its favor on the subject matter of these discussions between public officials. Accordingly, summary judgment for Plaintiffs as to Count III is not appropriate based on conflicting evidence over this narrow factual issue.

D. Count I—Writ of Mandamus

As conceded by Plaintiffs' counsel, summary judgment on this count is also not appropriate because the issue is now technically moot. Plaintiffs have conclusively established that the text messages in question are no longer in the possession of any county employee or official because they were deleted. Therefore, the court cannot compel the county to produce items it does not have.

F. Order

Based on the reasoning detailed above, the court grants summary judgment in favor of Plaintiffs as to Count II. As a matter of law, BOCC officials and county employees violated section 119.07(1)(a) of Florida's Public Records Act by indiscriminately deleting text messages without consideration of their substantive content and failing to undertake a reasonable search for text messages specifically requested by the Plaintiffs in their October 12, 2018 public records request. Summary judgment is denied as to Counts I and III and the case shall proceed forward to trial on the remaining issues of fact, namely the subject matter of conversations between BOCC members and county employees during the 2018 legislative session and at dinners following BOCC meetings. The court reserves ruling until after the resolution of the claim in Count III to assess entitlement to and the amount of attorney's fees under Chapter 119.

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[1]These matters currently remain unresolved and are still before the BOCC.

[2]1B-24.003. Records Retention Scheduling and Disposition.

(1) The Division issues General Records Schedules which establish minimum retention requirements for record series common to all agencies or specified types of agencies based on the legal, fiscal, administrative, and historical value of those record series to the agencies and to the State of Florida. The General Records Schedules established by the Division, which can be obtained at http://dos.myflorida.com/library-archives/records-management/general-records-schedules/, are incorporated by reference:

Fla. Admin. Code R., 1B-24.003(1).

[3]Two pages contained messages dated from August and September of 2015. The other 145 pages contain messages dated between 2016 and 2018.

* * *

Insurance—Homeowners—Attorney's fees—Where insurer responded to homeowners' series of escalating damage estimates by investigating claims and making payments, but homeowners filed suit before insurer could investigate and respond to latest estimate, suit was premature and homeowners are not entitled to attorney's fees and costs—Payment of appraisal award was not confession of judgment entitling homeowners to award of fees and costs where no judgment or decree has been entered against insurer, and appraisal award and litigation was not result of insurer wrongfully forcing homeowners to resort to litigation

TERRANCE TAYLOR, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 5th Judicial Circuit in and for Marion County. Case No. 42-2019-CA-001103. October 8, 2021. Gary L. Sanders, Judge. Counsel: James J. Dye, Morgan & Morgan, P.A., Orlando for Plaintiff. Lynn S. Alfano and Christopher J. Goodrum, Alfano Kingsford, P.A., Maitland, for Defendant.

ORDER

THIS CAUSE came before the Court for hearing on September 28, 2021, on Plaintiff's Motion for Entitlement to Attorney's Fees and Costs filed December 30, 2020 and Defendant's Motion to Deny the same filed March 31, 2021. Based upon the Court's review of the file, argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

Factual Background

This is not an insurance coverage matter. The litigated issue in this case is the amount of insurance coverage owing to Plaintiff by Defendant due to a homeowner's claim reported on September 21, 2017 relative to damage sustained to Plaintiff's home allegedly caused by Hurricane Irma.

Suit was filed on May 21, 2019. Before suit was filed, a great deal of communication and activity occurred between the parties in an effort to resolve the dispute. The details of that activity are more fully described in the "Statement of Facts" section of Plaintiff's Memorandum of Law filed September 21, 2021 and in the "Undisputed Facts" section of Defendant's Motion to Deny filed March 31, 2021.'

Suffice it to say, no agreement was reached before suit was filed. However, the amount of Plaintiff's demand was in no way consistent before suit was filed. After Defendant sent Plaintiff a letter on October 17,2017 accepting coverage but finding that the damage estimate fell below the Plaintiff's deductible amount of $6,4540, Plaintiff advised that he would submit a competing estimate. Plaintiff sent the competing estimate on December 11, 2017 in the amount of $21,284.23, thus requiring Defendant to further investigate.

State Farm reinspected the property and revised its estimate total to $8,718.82. Unhappy with that estimate, Plaintiff requested mediation. Mediation was held on April 24, 2018. No agreement was reached.

On May 13, 2019 Defendant received a letter from opposing counsel demanding payment and attaching documentation now claiming that the loss amount was $46,356.48. Before Defendant could investigate and respond to the latest information, Plaintiff filed suit. Pursuant to the terms of the policy at issue, Defendant demanded an appraisal. The parties eventually executed, and the Court entered an Order granting a Joint Stipulation to Abate Litigation Pending Completion of Appraisal on September 10, 2019. An appraisal award was entered on November 19, 2020 which Defendant paid.

Plaintiff now claims entitlement to costs and fees pursuant to *Fla. Stat.* §§627.428, 57.041, and 92.231.

Law

The purpose of §627.428, *Florida Statutes*, "is to discourage litigation and encourage prompt disposition of valid insurance claims." However, applying this legal concept, and the relevant supporting case law, to the actual facts of the subject claim demonstrates that an award of attorney's fees and costs is not appropriate in this case as it was not the filing of the instant lawsuit that acted as the catalyst to Defendant's issuance of payment, but rather it was Defendant's continued adjustment of the subject claim in accordance with the terms of the subject policy which resulted in the payment of insurance benefits to Plaintiff.

Concerning premature litigation, the Fifth District Court of Appeal explained in *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So.2d 393 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1791e], that, under §627.428, *Florida Statutes,* attorney's fees should not be awarded to plaintiffs who bring premature suits against insurers, as it rewards unnecessary litigation and discourages insurers' prompt compliance with their obligations. *Id.* at 399. In this regard, the *Lorenzo* Court cited to a United States District Court case from the Middle District of Florida, *Tristar Lodging, Inc. v. Arch Specialty Ins. Co.,* 434 F. Supp. 2d 1286 (M.D. Fla. 2006), noting the persuasiveness of the following excerpt:

> Plaintiff. . . [argues] that the Court [must] . . .award fees whenever a Plaintiff sues an insurer and money is later paid. The Court declines to read the statute so broadly. . .If Plaintiff were correct then it would behoove every policyholder to sue whenever a claim is contemplated, because. . .whether the claim is eventually adjusted downward or paid in full, attorney's fees would automatically result. This. . .would be contrary to the stated purpose of the statute: discouraging lawsuits and encouraging timely payments of claims. If the insurer knows it will eventually have to pay attorney's fees regardless, it loses the incentive to pay the claim timely, and this would raise the likelihood that the claim will be contested. Moreover, there is a fundamental due process concern in finding that an insurance company which appropriately pays a valid claim according to the Policy terms must still pay attorney's fees, because a claimant sued it to do what it was already in the process of doing. . .[T]his statute. . .ha[s] consistently been interpreted to authorize recovery of attorney's fees from an insurer only when the insurer has wrongfully withheld payment of the proceeds of the policy. *Id. at* 1297-1298.

Further, although the case of *Federated Nat'l Ins. Co. v. Esposito*, 937 So.2d 199 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2220a], concerned an insured's pre-suit invoking of appraisal, the language of the opinion is still instructive to the circumstances in the instant litigation, with regard to the significance of an appraisal demand's timing, as that Court explained that:

> We cannot fault the insurer for complying with the terms of its insurance contract by participating in the appraisal process and paying in a timely manner. To do so would dissuade the insurers from complying with the terms of their own agreements. . .The insurer did not contest coverage but, rather, participated in the contractual appraisal process because it could not reach an agreement with the insured over the disputed amount of the insured's claim. To rule otherwise would encourage an insured to run to the courthouse rather than to participate in the alternative dispute resolution outlined by the agreement between the parties. This is contrary to the intent and purpose behind the appraisal process. *Id. at* 201 - 202.

In the instant case, Defendant's pre-suit actions demonstrate a continuance of its efforts to adjust and negotiate the claim to an agreed settlement with Plaintiff, and Defendant should not be penalized for attempting to further adjust any amounts still disputed between the parties. *See Rodrigo v. State Farm Fla. Ins. Co.,* 144 So.3d 690 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1760a] ("Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim does not constitute a waiver of [policy requirements]"); *see also Tristar Lodging Inc.*, 434 F. Supp. 2d at 1300 ("While Plaintiff wanted immediate payment, it did not contract for that. . .")

Florida case law further reflects the well-established position that

entitlement to attorney's fees "should normally be limited to the work associated with filing the lawsuit after the insurance carrier has ceased to negotiate or has breached the contract and the additional legal work necessary and reasonable to resolve the breach of contract." (emphasis added). *Hill v. State Farm Fla. Ins. Co*., 35 So.3d 956 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1041a].

In the instant case, Defendant's pre-suit actions demonstrate a continuance of its efforts to adjust and resolve the claim with Plaintiff. Specifically, after Defendant accepted coverage for the Plaintiff's loss and made payment, Plaintiff submitted a competing estimate. As a result, Defendant conducted a reinspection of the subject property, revised its estimate, and made another payment. The Plaintiff then submitted yet another estimate, through counsel, to which Defendant made requests to Plaintiff's attorney to discuss the competing estimates in an attempt to resolve the parties' differences.

Rather than give Defendant an opportunity to the most recent estimate submitted, and resolve the parties' differences, Plaintiff's counsel filed this lawsuit.

The Court finds that Defendant was denied any meaningful opportunity to resolve the disagreement between the parties as to the amount of the subject loss prior to the commencement of suit, especially in light of the newest demand. Accordingly, the instant lawsuit constituted premature litigation such that the Plaintiff is not entitled to an award of attorney's fees and costs.

Lastly, payment of the appraisal award by Defendant did not amount to a confession of judgement. *Florida Statutes* §627.428 requires that a judgment or decree must be entered against an insurer in order for the insured to be entitled to an award of attorney's fees and costs. No such judgment or decree has been entered against State Farm and Defendant's payment of the appraisal award is not a confession of judgment.

Florida case law is clear that post-suit payment of an appraisal award will only constitute a confession of judgment when that appraisal award and litigation was the result of an insurer wrongfully, meaning incorrectly, forcing its insured to resort to litigation. *See State Farm Fla. Ins. Co. v. Colella,* 95 So. 3d 891 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1022a] (reversing a summary judgment finding in favor of the insured that post-suit payment of policy limits was a confession of judgment as the confession of judgment rule is "not absolute," the rule is "intended to penalize insurance companies for 'wrongfully' causing an insured to resort to litigation," and as the record did not evidence that the insured "ever was required to 'resort' to litigation. She appears to have opted to pursue litigation without ever attempting to discuss the disagreement with the insurance company"); *Grow v. First Nat'l Ins. Co.,* 2008 U.S. Dist. LEXIS 2288 (N.D. Fla. 2008) ("[A]ttorney's fees are not warranted where the insurance company did not wrongfully withhold the insured's benefits"): *See Tristar Lodging,* 434 F. Supp. 2d at 1298 (noting that section 627.428 "[h]as consistently been interpreted to authorize recovery of attorney's fees from an insurer only when the insurer has wrongfully withheld payment of the proceeds of the policy."

Based upon the foregoing, the Plaintiff's Motion for Attorney's Fees and Costs is hereby **DENIED**.

* * *

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

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. ROBERTO FRANCISCO HERNANDEZ and ALEX OMAR HERNANDEZ, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CA-001795-O. October 1, 2021. Paetra T. Brownlee, Judge. Counsel: Alexander L. Avarello, McFarlane Law, Coral Springs, for Plaintiff. Alex Omar Hernandez, Pro se, Altamonte Springs, Defendant.

ORDER ON PLAINTIFF, DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT, ALEX OMAR HERNANDEZ

THIS CAUSE having come before this Court at the hearing on July 20, 2021, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ALEX OMAR HERNANDEZ, and the Court having considered the same, it is hereupon,

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

1. This Court finds that the Plaintiff, Direct General Insurance Company's application for insurance required Roberto Francisco Hernandez to disclose that his nephew, Alex Omar Hernandez, and his brother, Omar Hernandez, lived with him at the policy garaging address at the time of the policy inception, that Plaintiff provided the required testimony to establish that Roberto Francisco Hernandez' failure to disclose all household residents living at the policy garaging address was a material misrepresentation because Plaintiff would not have issued the policy at the same premium, and thus, Plaintiff properly rescinded the subject insurance policy.

2. The Court finds there are no genuine issues of material fact as to Alex Omar Hernandez. The Defendant, Alex Omar Hernandez did not appear at the Summary Judgment Hearing or file any summary judgment evidence.

3. With respect to Defendant, Alex Omar Hernandez, a Clerk's Default was entered against him on April 20, 2021.

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

4. Plaintiff, DIRECT GENERAL INSURANCE COMPANY's Motion for Final Summary Judgment against the Defendant, ALEX OMAR HERNANDEZ, is hereby **GRANTED**.

5. This Court hereby enters final judgment for Plaintiff, DIRECT GENERAL INSURANCE COMPANY, and against the Defendant, ALEX OMAR HERNANDEZ.

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

7. This Court finds that the facts alleged by the Plaintiff, DIRECT GENERAL INSURANCE COMPANY, in its Complaint for Declaratory Judgment, the Motion for Final Summary Judgment, the transcript of the recorded statement of ROBERTO FRANCISCO HERNANDEZ, the Stipulation for Consent Judgment by ROBERTO FRANCISCO HERNANDEZ, and in the Affidavit of Kimberly Willcox, are not in dispute, which are as follows:

a. The DIRECT GENERAL INSURANCE COMPANY Policy of Insurance, bearing policy # FLPGXXXXX3284, is rescinded and is void *ab initio*.

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

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

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

* * *

Criminal law—Post conviction relief—Discovery—Deposition of defendant—State's motion to depose defendant prior to hearing on motion for post conviction relief is denied where state has not set forth good reason or shown good cause to depose defendant over his objection—If state shows that it is genuinely surprised by any of defendant's testimony at hearing, trial court will consider granting adjournment to allow state to obtain evidence to rebut surprise testimony

STATE OF FLORIDA, Plaintiff, v. JORGE ESPINOSA, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F14-2572-A, Section 17. October 21, 2021. Thomas J. Rebull, Judge.

ORDER ON STATE'S MOTION TO TAKE DEPOSITION OF DEFENDANT

This case is pending an evidentiary hearing on Mr. Espinosa's 3.850 postconviction motion. The State is asking me for leave to take Mr. Espinosa's deposition before he testifies at the hearing. Mr. Espinosa objects.[1] I exercise my discretion to respectfully deny the Motion.

The State and Defense agreed to exchange the names of witnesses who they intend to call at the evidentiary hearing. They also agreed to depositions of those witnesses, except for the Defendant Mr. Espinosa.

The State has not cited any legal authority approving an order to depose a criminal defendant in the postconviction context. My own independent research has not located any such authority.[2] Mr. Espinosa has, however, cited a New Mexico case which held that it was error for the trial judge to allow the state to depose a criminal defendant in a postconviction proceeding.

In *Allen v. LeMaster,* 2012-NMSC-001, ¶ 1, 267 P.3d 806, 807, the New Mexico Supreme Court held that its rules of criminal procedure prohibited taking the deposition of a criminal defendant, "including one who is in the postconviction habeas corpus phase of a criminal proceeding. *See id.* at 808. In so doing, the Court expressly rejected the argument that postconviction proceedings were civil in nature.

> The placement of habeas corpus regulation within our Rules of Criminal Procedure demonstrated this Court's recognition that postconviction motions challenging a conviction or sentence in a criminal case are in reality part of a criminal proceeding.
>
> * * *
>
> Habeas corpus proceedings under Rule 5-802, like motions for postconviction relief under former Rule 57, are in every real sense a continuation of a defendant's criminal case.

Allen v. LeMaster, 2012-NMSC-001, ¶ 15, 267 P.3d 806, 810.

The New Mexico rule provides for the taking of compelled statements, but expressly exempts the defendant. Depositions are allowed "only if the State shows that the person would be unable or unwilling to attend the trial or a hearing." *See id.*

Similarly, the Florida Rules of Criminal Procedure do not provide for depositions of criminal defendants. The rules do (as a whole) expressly apply to postconviction proceedings under rule 3.850. "These rules shall govern the procedure in all criminal proceedings in state courts including . . . proceedings under rule 3.850 . . . ." Fla. R. Crim. P. 3.010. Assuming rule 3.220 relating to discovery applies to postconviction proceedings,[3] there is no authority for the proposition that the rule permits a prosecutor to take the deposition of a defendant. Even in the pretrial stage of a criminal case there is, of course, no authority for the notion that the rules permit the State to depose a criminal defendant.

Fortunately, the Florida Supreme Court has addressed the issue of prehearing discovery in postconviction proceedings. The Court holds that "it is within the trial judge's inherent authority, rather than any express authority found in the Rules of Criminal Procedure, to allow limited discovery" in postconviction proceedings under rule 3.850. *See State v. Lewis,* 656 So. 2d 1248, 1249 (Fla. 1994).

In a later death penalty case, the Court answered the question as to whether the trial court denied the defendant due process when it denied his request to prehearing depositions of the trial judge and two trial prosecutors. The Court held that the trial judge did not abuse his discretion in denying the deposition requests. *See id*. at 1280.

Among the reasons the Court gave for its affirmance was the fact that the defendant was able to question the lead prosecutor and trial judge at the evidentiary hearing. *See id.* And the fact that the postconviction judge allowed the defendant to ask for a continuance of the hearing if he was "surprised by the testimony of the witnesses." *See id.* The Court also provided the following recap and guidance regarding discovery during postconviction proceedings.

> "In *State v. Lewis,* 656 So.2d 1248, 1249 (Fla.1994), this Court held that it is within the trial judge's inherent authority to allow limited prehearing discovery during postconviction proceedings. We set forth the following parameters for such discovery: the motion seeking discovery must set forth good reason; the court may grant limited discovery into matters which are relevant and material; the court may set limits on the sources and scope of such discovery; and on review of orders limiting or denying discovery, the moving party has the burden of showing an abuse of discretion. *Id.* at 1250 (quoting *Davis v. State,* 624 So.2d 282 (Fla. 3d DCA 1993), and adopting procedures established therein). In deciding whether to allow this limited form of discovery, the trial judge must consider "the issues presented, the elapsed time between the conviction and the postconviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." *Id.* Our opinion did not expand the discovery procedures established in Florida Rule of Criminal Procedure 3.220, which governs discovery, nor was the opinion to be interpreted as automatically allowing discovery in postconviction. proceedings. We further cautioned that a trial judge's inherent authority to permit postconviction discovery "should be used ***only upon a showing of good cause***." *Id.* While a party may be allowed to take postconviction depositions of the trial judge, this should only occur when the testimony of the judge is "absolutely necessary to establish factual circumstances not in the record," provided that the procedures set forth in the opinion are followed and the judge's thought process is not violated. *Id.* "The need to have a trial judge testify is very limited in scope and particularly applies only to factual matters that are outside the record." *Id.* at 1250 n. 3."

Rodriguez v. State, 919 So. 2d 1252, 1279 (Fla. 2005) [30 Fla. L. Weekly S385a], as revised on denial of reh'g (Jan. 19, 2006) [31 Fla. L. Weekly S39a].

Here, the State has not set forth "good reason" or made a showing of "good cause" to warrant deposing Mr. Espinosa over his objection. As in the *Rodriguez* case, *supra,* the State will have the opportunity to cross-examine Mr. Espinosa at the evidentiary hearing. And, again as in *Rodriguez,* if the State shows that it was genuinely surprised by any of Mr. Espinosa's testimony, I will ***consider*** granting the State an adjournment of the proceedings (after hearing from Mr. Espinosa of course) so that it may obtain testimony or evidence it claims it needs to rebut the surprise testimony.

Indeed, fear of surprise seems to be the primary basis for the State's request to depose Mr. Espinosa. In its Motion the State argues that "proceeding to a hearing without the benefit of deposing the defendant will place the State in an untenable position of attempting to defend the allegations without the ability to rebut them in the form of live testimony or other documentary evidence." State's Mot. at 2. I respectfully disagree.

Mr. Espinosa has been very clear and specific in his sworn 3.850 motion as to the testimony he himself intends to offer. His motion swears as follows:

• "Jorge Espinosa alleges that he would not have taken the plea but for the fact that he knew that his attorney was unprepared to represent him at trial as he had not consulted with Mr. Espinosa about a defense strategy, had not taken depositions and had not obtained the depositions that prior counsel Howard Srebnick had taken or the discovery that had [been] produced by the State, which was the bulk of it, while Howard Srebnick was on the case."

• "Jorge Espinosa further alleges that he would not have taken the plea except for the threats made to arrest his wife if he did not take the plea."

• "Mr. Espinosa alleges that the first time he learned that he would have to plea or his wife Carolina would be charged with the new crime of money laundering was on May 11, 2018, the day he took the plea, and that this threat was explicitly made to induce him to take the plea and take away any other realistic option."

• "Further, Jorge Espinosa alleges that there were not valid grounds to arrest Carolina Espinosa fox money laundering and the State did not have probable cause to do so."

• "Finally, Mr. Espinosa alleges that earlier in the case the State offered six years in prison to resolve his case. He rejected this plea because his attorney advised him that the State would not be able to prove the case against him and also failed to advise him that due to the number of counts he was facing a maximum of effective life in prison at trial. The attorney also told him that the six-year offer would remain available to him and there was no reason to take it at that time. In fact, it was later withdrawn and the offer became 20 years. Mr. Espinosa believes that his counsel was attempting to prolong the case so he could get paid as he had not been paid in full. Mr. Espinosa alleges that if he had been properly advised, he would have accepted the six-year offer, the prosecutor would not have withdrawn it, and the court would have accepted it."

Mr. Espinosa has sworn to these factual allegations. His lawyer has indicated that he intends to call him at the evidentiary hearing and elicit this testimony through direct examination. Consequently, as it relates to these matters, there can be no surprise to the State. There does not seem to be any reason that the State cannot prepare to rebut testimony from Mr. Espinosa that is consistent with these factual allegations.

For these reasons, and considering the factors set forth by the Florida Supreme Court in *Rodriguez,* I exercise my discretion to respectfully deny the State's request to depose Mr. Espinosa before the evidentiary in this 3.850 proceeding.

If after Mr. Espinosa's testimony the State establishes that it was surprised by his testimony and it could not have through due diligence been prepared to present witnesses or other evidence to rebut such "surprise testimony," I will consider adjourning the hearing to allow the State to obtain such evidence. The State will have to make such a request at that time and will have the burden to establish "surprise" and provide some indication as to the specific additional evidence it wishes to present. Mr. Espinosa will of course be heard in opposition to any such request.

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[1]I've reviewed the State's 9/21/21 Motion, Mr. Espinosa's 10/5/21 response, and his 10/7/21 notice of supplemental authority. I also held a hearing on the Motion and heard argument from all counsel.

[2]One treatise on postconviction remedies discusses policy reasons for allowing such depositions, but there is not a citation to any case where a prosecutor has been allowed to depose a criminal defendant over his objection; much less one where the defendant has indicated his intention to testify at the evidentiary hearing. *See* Brian R. Means, *Postconviction Remedies* § 20:2 (2021). There are, however, some references to cases where a prisoner's deposition testimony is used "in lieu of his testifying at the evidentiary hearing." *See id.* at § 22:26 n.15 and n. 34.

[3]While rule 3.220 says that a defendant may elect to participate in discovery "[a]fter the filing of the charging document," a fair reading of the entire rule in context, and where the rule is located within all the rules of criminal procedure, reflects that it only applies to prejudgment proceedings.

* * *

Criminal law—Prisoners—Habeas corpus—Manifest injustice—No merit to argument that prisoner whose conditional release was revoked and whose gain time was forfeited as result of possessing 20 grams or less of cannabis is being unlawfully detained because he was returned to prison for longer than one-year maximum sentence applicable to possession offense where prisoner was not returned to prison to serve new sentence for possession charge but to complete original sentence—No merit to argument that forfeiture of gain time cannot exceed amount of forfeiture allowed by administrative rules for narcotics possession where statutes expressly contemplate gain time forfeiture upon revocation of conditional release—Because prisoner whose conditional release is revoked is not entitled to credit against sentence for time served on conditional release, extension of prisoner's original maximum release date does not violate due process or constitute cruel and unusual punishment—Petition for writ of habeas corpus is denied

EDWARD WEBB, Petitioner, v. FLA. DEPT. OF CORRECTIONS, Respondent. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F21-15074, Section 09. October 21, 2021. Joseph Perkins, Judge.

ORDER DENYING AMENDED PETITION FOR HABEAS CORPUS ALLEGING MANIFEST INJUSTICE

Habeas petitioner Edward Webb's conditional release from prison was revoked, and his gain time forfeited, due to Webb's possessing 20 grams or less of cannabis. The effect of this revocation and forfeiture was for Webb to return to prison for more than one year.[1] In his Amended Petition for Writ of Habeas Corpus Alleging Manifest Injustice ("Petition"), Webb argues that he is being illegally detained[2] against his will because the maximum penalty for possession of 20 grams or less of cannabis is one year in jail. *See* Fla. Stat. §§ 893.13(6)(b) and 775.082(4)(a). For the reasons below, the Court denies the Petition.

Legal Standard

Issuance of a writ of habeas corpus[3] is governed by § 79.01, Florida Statutes and Rule 1.630 of the Florida Rules of Civil Procedure. A habeas petitioner has the initial burden of stating a *prima facie* basis for entitlement to habeas relief by (1) alleging that the petitioner is currently detained in custody, and (2) showing "by affidavit or evidence probable cause to believe that [petitioner] is detained without lawful authority." Fla. Stat. § 79.01; *Quarles v. State*, 56 So. 3d 857, 858 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D469a]; *Smith v. Kearney,* 802 So.2d 387, 389 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2691a]; *Cox v. State*, 180 So. 2d 467, 470 (Fla. 2d DCA 1965). The Court assumes the allegations in the petition are true when assessing whether it states a *prima facie* basis for relief. *Guess v. Barton*, 599 So. 2d 770, 771 (Fla. 1st DCA 1992). If it does, the trial court must issue the writ and require a response from the detaining authority. *Quarles*, 56 So. 3d at 857.

Primer on Gain Time and Conditional Release

The Florida Department of Corrections ("FDOC") is statutorily authorized to award deductions to prisoner sentences in the form of "gain time" to encourage satisfactory prisoner behavior, encourage prisoners to participate in productive activities, and reward prisoners who perform outstanding deeds or services. Fla. Stat. § 944.275. Gain time can be granted or forfeited throughout an eligible inmate's sentence for good and bad behavior. *See id*., § 944.275(4)-(7).

For each prisoner, the FDOC calculates a "maximum sentence expiration date," which is the date when a prisoner's sentence expires after deducting credit for time served in jail before being convicted. Fla. Stat. § 944.275(2)(a). The FDOC also calculates a "tentative release date," which is the date of the prisoner's projected release from custody after deducting gain time from the "maximum sentence expiration date." The "tentative release date" becomes proportion-

ately earlier as gain time is earned and proportionately later when gain time is forfeited. Fla. Stat. § 944.275(3)(a).[4]

"[F]or certain more 'at risk' inmates, while gain time awards will shorten the length of their incarceration, they will have to remain under supervision after release from prison for a period of time equal to the amount of gain time awarded." *Duncan v. Moore*, 754 So. 2d 708, 710 (Fla. 2000) [25 Fla. L. Weekly S215a]; *see* Fla. Stat. § 947.1405. In such cases, the inmate's sentence does not expire when the inmate is released from incarceration and placed on conditional release. Rather, it expires only when the inmate has satisfactorily completed the entire sentence, including the supervisory period. *Id*. at 711.

If a conditional releasee fails to comply with the terms and conditions of conditional release, the releasee may be returned to prison with all gain time forfeited. Fla. Stat. § 947.1405(2)(c); *id*., § 947.141(6); *id*., § 944.28(1); *McNeil v. Canty*, 12 So. 3d 215, 216 (Fla. 2009) [34 Fla. L. Weekly S381a]; *Duncan*, 754 So. 2d at 710. When conditional release is revoked, the inmate is returned to prison not to serve a new sentence but, rather, to finish the sentence the sentencing judge originally imposed and for which conditional release was granted in the first place. *McNeil*, 12 So. 3d at 216-17; *Duncan*, 754 So. 2d at 711. The gain-time forfeiture cannot be imposed in a way that causes a defendant to serve more incarceration time than imposed by the sentencing judge in connection with the original sentence. *McNeil*, 12 So. 3d at 216-17.

An inmate is not entitled to credit for time served while on conditional release when such release is revoked and the inmate is returned to prison. *Rivera v. Singletary*, 707 So. 2d 326, 327 (Fla. 1998) [23 Fla. L. Weekly S94a]; *Davis v. State*, 943 So. 2d 975, 976 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D3087a]; *Fleming v. State*, 697 So. 2d 1322 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D2021a]. As a result, the "maximum sentence expiration date" will be a later date upon being returned to prison than it was when an inmate was conditionally released. *See Davis*, 943 So. 2d at 976 (holding that a fifteen-year sentence imposed in 1991 could well exceed the year 2006 where petitioner was placed on conditional release and control release during sentence and, when release was revoked, petitioner forfeited gain time and time spent on release was not credited toward sentence). There is no legal impediment to the maximum sentence expiration date being recalculated in these circumstances because a prison "sentence . . . is [for] a term of years, not a specific release date." *Fleming*, 697 So. 2d at 1322-23.[5]

Discussion

Petitioner alleges that his conditional release was revoked and gain time forfeited as a result of his possessing 20 grams or less of cannabis. Petitioner argues that he is being detained unlawfully because the maximum penalty for violating section 893.13(6)(b), Florida Statutes, governing possession of less than 20 grams of marijuana is one year in jail, *see* Fla. Stat. § 775.082(4)(a), but the effect of the revocation and forfeiture was for Webb to return to prison for more than one year. He argues that FDOC, as part of the Executive Branch of government, violated the separation of powers by overlooking this one-year statutory maximum punishment.[6] Petitioner's argument fails because Petitioner was returned to prison not to serve a new, court-imposed sentence but, rather, to complete his original sentence. Additionally, it is within the power of the legislature to determine the minimum conditions under which conditional release may be granted and the effect of its revocation. *See Owens v. State*, 300 So. 2d 70, 72 (Fla. 1st DCA 1974).

Petitioner argues that his detention is unlawful because Sections 3-3 and 9-27 of Florida Administrative Code Rule 33-601.314, which governs the maximum penalties allowed for certain prisoner disciplinary offenses, permit at most a forfeiture of 180 days of gain time for offenses relating to narcotics possession and use. This argument fails because Florida Statutes expressly contemplate gain-time forfeiture upon revocation of conditional release. *See* Fla. Stat. § 947.1405(2)(c); *id*., § 947.141(6); *id*., § 944.28(1); *McNeil*, 12 So. 3d at 216; *Duncan*, 754 So. 2d at 710. Even if, *arguendo*, administrative rules governing inmate discipline applied here, "an administrative rule may not modify, enlarge or contravene a statute." *Subirats v. Fid. Nat. Prop.*, 106 So. 3d 997, 1000 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D396a].

Petitioner argues that the FDOC acted without legal authority because § 947.1405 does not authorize FDOC to extend outward the Petitioner's original maximum release date by the number of days Petitioner was on conditional release and that such outward extension violates due process and constitutes cruel and unusual punishment. This argument fails because, as discussed above, a conditional releasee is not entitled to credit against his sentence for time served on conditional release when returned to prison. A prison "sentence . . . is [for] a term of years, not a specific release date," *Fleming*, 697 So. 2d at 1322-23, and a gain-time forfeiture cannot be imposed in a way that causes a defendant to serve more incarceration time than imposed by the sentencing judge in connection with the original sentence. *McNeil*, 12 So. 3d at 216-17.

Denial vs. Dismissal of Petition

The Third District Court of Appeal has sometimes denied and sometimes dismissed habeas petitions that fail to allege a *prima facie* basis for relief. *Compare Frederick v. McDonough*, 931 So. 2d 1005 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1580c] (denying habeas petition because department of corrections may declare a forfeiture of all gain time earned when conditional release is revoked) *with Wright v. Inch*, 2021 WL 1694842 (Fla. 3d DCA Feb. 9, 2021) (dismissing habeas petition alleging ineffective assistance of appellate counsel that failed to allege a *prima facie* showing of deficient performance or prejudice). Denial on the merits is appropriate because here, unlike in a case where a petitioner fails to allege all necessary elements, Petitioner's allegations, when taken as true, affirmatively establish that he is not entitled to relief.

Instructions to Clerk

The Clerk shall mail a copy of this Order to Edward Webb, DC # [Editor's note: Number redacted], Everglades C.I., [Editors' note: Address redacted], Miami, FL 33194.

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[1]The Amended Petition for Writ of Habeas Corpus Alleging Manifest Injustice ("Petition") contains a paucity of facts, but it does allege these basic facts, which are enough for the Court to enter this Order. *See* Petition at 13-15, 21.

[2]Petitioner is currently incarcerated at the Everglades Correctional Institution in Miami-Dade County, Florida, so the Court has jurisdiction. *Broom v. State*, 907 So. 2d 1261, 1262 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1864a].

[3]For a discussion of the history and purpose of the writ, *see Henry v. Santana*, 62 So. 3d 1122 (Fla. 2011) [36 Fla. L. Weekly S191a].

[4]The tentative release date can never be later than the maximum sentence expiration date. Fla. Stat. § 944.275(3)(c).

[5]By way of an example and using simple numbers, assume that an inmate is sentenced to twenty years in prison on January 1, 2000 (and does not have any credit for time served in jail pretrial). The "maximum sentence expiration date" will be January 1, 2020. Without gain time, on January 1, 2017 the inmate would still owe the State three more years of incarceration. Assume, however, that the inmate has accumulated enough gain time to be released from incarceration on January 1, 2017 (the "tentative release date") and placed on conditional release. The conditional release period will equal the amount of gain time accrued (three years), and the sentence will still expire on January 1, 2020. If, on January 1, 2019, conditional release is revoked, all three years of gain time the inmate accrued as of January 1, 2017 will be forfeited, and the inmate will still owe the State three more years of incarceration. The inmate will not be entitled for any credit against this debt to the State for time spent on conditional release, so if returned to prison on January 1, 2019, the inmate's new maximum sentence expiration date will be January 1, 2022.

[6]It is actually the Florida Commission on Offender Review ("Commission"), not

the FDOC, that is charged with the decision of whether to revoke conditional release. *See* Fla. Stat. §§ 947.005(3) & 947.1405(2)(c).

* * *

Attorneys—Legal malpractice—Abandonment of claim—Where appeal of Agency for Health Care Administration decision to deny medical providers an administrative hearing on providers' challenge to AHCA's adverse findings in audit of Medicaid reimbursements would have likely been successful, providers abandoned legal malpractice claim against their former attorneys by choosing not to take appeal—Reviewing court would have likely concluded that providers either complied with AHCA's requirements for filing request for hearing or substantially complied with those requirements by serving request on AHCA's counsel rather than its clerk—Further, reviewing court would have likely found that AHCA erred in concluding that providers presented no facts showing that filing deadline was equitably tolled where notice of right to hearing failed to state that filing with clerk was only manner to file hearing request, and AHCA expressly directed providers' attorneys to address any communications to its counsel

RENE U. PULIDO, M.D. and EMED URGENT AND PRIMARY CARE, P.A., Plaintiffs, v. JUAN C. SANTOS, ESQUIRE and CHAPMAN LAW GROUP, PLLC, a Florida professional limited liability Company and CHAPMAN AND ASSOCIATES, P.C., a Michigan professional corporation, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case No. 2020-009171-CA-01. October 12, 2021. Michael A. Hanzman, Judge. Counsel: Warren R. Trazenfeld, Warren R. Trazenfeld, P.A., Miami, for Plaintiffs. Jonathan Vine and Keisha Hall, Cole, Scott & Kissane, P.A., West Palm Beach, for Defendants.

ORDER

I. INTRODUCTION

Before the Court is "Plaintiffs' Motion for Court to Determine Whether Appeal Would Have Been Successful" ("Motion") (D.E. 185). Through that motion, Plaintiffs ask the Court to adjudicate an issue Defendants claim to be case dispositive: whether Plaintiffs—by deciding not to appeal an adverse decision of the Agency of Health Care Administration ("AHCA" or "Agency") that resulted from Defendants' alleged negligence—abandoned the right to bring this legal malpractice action. The answer to this question turns on whether Plaintiffs would likely have been successful had an appeal been taken. If an appeal would likely have been successful, the failure to pursue it bars this case. Conversely, if an appeal would likely not have been successful, Plaintiffs' failure to pursue it is of no moment. For the reasons set forth below, the Court concludes that had Plaintiffs elected to appeal AHCA's adverse ruling, that appeal would likely have been successful, thereby curing any alleged legal malpractice. This lawsuit is therefore barred.

II. RELEVANT BACKGROUND

Plaintiffs, EMED Urgent and Primary Care, P.A. ("EMED") and Rene U. Pulido, M.D. ("Dr. Pulido") (collectively "Plaintiffs"), bring this legal malpractice action against Juan C. Santos, Esquire ("Santos"), Chapman Law Group PLLC and Chapman and Associates, P.C. (collectively "Defendants"). Plaintiffs allege that Defendants failed to properly file a Request for an Administrative Hearing ("Request") and, as a result, waived Plaintiffs' right to contest the adverse findings contained in a Final Audit Report ("FAR") issued by AHCA. Plaintiffs were therefore denied an opportunity to challenge those findings—a challenge they say would have been successful.[1]

Defendants contend that although the Request was not delivered to AHCA's designated "agency clerk," they complied (or at least substantially complied) with AHCA's filing requirements by timely serving the document on AHCA's counsel. Defendants further assert that, having timely received the Request, AHCA erroneously concluded that Plaintiffs were not entitled to an administrative hearing, and erroneously denied Defendants' subsequent Petition for Reconsideration of that decision. More importantly for present purposes, Defendants insist that Plaintiffs could have successfully challenged AHCA's erroneous ruling on appeal (*i.e.* , cured any harm caused by the alleged malpractice), and that by electing not to pursue an appeal, Plaintiffs abandoned this legal malpractice claim. *See Technical Packaging, Inc. v. Hanchett,* 992 So. 2d 309, 312 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D2305a] ("[w]here a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would *most likely* have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained") (citing *Pa. Ins. Guar. Ass'n v. Sikes,* 590 So. 2d 1051 (Fla. 3d DCA 1991)).

Plaintiffs disagree, insisting that any appeal would likely have been unsuccessful and, for that reason, the failure to pursue an appeal has no impact on this case. Put simply, Plaintiffs say that: (a) there is no duty to file a losing appeal in order to preserve a legal malpractice claim, *see Segall v. Segall,* 632 So. 2d 76, 78 (Fla. 3d DCA 1993) (not every party is required "to obtain a final appellate determination of the underlying case before asserting a claim for legal malpractice"), and (b) the appeal Defendants now say should have been pursued was a "loser." The question, then, is whether this hypothetical appeal would likely have been successful.

III. GOVERNING LAW

a. The Abandonment Doctrine

Defendants rely on the abandonment doctrine to claim this malpractice action "is not tenable" because Plaintiffs "took the affirmative step not to file an appeal; an appeal which . . . would have likely been successful." Defendants' Opp. 2. *See also Technical Packaging,* 992 So. 2d at 312 ("cause of action for legal malpractice is abandoned if a final appellate decision is not obtained"); *Bradley v. Davis*, 777 So. 2d 1189, 1190 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D548a]. The reasoning behind this doctrine is that "a favorable outcome on appeal could eliminate any reasonable possibility of loss" proximately caused by the alleged malpractice. *See, e.g., Coble v. Aronso,* 647 So. 2d 968, 970 (Fla. 4th DCA 1994); *Diaz v. Piquette,* 496 So. 2d 239, 240 (Fla. 3d DCA 1986) ("since it is plain that no claim would even have existed if the temporary results of the attorney's conduct had been reversed on appeal, this decision is in accordance [with] . . . principles that premature, possibly useless, litigation should be discouraged and that no cause of action should therefore be deemed to have accrued until the existence of redressable harm has been established").

Courts, however, point out that not every "failure to take an appeal of the underlying lawsuit, will automatically translate into an inability to establish redressable harm," *Lenahan v. Russell L. Forkey, P.A.,* 702 So. 2d 610, 611 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D18a], and have declined to establish a bright-line test for the application of the abandonment doctrine. *See, e.g., Eastman v. Flor-Ohio, Ltd.,* 744 So. 2d 499, 502 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D2148b] (joining the Third and Fourth Districts in "declining to articulate a bright line for application of the abandonment rule, pointing out that only in 'very narrow' circumstances should it be applied as a matter of law"). Rather, precedent recognizes that there are compelling policy reasons which militate against a broad application of the doctrine. A bright-line rule would force parties to file "meritless appeals" merely to preserve their right to assert a malpractice claim. *Eastman,* 744 So. 2d at 504. A compulsory requirement of an appeal also would, "in many cases, violate the tenet that the law will not require the performance of useless acts," *Segall,* 632 So. 2d at 78, and "require litigants to spend yet more of their resources prosecuting an

appeal to judicial conclusion even though they may disagree with the theory presented on appeal." *Eastman,* 744 So. 2d at 504.

For these reasons, and others, the abandonment doctrine will only bar a legal malpractice claim when "the client's loss resulted from judicial error occasioned by the attorney's curable, nonprejudicial mistake that 'in all likelihood' would have been corrected on appeal." *Lenahan,* 702 So. 2d at 611. But, a failure to appeal will not bar a lawsuit for malpractice if the appeal would likely have been unsuccessful. *See e.g. Technical Packaging,* 992 So. 2d at 312; *Lenahan,* 702 So. 2d at 612.

Plaintiffs again request that the Court find, based on the then existing record, that an appeal of AHCA's decision to deny an administrative hearing would likely have been unsuccessful. *See Technical Packaging,* 992 So. 2d at 312 ("[t]he issue here, then, is whether [defendants] could demonstrate under the summary judgment standard that an appeal by [plaintiff] . . would in all likelihood have resulted in reversal"); *Lenahan,* 702 So. 2d at 612 ("[a]t this juncture, we must conclude that, as a matter of law, the circumstances of this case do not constitute abandonment"). Defendants ask the Court to find that such an appeal would likely have been successful, and that any alleged legal malpractice would have therefore been cured. *See, e.g., Bradley*, 777 So. at 1189 (Fla. 4th DCA 2001) (affirming the trial court's holding that the client could not pursue a legal malpractice case and stating that "[w]e agree with the defendants that in all likelihood' plaintiff would have won her appeal of the dismissal with prejudice of the arbitration proceedings if she had pursued it").

b. Does the Court or Jury Decide this Issue?

Both parties agree that this issue should be decided by the Court. Precedent confirms they are correct. In *Millhouse v. Wiesenthal,* 775 S.W. 2d 626, 628 (Tex. 1989), the Court was "presented the question of whether the determination of causation in an appellate legal malpractice case is a question of law or a question of fact." *Id.* The Texas Supreme Court explained that while the determination of proximate cause was usually a question of fact, in this unusual context the issue of causation "requires determining whether the appeal in the underlying action would have been successful." *Id.* The Court then held that:

> [t]he question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. Millhouse's position that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial record and briefs, and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges; a court is qualified in a way a jury is not to determine the merits and probable outcome of an appeal. Thus, in cases of appellate legal malpractice, where the issue of causation hinges on the possible outcome of an appeal, the issue is to be resolved by the court as a question of law.

Id. Numerous other jurisdictions also have concluded that the determination of causation in this particular context is a question to be answered by the court.[2]

IV. THE RELEVANT RECORD OF THE AHCA PROCEEDINGS

AHCA is the agency responsible for the administration of the Florida Medicaid Program. EMED is a professional association which provides Medicaid services. Dr. Pulido, a physician licensed to practice medicine in Florida, is EMED's President.

At some point, AHCA audited submissions by EMED for Medicaid reimbursements. On or about October 3, 2018, Plaintiffs retained Defendants to represent them in connection with the AHCA audit. On or about October 16, 2018, AHCA's attorneys, Kimberly Murray and Ryan McNeil, informed Defendants they would be representing the Agency in the Preliminary Audit Report Matter, and requested that "any future correspondence" be addressed to their attention.

On February 4, 2019, AHCA issued its FAR, finding that "[t]he Agency has made the determination that [EMED's] violation(s) of Medicaid policy constitute fraud or abuse as referenced in Section 409.913, F.S." *See* FAR, at p. 7. Based on these findings, AHCA required EMED to repay "$803,871.68 for services that in whole or in part are not covered by Medicaid," pay $163,274.33 in fines, and $3,358.26 in audit costs, for a total of $970,504.27. *See* AHCA Feb. 4, 2019 Final Audit Report, at p.1.

The FAR contained a Notice of Administrative Hearing and Mediation Rights ("Notice") advising Plaintiffs of their right to request an administrative hearing pursuant to Florida Statute Section 120.569. This statute provides that a petition or request for a hearing "shall be **filed** with the agency." Fla. Stat. §120.569(2)(a) (emphasis added). Consistent with the statute, the FAR advised that the Request "must be **received by the Agency** within twenty-one (**21**) days of receipt of [the FAR]." *See* AHCA Feb. 4, 2019 Final Audit Report, at p. 7. Similarly, the Notice informed Plaintiffs that the Request "must conform to the requirements of either Rule 28-106.201(2) or Rule 28-106.301(2) of the Florida Administrative Code, and must be **received** by [AHCA] by 5:00 P.M. no later than 21 days after you received the FAR." *Id.* at 9 (emphasis added). Neither the FAR nor the Notice, however, clearly stated that Plaintiffs were required to file the Request with AHCA' s Clerk.

Although the Notice identified Richard J. Shoop, Esquire as the "Agency Clerk," his name was given as part of "[t]he address for filing the written request for an administrative hearing." *Id.* The Notice went on to instruct that "[p]etitions for hearing filed pursuant to the administrative process of Chapter 120, Florida Statutes **may** be filed with the Agency by U.S. Mail or courier sent to the Agency Clerk at the address listed [therein], by facsimile . . . or by electronic filing through the Agency's website at http://apps.ahca.myflorida.com/Efile." *Id.* (emphasis added.) Nowhere does the Notice make clear that a request for an administrative hearing must, in all instances, be served upon the Agency Clerk. And, as noted earlier, Defendants also had been advised that "any future correspondence" relating to the matter should be sent to the attention of AHCA's counsel, Ms. Murray and Mr. McNeil.

Both the FAR and the Notice warned that if "a written request for an administrative hearing is not timely received, [Plaintiffs] will have waived [their] right to have the intended action reviewed . . . and the action set forth in the FAR shall be conclusive and final." *Id.* at 10; *see also* Fla. Stat. §120.569(2)(c) (a petition shall be dismissed if it is not in substantial compliance with the statutory requirements or it has been untimely filed). Defendants admit the FAR was received on February 11, 2019; thus, AHCA had to receive the Request no later than March 4, 2019. On February 26, 2019, six days prior to the deadline, Defendants' staff emailed a copy of the Request to AHCA's counsel, Ms. Murray and Mr. McNeil. Defendants, however, did not serve the Request upon the Agency Clerk, Richard J. Shoop, Esquire. AHCA does not dispute that its counsel received the Request. It is also undisputed that Kimberly Murray, Ryan McNeil, and Richard J. Shoop are all attorneys at AHCA's Office of the General Counsel, and that each are located at the same address to which the Request was sent: 2727 Mahan Drive, Mail Stop #3, Tallahassee, Florida 32308.

On April 17, 2019, AHCA entered a Final Order, finding that because the Request was not served on Mr. Shoop (the Agency Clerk) EMED had not properly perfected its right to an administrative hearing, and that as a result the Agency's conclusions were deemed admitted. On April 19, 2019, two days after the issuance of the Final

Order, AHCA's counsel advised Defendants that they did "not have [a] record that [a] petition [requesting an administrative hearing] was filed." *See* Petition for Reconsideration and Exhibits.

Defendants received AHCA's Final Order on April 22, 2019. That same day, Defendants filed a Petition for Reconsideration on behalf of EMED, seeking a rescission of the Final Order and requesting leave to submit a "proper filing of [a] Petition for Formal Hearing and Mediation." As grounds for reconsideration, Santos stated that he had instructed an assistant to file the Request with the Agency Clerk and to furnish copies to AHCA's counsel. Based on these instructions, Santos was "under the belief that Respondent's Petition for a Formal Hearing and Mediation was filed with the Agency's Clerk and furnished to AHCA's attorneys . . . ." However, after receipt of the April 19, 2019 email from AHCA' s counsel stating the Request had not been filed, and after careful review of the records, it became "apparent after speaking with the Agency's Clerk that [Defendant's staff] had inadvertently overlooked filing [the Request] with the Agency's Clerk. *Id.* Defendants also advised that prior to April 22, 2019, Santos had been in discussions with AHCA's counsel regarding possible monthly payments while seeking an amicable resolution. *Id.* Santos admitted he was "acutely aware that ultimately, it's his responsibility . . . that [Plaintiffs'] Petition to a Formal Hearing be filed with the Agency's Clerk." *Id.* Santos again sought reconsideration and rescission of AHCA's Final Order, and requested that AHCA allow EMED to properly file its Request. *Id.*

On April 29, 2019, AHCA's counsel submitted the Agency's "Response to Petition for Reconsideration," stating that any person "who fails to file a written request for a hearing within twenty-one (21) days waives the right to request a hearing on such matters," citing Fla. Admin. Code. R. 28-106.111(4).[3] AHCA's counsel took the position that a Request had not been timely filed with the Agency Clerk and that, for this reason, no administrative hearing should be granted.

On May 22, 2019, AHCA issued an Order denying the Petition for Reconsideration based on the following findings: (a) there is no dispute that EMED received the FAR; (b) Rule 28-111(2) of the Florida Administrative Code requires that persons seeking an administrative hearing on an agency decision file a petition within twenty-one (21) days of receipt of the written notice[4]; (c) Rule 28-106.014(1) of the Florida Administrative Code defines "file" as "received by the office of the agency clerk during normal business hours or by the presiding officer during the course of a hearing"[5]; and (d) notwithstanding these provisions, EMED admitted they failed to file the request for an administrative hearing within the 21 days. AHCA opined that service on its counsel was irrelevant, and concluded that the Petition "offer[ed] no facts that would excuse its failure to file a request for an administrative hearing under the doctrine of equitable tolling." The Agency found that EMED had not shown it was in any way prevented from timely filing the Request and had " 'merely alleged that [it] **mistakenly failed** to do so. Such a mistake . . . does not provide [it] with an escape from the consequences' " (quoting *Gonzalez v. Fla. Dep't Fin. Svc.,* 60 So. 3d 469 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D780b]). *See* Order on Petition for Reconsideration, at p. 2.

On May 23, 2019, a day after learning of AHCA's final determination, Santos emailed Plaintiffs to inform them of AHCA's position and asked that they contact him to discuss their legal options. One of those options, which remained available until June 21, 2019 (thirty days from the issuance of the May 22, 2019 ruling), was to file an appeal of AHCA's Order denying the Petition for Reconsideration. *See State v. Murciano,* 163 So. 3d 662, 664 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1008a] (a petition for review of a final or nonfinal agency action is "within 30 days of rendition of the order to be reviewed") (citing Fla. Stat. §120.68(1) and Fla. R. App. P. 9.100(c)(3)). On June 3, 2019, Plaintiffs notified Santos that he was formally discharged, and that all records should be forwarded to their new counsel, Christine Whitney, Esquire.

Plaintiffs (presumably after consulting their new counsel) chose not to appeal AHCA's Order denying the Petition for Reconsideration. They instead left AHCA's order unchallenged and filed this legal malpractice suit against their former attorneys.[6] In response, Defendants again argue the lawsuit is barred because an appeal would have cured what, in their view, were erroneous rulings. The Defendants believe Plaintiffs would have likely prevailed on appeal because: (a) AHCA had timely received the Request, as it was delivered to the lawyers Santos was directed to communicate with (*i.e.,* Ms. Murray and Mr. McNeil); (b) Santos substantially complied with all requirements for filing the Request; and (c) Defendants' failure to file with the Agency Clerk was excused under the doctrine of equitable tolling. Had an appeal been successful, AHCA would have been ordered to afford Plaintiffs an administrative hearing as permitted by law, *see* Fla. Stat. §120.68(6)(a),[7] thereby eliminating the prospect of any harm caused by the alleged legal malpractice, as a reversal would have placed Plaintiffs in the same position they would have been in had no alleged malpractice occurred: namely, with the opportunity to have an administrative hearing.

V. APPELLATE STANDARD OF REVIEW

Because the facts upon which AHCA based its ruling are undisputed, an appeal of the decision to deny Plaintiffs an administrative hearing would have been subject to *de novo* review. *See Fortune v. Gulf Coast Tree Care Inc.,* 148 So. 3d 827, 828 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2152a] ("[w]hen the facts are not in dispute, the application of law to those facts is reviewed de novo, and to the extent resolution of an issue requires statutory interpretation, review is de novo"); *Rodriguez v. Dep't of Bus. And Prof'l Regulation,* Case No. 3D20-1417, 2021 WL 3744956, at *1 (Fla. 3d DCA Aug. 25, 2021) [46 Fla. L. Weekly D1923c] ("[w]e review issues of law in a final administrative order de novo"). So the relevant questions become whether an appellate court, employing a standard of de novo review, would have likely concluded that: (a) Defendants complied (or substantially complied) with AHCA's filing requirements; and (b) AHCA was required, by principles of equitable tolling, to afford Plaintiffs a hearing on the merits.

VI. ANALYSIS

a. Actual/Substantial Compliance

In this Court's opinion, a reviewing court would likely have concluded that Plaintiffs either complied (or substantially complied) with AHCA's filing requirements, as the FAR and the Notice only require that the Agency **receive** the request within 21 days. Both documents fail to inform the reader, **clearly and unequivocally**, that any Request **must** be filed with the Agency Clerk in order for AHCA to deem it received. And while Florida Administrative Code Rule 28-106.104(1) states that "filing shall mean received by the office of the agency clerk," AHCA did not reference this rule anywhere in either the FAR or the Notice.

An administrative agency must give an adversely affected party a "clear point of entry" into the administrative process. *Fla. League of Cities, Inc. v. Admin. Comm'n,* 586 So. 2d 397, 414-15 (Fla. 1st DCA 1991); *City of St. Cloud v. Dept. of Envtl. Regulation,* 490 So. 2d 1356, 1358 (Fla. 5th DCA 1986) (a "[n]otice of agency action which does not inform the affected party of his right to request a hearing, and the time limits for doing so, is inadequate to provide a clear point of entry to the administrative process"). A "clear point of entry" requires that an agency clearly inform the affected party of its rights and the time limits. *Id.* Thus, "[t]he notice must contain a statement concerning a right to a hearing, set forth a time limit for requesting a hearing,

and **refer to the applicable procedural rules** of the agency." *Id.* (emphasis added); *McIntyre v. Seminole Cty. School Bd.* 779 So. 2d 639, 741-42 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D707a] ("for an agency to establish that a person has waived his right to an administrative hearing, the agency must demonstrate that the person has been advised of the action to be taken and the basis thereof, the right to an administrative hearing, **a clear point of entry** into the administrative process, and a deadline by which a hearing must be requested") (emphasis added). "The policy behind the requirement of a clear point of entry is to assure that affected parties are not prejudiced by administrative action without being afforded an opportunity to pursue an available and adequate remedy." *Fla. League,* 586 So. 2d at 414 (internal citation omitted). "Notice of final agency action is intended to create a clear point of entry, not a trap for the unwary." *Id.*

Here, the FAR and Notice merely denote that **receipt** by the Agency is required and, as phrased, that the Request **may** be filed with the Agency Clerk through several avenues. The address where the Request may be sent is the one used by all attorneys at AHCA's Office of the General Counsel; the name of the Agency Clerk is only provided as part of the address where the Request is filed; and there is no indication that Mr. Shoop **must** be the one served. All wording referencing filing with the Agency Clerk are encased in permissible rather than mandatory language (*i.e.,* the petition "may be filed" with the agency clerk at the address listed, rather than must be filed). Thus, AHCA's documents fail to provide a clear point of entry as to whom the Request must be served to constitute receipt. Moreover, Defendants were specifically told that all communications in this case should be served upon AHCA's counsel, Ms. Murray and Mr. McNeil. That is precisely how Santos served the Request, and neither Ms. Murray nor Mr. McNeil denied its receipt. A reviewing court would therefore likely have concluded that AHCA timely and properly received the Request. *Manasota-88, Inc. v. State Dep't of Envtl. Regulation,* 417 So. 2d 846, 847 (Fla. 1st DCA 1982) (holding agency had failed to meet the requirements for providing a clear point of entry and, therefore, petition for hearing was not untimely).

Even if the appellate court concluded that service on Mr. Shoop was the *sine qua non* of a proper Request, under the facts of this case that appellate court would likely have held that the receipt of the Request by AHCA's counsel was in substantial compliance with AHCA's filing mandate. Section 120.569, cited in the FAR and the Notice, provides that:

> [u]pon receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in **substantial compliance** with these requirements or it has been untimely filed.

Fla. Stat. §120.569(2)(c). The "wording of the statute itself" allows dismissal of a petition "only if the petition 'is not in **substantial compliance** with these requirements . . . .' " *Brookwood Extended Care Ctr. Of Homestead, LLP v. Agency for Healthcare Admin.,* 870 So. 2d 834, 842 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1869a] (concurring opinion). "Because of due process considerations, if there is any doubt about the sufficiency of the petition, the doubt must be resolved **in favor of granting the administrative hearing.**" *Id.* The substantial compliance standard can be applied to interpret whether a filing is timely. *See generally, W. Frank Wells Nursing Home v. Agency. for Health Care Admin.,* Case No. 02-4752, 02-4827, 2003 WL 22977815 (Fla. Div. Admin. Hrgs. Dec. 15, 2003) (reviewing administrative judge found that "the circumstances show that, in effect, substantial compliance with the . . . filing deadline has been met" even though the petitioner filed his request for a hearing thirteen (13) days late). Additionally, in *Pro Tech Monitoring, Inc. v. State Dep't of Corrections,* 72 So. 3d 277, 279 (1st DCA 2011) [36 Fla. L. Weekly D2282b], the court explained that Rule 28-106.104 (defining "received" when a petition is filed with the agency) "was adopted in an effort to establish procedures that comply with the requirements of Administrative Procedure Act" and for the purpose of "furthering justice instead of frustrating it." *Id.*

In fact, in this Court's opinion, an appellate panel would have quickly discerned that AHCA pulled a "gotcha." *See generally C.R. v. Dep't of Children and Families,* 225 So. 3d 393, 394 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D1819b] (the purpose of statute is not to terminate parental rights on a "gotcha" basis, but "to ensure that the object of the termination petition is not defeated by the neglect of the proceeding by the parent"); *Jaszay v. H.B. Corp,* 598 So. 2d 112, 113 (Fla. 4th DCA 1992) (the court will not countenance "gotcha" maneuvers, where appellee is estopped from asserting statute of limitations defense because it stipulated to extension of pre-suit screening period).

Again, the FAR and the Notice do not **clearly** command that a Request be filed with the Agency Clerk, and AHCA's counsel instructed Defendants to submit all "further correspondence" to their attention. AHCA's counsel, who are part of AHCA's Office of the General Counsel, do not deny timely receiving the Request and, therefore, AHCA was on **actual** notice of EMED's request for an administrative hearing. Nothing more was required. *See, e.g., Patry v. Capps,* 633 So. 2d 9, 12 (Fla. 1994) ("[w]hen considering other statutes that appear to mandate a specific mode of service, several Florida courts have held actual notice by a mode other than that prescribed sufficient"); *Frymer v. Brettschneider,* 696 So. 2d 1266, 1268 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1618b] ([w]here the purpose of the statute has not been diminished or harmed and where due process has been afforded, this court has held that substantial compliance with a statute's notice procedures is sufficient"); *S. Steel Co. v. Hobbs Const. & Dev., Inc.,* 543 So. 2d 843, 845 (Fla. 3d DCA 1989) ("actual notice may be sufficient to satisfy the notice requirement even though not in compliance with the statute"); *Phoenix Ins. Co. v. McCormick,* 542 So. 2d 1030, 1031 (Fla. 2d DCA 1989) (though statute requires notice by registered or certified mail, an absence of strict compliance is not fatal when insureds have received "actual notice"). AHCA, through the counsel it instructed Santos to "communicate" with, had actual possession and notice of Plaintiffs' Request. It was therefore required to offer Plaintiffs an administrative hearing. As Judge Schwartz succinctly put it, ". . . I see no reason why the failure to properly *serve* something on someone who already knows of the document's existence should relieve" the recipient of the legal consequences that flow from its receipt. *Spencer v. EMC Mortg. Corp.,* 97 So. 3d 257, 262 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2068a] (concurring opinion). The Court agrees, and finds that an appellate court would likely have ordered AHCA to grant Plaintiffs an administrative hearing.

d. Equitable Tolling

Because the Court has concluded that had an appeal been taken, an appellate court would likely have ordered a hearing on the merits because: (a) the filing requirements for serving the Request were satisfied; or (b) Defendants substantially complied with those filing requirements, it need not address whether an appellate court also would have likely found that the doctrine of equitable tolling was implicated. The Court will nevertheless briefly address this issue for purposes of completeness.

In its ruling, AHCA found that the Petition presented no facts showing that Plaintiffs were misled, lulled into inaction, or that they were "in some extraordinary way prevented" from asserting their rights. *See, e.g., Machules v. Dep't of Admin,* 523 So. 2d 1132 (Fla.

1988). Defendants argue that on appeal this conclusion would have likely been found erroneous. The Court agrees.

Courts apply equitable doctrines to "ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules." *Machules,* 523 So. 2d at 1134. The *Machules* court described *Martinez v. Orr,* 738 F.2d 1107 (10th Cir. 1984) as an example of when a person is "misled or lulled into inaction," stating that:

> [i]n *Martinez,* the claimant had received notice informing him of his right to file a civil action within thirty days as well as his right to request that his EEOC complaint be reopened. During the process of requesting reopening and reconsideration by the EEOC, he missed the deadline for filing a civil suit. The court noted that "the notice says only that suit *may* be filed within thirty days; it does not specify that this period represents the claimant's one and *only* opportunity to file suit." Under these circumstances, the court reasoned that equitable tolling was appropriate.

Id. at 1135. The claimant in *Martinez* (albeit initially proceeding as *pro se*) did not allege that he had been lulled into inaction. Similarly, Plaintiffs Petition for Reconsideration did not claim that they were lulled into inaction. But equitable tolling would nevertheless be applicable here because: (a) the FAR and Notice failed to state, **with clarity,** that filing with the Agency Clerk was the **only** way AHCA will deem the Request received; and (b) AHCA again expressly directed Defendants to communicate with its counsel—precisely what Santos did. Finally, as in *Martinez,* a reviewing court would likely have concluded that this is not a circumstance involving "unreasonable or unnecessary delay." *Martinez,* 738 F. 2d at 1112.

VI. CONCLUSION

The Court has carefully reviewed the record that would have been presented on appeal had Plaintiffs challenged AHCA's decision. Based on that record, the Court finds that an appeal of AHCA's decision to deny Plaintiffs an administrative hearing would likely have been successful. Plaintiffs therefore abandoned this claim for legal malpractice by choosing not to take an appeal. Defendants counsel shall prepare, and submit to the Court, a Final Judgment of Dismissal consistent with this Order.[8]

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[1]Assuming the case proceeded to trial, Plaintiffs would have to prove that had they received an administrative hearing, the adverse findings contained in the FAR would have been vacated and/or modified. In other words, Plaintiffs would have to prove a "case within a case." *See, e.g., Gunn v. Minton,* 568 U.S. 251, 259 (2013) [24 Fla. L. Weekly Fed. S39a] ("in cases like this one, in which the attorney's alleged error came in failing to make a particular argument, the causation element requires a 'case within a case' analysis of whether, had the argument been made, the outcome of the earlier litigation would have been different").

[2]*See, e.g., Cabot, Cabot & Forbes Co. v. Brian, Simon, Peragine, Smith & Redfearn,* 568 F.Supp. 371, 374 (E.D.La.1983) (applying Louisiana law), aff'd, 835 F.2d 286 (5th Cir. 1987); *Phillips v. Clancy,* 152 Ariz. 415, 421, 733 P.2d 300, 306 (Ariz.Ct.App.1986); *Croce v. Sanchez,* 256 Cal.App.2d 680, 683, 64 Cal.Rptr. 448, 449-50 (1967), cert. denied, 391 U.S. 927, 88 S.Ct. 1827, 20 L.Ed.2d 666 (1968); *Hyduke v. Grant,* 351 N.W.2d 675, 677 (Minn.Ct.App.1984); *Katsaris v. Scelsi,* 115 Misc.2d 115, 118, 453 N.Y.S.2d 994, 996-97 (1982); *Jablonski v. Higgins,* 6 Ohio Misc.2d 8, 10-11, 453 N.E.2d 1296, 1298-99 (Ohio C.P.1983); *Chocktoot v. Smith,* 280 Or. 567, 575,571 P.2d 1255, 1259 (1977); *Jackson v. Olson,* 77 Or.App. 41,45, 712 P.2d 128, 130 (1985); *Sola v. Clostermann,* 67 Or.App. 468, 472, 679 P.2d 317, 319 (1984); *Stafford v. Garrett,* 46 Or.App. 781, 786, 613 P.2d 99, 101 (1980); *Floyd v. Kosko,* 285 S.C. 390, 394, 329 S.E.2d 459, 461(S.C.Ct.App.1985); *Daugert v. Pappas,* 104 Wash.2d 254, 258-59, 704 P.2d 600, 603-04 (1985); *Helmbrecht v. St. Paul Ins. Co.,* 122 Wis.2d 94, 127 n. 14, 362 N.W.2d 118, 135 n. 14 (1985); *Lewandowski v. Continental Casualty Co.,* 88 Wis.2d 271, 279, 276 N.W.2d 284, 287 (1979); *General Accident Fire & Life Assurance Corp. v. Cosgrove,* 257 Wis. 25, 27, 42 N.W.2d 155, 156 (1950). *Id.*

[3]Fla. Admin. Code R. 28-106.111(4) states that "[a]ny person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense."

[4]The correct cite to AHCA's quoted provision is Fla. Admin. Code R. 28-106.111(2).

[5]The correct cite to AHCA's quoted provision is Fla. Admin. Code R. 28-106.104(1).

[6]Based upon the record, the Court cannot discern why Plaintiffs decided not to appeal AHCA's decision. If successful they would have obtained a hearing and eliminated the need to bring a legal malpractice action. At worst, the appeal would have been unsuccessful, and they could then pursue this malpractice claim. *See Peat, Marwick, Mitchell & Co. v. Lane,* 565 So. 2d 1323 (Fla. 1990). Maybe Plaintiffs calculated that they had a better chance of recovery through a legal malpractice action than through the administrative hearing they would have received had AHCA's decision been reversed on appeal. In any event, why Plaintiffs chose not to appeal is irrelevant. The question, viewed by the Court objectively, is whether an appeal would likely have been successful.

[7]Fla. Stat. § 120.68(6)(a) provides as follows:

> The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The Court may:
>
> 1. Order the agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and
>
> 2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

[8]The Court notes that at the time Plaintiffs discharged Defendants, and retained successor counsel, they had ample time remaining in which to file an appeal. Had Defendants continued to represent Plaintiffs until the time for filing an appeal expired, and had Plaintiffs elected not to appeal based upon Defendants advice, or had Defendants not advised Plaintiffs of the option to appeal, the outcome here would be different.

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Corporations—Shareholder derivative actions—Limitation of actions—Summary judgment is granted in favor of defendants in thirteen derivative actions—Actions are time-barred where single breach of fiduciary duty claim advanced in each case accrued more than four years ago—Relation-back doctrine—Derivative actions do not relate back to direct actions brought earlier by plaintiff where derivative actions are separate from direct actions, not modifications of direct claims, and plaintiff was acting in separate capacities in bringing direct and derivative claims—Equitable tolling—Limitations period cannot be tolled by trial court's alleged rulings advising plaintiff that he could pursue direct and derivative claims together where record does not support claimed rulings—Even if court had so ruled, reliance on trial court rulings is not grounds for equitable tolling

CONSTANTINE SCURTIS, ACREI, LLC, ACREI-II, LLC and ACREI-III, LLC, Plaintiffs, v. ALEXANDER E. RODRIGUEZ, STUART ZOOK, NEWPORT PROPERTY VENTURES LTD., et al., Defendants. IN RE: SCURTIS V. RODRIGUEZ CONSOLIDATED DERIVATIVE ACTIONS. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case Nos. 2014-31805 CA 01, 2021-589 CA 01, 2021-590 CA 01, 2021-591 CA 01, 2021-592 CA 01, 2021-672 CA 01, 2021-682 CA 01, 2021-698 CA 01, 2021-699 CA 01, 2021-700 CA 01, 2021-701 CA 01, 2021-702 CA 01, 2021-703 CA 01, 2021-704 CA 01. August 24, 2021. Michael A. Hanzman, Judge. Counsel: Katherine Eskovitz, Nathan Holcomb, and Colleen Smeryage, Santa Monica, CA, for Plaintiffs. John Lukacs, Coral Gables; and Benjamin Brodsky and Alaina Fotiu-Wojtowicz, Miami, for Defendants.

FINAL SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is "Defendants' Motion for Summary Judgment on the Thirteen Derivative Lawsuits" filed by nominal Plaintiff, Constantine Scurtis ("Plaintiff" or "Scurtis"). (DE 921).[1] Defendants insist that these derivative cases, which were first filed on January 8, 2021, are time-barred because the single breach of fiduciary duty claim advanced in each case accrued more than four (4) years prior to filing. *See* Fla. Stat. § 95.11 (3); *Amato v. City of Miami Beach,* 208 So. 3d 235, 238 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2712b] ("[a] breach of fiduciary duty claim may be based on negligence or intentional conduct, but under either alternative, the statute of limitations is four years").

Plaintiff does not deny that the breach of fiduciary duty claim pled in each of these derivative cases accrued more than four (4) years prior

to January 8, 2021. But he says these derivative cases relate-back to the original complaint he filed in 2014, which brought only direct claims. This is so—according to Plaintiff—because "the derivative complaints arise from the same conduct, transaction, or occurrence as in the original direct action . . ." Plaintiff's Opp. pp 4-5. Plaintiff alternatively claims the statute of limitations "must be equitably tolled due to reliance on the court." Plaintiff's Opp. p 6. Specifically, he points out that: (a) this Court's predecessors denied motions to dismiss his individual case, based on the contention that he had improperly pled both direct and derivative claims; (b) he allegedly relied on those rulings, "which permitted this case to proceed with the derivative claims and the direct claims within the same action for . . . six years"; and (c) Plaintiff was therefore "misled or lulled" into inaction by predecessor judges. Plaintiff's Opp. p. 6.

The Court entertained oral argument on the motion on August 19, 2021, and the matter is now ripe for disposition. For the reasons that follow, the Court concludes that these thirteen (13) derivative actions are in fact time-barred, and accordingly enters Final Summary Judgment in favor of all Defendants.

II. RELEVANT BACKGROUND

In 2003 Alexander Rodriguez ("Rodriguez") and his then brother-in-law, Scurtis, decided to invest in real estate together.[2] Rodriguez would provide capital (or access to capital), and Scurtis would contribute real estate "know how" and "sweat equity."

Scurtis identified acquisition targets and the parties—using Rodriguez' capital—began to acquire income producing real estate. Like many real estate investors, they formed a single purpose entity (typically a limited partnership) to acquire each parcel. Each entity was governed by a written limited partnership agreement that identified all general/limited partners, and the percentage of the entity each partner owned. Generally speaking, Rodriguez was the 95% owner, Scurtis owned approximately 5%, and an entity controlled by Scurtis (initially ACREI, LLC) was designated the general partner of each limited partnership as well as a .01% owner.[3] Each written limited partnership agreement carefully defined the respective rights and obligations of the general and limited partners.[4]

At or about 2005, Scurtis and Rodriguez decided to expand what Scurtis described as their "mom and pop" shop and pursue larger projects. They then hired Fred Levenson, Esquire ("Levenson"), an attorney at White and Case, to counsel them on matters of corporate structuring and acquisition financing. Levenson recommended that a new "guarantor" entity be formed so that Rodriguez and Scurtis would not have to personally guarantee debt or be subject to so-called "bad-boy" carve outs on otherwise non-recourse financing. Rodriguez and Scurtis agreed to implement this recommendation, and Levenson formed Newport Property Apartment Ventures, Ltd. ("NPV") as the new "guarantor" entity.

To capitalize NPV, thereby enabling it to serve as the guarantor for acquisition loans, Scurtis and Rodriguez assigned to this new entity their respective interests in twelve (12) limited partnerships that had already acquired real estate. At that time the general partner of each of these twelve (12) limited partnerships was an entity controlled by Scurtis (ACREI, LLC, ACREI II, LLC or ACREI III, LLC). Following this March 2005 transaction, and the assignments executed in connection therewith, all interests in these limited partnerships previously owned by Rodriguez and Scurtis, including Scurtis' interest in the ACREI entities, were transferred to—and now owned by—NPV.[5] NPV was owned 94.5% by Rodriguez and 5% by Scurtis, with a minor interest (.5%) held by an entity general partnership, Newport Property Apartment Ventures, Inc. ("NPV, Inc.").[6] NPV, Inc. was, in turn, wholly owned by Rodriguez.[7] This 2005 transaction therefore divested Scurtis of legal operating control over the twelve (12) limited partnerships that were now held by NPV—transferring that control to Rodriguez. Scurtis, however, continued to manage the day-to-day affairs of the restructured business.

Between 2005 and 2007 Rodriguez and Scurtis jointly acquired additional properties, continuing to use single purpose limited partnerships (or other closely held entities). Like before, Scurtis generally owned 5%, with Rodriguez owning approximately 95%, of each entity. A general partner entity, now controlled by Rodriguez, would own a small (usually .01%) interest. Both Scurtis and Rodriguez executed written limited partnership (or operating) agreements governing each of these entities.

In 2008 the marriage between Rodriguez and Cynthia began to unravel, and the relationship between Rodriguez and Scurtis quickly followed suit. On August 14, 2008, Scurtis was: (a) removed as a member of the Board of Directors (or similar governing body) of each partnership entity; (b) "terminated and removed as an [sic] manager of each General Partnership and/or Newport Entity"; and (c) divested of "any authority" or "apparent authority" to act "on behalf of any general partner, any Management Entity or any of their respective affiliates, subsidiaries, ..." *See* August 14, 2008 "Written Consent of Equity Holders." This written consent also directed "each General Partner and each Newport Entity" to take all action necessary to: (a) terminate Scurtis for "cause" from all board/officer positions; and (b) prevent Scurtis from (i) accessing any tangible or intangible property, including financial books and records; and (ii) communicating with any third parties on behalf of the entities. *Id*.[8]

On September 18, 2008, Scurtis advised "everyone that effective immediately I will no longer be working at Newport," and that he had "decided to pursue other opportunities." He further advised that "Stuart Zook will become the Chief Operating Office at Newport," and asked, "everyone to embrace the change and continue to work with the same passion and desire to grow Newport to heights we have dreamed about." From that point forward Scurtis had no involvement in day-to-day business affairs.

III. THE LITIGATION

On December 17, 2014, Scurtis filed his individual action, case number 2014-31805 CA 01. In Count I of his initial complaint, he alleged that Defendant 6th Avenue Buildings, Ltd. (one of the parties' jointly owned entities) breached a contract by "selling properties without authority, without notifying Scurtis, and without compensating Scurtis." Complaint p. 4. Four properties that were allegedly sold in violation of this contract were identified: 2395 NE 6th Avenue, Miami, Florida—2341 NE 6th Avenue, Miami, Florida—2347 NE 6th Avenue, Miami, Florida—and 700 NE 24th Street, Miami, Florida. Similar breach of contract claims also were advanced against three (3) other entities that had been formed by Rodriguez and Scurtis to acquire real estate: 455 Building, Ltd. (count II), 750 Bayfront, Ltd. (count III), 500 NE 24th Street, Ltd. (count IV) and 2328 NE 6th Ave, Ltd. (count V).

The initial complaint also brought a breach of contract claim against Rodriguez, alleging that he also sold "properties without authority, without notifying Scurtis, and without compensating Scurtis." Complaint ¶ 40 (count IV). The complaint also pled a claim for "Improper Conveyance" (whatever that may be) against all Defendants (count VII). Plaintiff sought damages equaling "5% of net profits from the sale of the subject properties; the loss of the right to sell the property in the future; and the loss of right to develop the property in the future." Complaint ¶ 48. This initial pleading was filed by Scurtis individually, not on behalf of any entity.

On August 26, 2015, Scurtis filed his "Amended Complaint and Demand for Jury Trial," adding meat to the bones. This pleading was brought by Scurtis as well as ACREI, LLC. Again, no derivative claims were brought. The amended complaint added a number of additional Defendants, including Stuart Zook and other Rodriguez-Scurtis partnership entities that had not been previously sued. This amended pleading also contained additional background allegations,

including beefed up allegations relating to the formation and structure of the parties' venture.

The amended complaint alleged that: (a) Rodriguez and Scurtis orally agreed to enter into a general partnership for the purpose of acquiring, rehabilitating, developing and managing income producing real estate; (b) that pursuant to this oral agreement Scurtis (through his entity SITRUCS) was to receive a three percent (3%) acquisition fee on all real estate acquired; (c) that NPV was formed to act as the Rodriguez-Scurtis general partnership and to administer several limited partnerships under the umbrella of the Rodriguez-Scurtis general partnership; and (d) that the NPV partnership agreement granted each partner a "right of first refusal" to buy another's limited partnership interest.[9] The amended complaint also alleged that Rodriguez—with the assistance of others—transferred assets belonging to the Rodriguez-Scurtis general partnerships to newly created entities [MCM and MRES], and that Scurtis was entitled to a five percent (5%) ownership interest in these entities, as well as a three percent (3%) acquisition fee for each piece of real property they acquired. Amended Complaint ¶ 93.

On June 13, 2016, Scurtis, ACREI, LLC and ACREI II, LLC filed a "Verified Second Amended Complaint" which also pled no derivative claims. Nor were any derivative claims pled in the "Third Amended Complaint" filed by Scurtis, ACREI, LLC and ACREI II, LLC on April 25, 2019. Scurtis then changed counsel, retaining the firm of Roche Cyrulnik Freedman LLP. Shortly thereafter, on January 8, 2021, he, together with all three ACREI entities, filed a "Verified Fourth Amended Complaint."[10] This pleading, like its predecessors, was brought by the Plaintiffs in their own capacities—not on behalf of any of limited partnership entities.[11]

On January 8, 2021, the same day Plaintiffs filed their "Verified Fourth Amended Complaint," Scurtis—for the first time—filed these thirteen (13) derivative actions, advancing a single breach of fiduciary duty claim on behalf of certain of the entities in which he owns a five percent (5%) interest.[12] Through these thirteen (13) actions Scurtis, in a derivative capacity, brings a claim "belonging to the [partnership entities], *Kaplus v. First Cont'l Corp.,* 711 So. 2d 108, 110 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1021b], with Scurtis himself "being only a nominal Plaintiff." *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]; *Regalado v. Cabezas,* 959 So. 2d 282, 287 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D939a] (in a derivative action the entity "is the real party interest and the shareholders are merely redressing rights of action that belong to the corporation"); *Liddy v. Urbanek,* 707 F.2d 1222, 1224 (11th Cir. 1983) ("[t]he corporation is the real party in interest even though the corporate management has failed to pursue the action").[13]

IV. GOVERNING LEGAL PRINCIPLES

Before addressing Plaintiff's relation-back and equitable tolling arguments, the Court will briefly discuss two overarching legal principles that inform its analysis.

First, limitation periods are creatures of statute, which is precisely why they are called "statutes of limitation." And as our Supreme Court has recently reminded us, these statutes, like all others, must be applied as written by the Legislature. *See, e.g., R.R. v. New Life Cmty. Church of CMA, Inc.,* 303 So. 3d 916, 921 (Fla. 2020) [45 Fla. L. Weekly S261a] ("[a]s we must, we examine this issue in the context of the overall statutory framework governing limitations periods"). *See also Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd.,* 894 So. 2d 954, 960 (Fla. 2005) [30 Fla. L. Weekly S109a] ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning"); *DMB Inv. Tr. v. Islamorada, Vill. of Islands,* 225 So. 3d 312, 317 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1615a] ("[t]he Legislature must be understood to mean what it has plainly expressed . . . " and when a statute is clear and "unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms").

Second, "[i]n a derivative action, a stockholder seeks to sustain in his or her name, a right of action belonging to the corporation." *Kaplus v. First Cont'l Corp.,* 711 So. 2d 108, 110 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1021b]. "The corporation is the real party in interest with the stockholder [here Scurtis] being only a nominal plaintiff." *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c] (citing *James Talcott, Inc. v. McDowell,* 148 So.2d 36, 37 (Fla. 3d DCA 1962)). Put another way, in a derivative action the named/nominal plaintiff [here Scurtis] is advancing a claim that belongs to a completely different party—the entity on whose behalf the claim is brought. *See, e.g., Liddy v. Urbanek,* 707 F.2d 1222, 1224 (11th Cir. 1983) ("[t]he corporation is the real party in interest even though the corporate management has failed to pursue the action").

Because a plaintiff pursuing both direct and derivative claims is acting in two distinct capacities, and pursuing claims belonging to two distinct parties, our appellate court has long held that direct and derivative claims cannot be combined in a single action. *See, e.g., Dep't of Ins. of State of Fla. v. Coopers & Lybrand,* 570 So. 2d 369 (Fla. 3d DCA 1990); *Gen. Dynamics Corp. v. Hewitt,* 225 So. 2d 561, 563 (Fla. 3d DCA 1969); *Lobree,* 199 So. 3d at 1097-98. For this reason, plaintiffs who want to bring both direct and derivative claims must file separate actions—one on their own behalf (direct claims) and the other on behalf of the entity they seek to represent (derivative claims). The cases are then usually consolidated when they involve a common nucleus of operative facts.

Instead of bringing both direct and derivative claims back in 2014, Scurtis decided to pursue only individual claims (and later claims belonging to the ACREI entities) from 2014 through January 8, 2021—the date on which these thirteen (13) derivative actions were first filed. To be sure, Scurtis—in his direct action—sought to recover for himself damages that belonged to some of the juridical entities he now seeks to represent derivatively. But that does not transform his 2014 direct action into a derivative case. What it was (and still is) is a direct action seeking to recover damages he suffered, as well as damages he did not suffer.

The bottom line is that Plaintiff did not purport to bring (or actually bring) any derivative actions until January 8, 2021, even though, as the Court will discuss later, he (or his counsel) knew (and were repeatedly advised by the Defendants) that he could not secure damages belonging to these entities through his direct case. Armed with that knowledge, and controlling precedent requiring him to file a derivative case(s) if he sought to redress injuries suffered by these entities, he nevertheless elected to forge ahead without filing derivative actions until January of 2021. Unfortunately for the entities he now seeks to pursue claims on behalf of, the derivative actions he filed in 2021 do not relate-back to his 2014 direct action, and the statute of limitations governing these claims is not subject to equitable tolling.

V. ANALYSIS

A. Relation-Back

Like our statutes of limitation, the relation-back doctrine is codified. It is embodied in Florida Rule of Civil Procedure 1.190(c), which provides:

> **(c) Relation Back of Amendments.** When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

Fla. R. Civ. P. 1.190(c). The language of this Rule could not be clearer. It permits the relation-back of claims or defenses brought in

an "amended pleading" when such claims or defenses arise out of the same or similar conduct, transaction or occurrence that is the subject of the "original pleading." *Id.* Nothing in this rule, as plainly written, permits claims pled in a separate lawsuit to relate-back to the time an earlier lawsuit was filed. That alone forecloses Plaintiff's argument. *Weston TC LLLP v. CNDP Mktg. Inc.,* 66 So. 3d 370, 375 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1610a] ("[w]hen a rule is clear and unambiguous, courts will not look behind the rule's plain language or resort to rules of construction to ascertain intent"). *R.R.,* 303 So. 3d 923 ("[w]hen a 'statute purports to provide a comprehensive treatment of the issue it addresses, judicial lawmaking is implicitly excluded' ").[14]

The Court appreciates that Rule 1.190 (c) must be "construed liberally," *Stirman v. Michael Graves Design Group, Inc.,* 983 So. 2d 626, 628 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1248a], and that a lawsuit should not be ". . . a game of chess in which the technique of the maneuver captures the prize." *Schwartz ex rel. Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.,* 725 So. 2d 451, 454 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D403a]. But this Court has no authority to disregard the plain meaning of Rule 1.190 (c) just because it may believe that, in this unusual context, it is "a good idea or the 'fair' thing to do." *Guardian Ad Litem Program v. O.R.,* 45 So. 3d 974 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2275a]. *See also R.R.,* 303 So. 3d at 923 ("[t]he statutory framework [of Chapter 95] leaves no room for supplemental common law . . . rules"). The Court's constitutional charge is to apply the Rule as written—period. *See, e.g., L.P. v. Dep't of Children & Family Serv.,* 962 So. 2d 980, 982 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1830b] (it is a court's ". . . duty to say what the law is, and not what it should be").

As plainly written, Rule 1.190 (c) does not permit a separate free-standing lawsuit to relate-back to an earlier lawsuit. Rather, like the Federal Rule of Civil Procedure it is patterned after (15(c)), the Rule only comes into play when an original complaint is amended. *See, e.g., In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.,* 2004 WL 487222, at *3 (S.D.N.Y. Mar. 12, 2004) (rejecting the argument Scurtis makes here because of one "fundamental flaw: the issuer complaint is not an amended pleading, but rather an entirely new complaint. By its terms, Rule 15(c) simply does not apply to complaints filed in separate lawsuits"); *Bruce Kirby, Inc. v. LaserPerformance (Europe) Ltd.,* 2019 WL 3767510, at *5-6 (D. Conn. Aug. 9, 2019) (although the allegations in new suit "resemble those" first asserted in a prior suit "against the same defendants," Rule 15 (c) does not permit an "attempt to relate back between *separate* lawsuits"); *Hunsinger v. Leehi Intern.,* 2010 WL 2573948, at *3 (S.D. Fla. June 24, 2010) (". . . it is well established that a separately filed claim, as opposed to an amendment or a supplementary pleading, does not relate back to a previously filed claim"); *Gray v. Arkansas Dep't of Hum. Servs.,* 588 Fed. Appx. 515 (8th Cir. 2015) ("Gray's complaint did not relate back to a pleading she filed in a separate lawsuit and that her claims were barred under the applicable statute of limitations"); *U.S. ex rel. Malloy v. Telephonics Corp.,* 68 Fed.Appx. 270, 273 (3d Cir. 2003) ("pursuant to the plain language of the rule, the relation back theory applies to an amendment of a pleading in the same civil action"); *Lucchesi v. Experian Info. Solutions, Inc.,* 226 F.R.D. 172, 175 (S.D.N.Y. 2005) (the applicable rule "contemplates the relation back of pleadings only in the context of a single proceeding"); *Palatkevich v. Choupak,* 152 F. Supp. 3d 201, 226 (S.D.N.Y. 2016) ("the concept of relation back permits parties to modify claims already filed, not to file entirely new lawsuits").

Even if Plaintiff could overcome this hurdle, what he actually argues here is that an otherwise time-barred lawsuit filed by party "A" can relate-back to an earlier action filed by party "B." As the Court pointed out earlier, a plaintiff bringing direct and derivative claims is acting in two separate capacities, and pursuing claims owned by two separate parties, which is precisely why direct and derivative claims cannot be brought in a single action. *See, e.g., Lobree,* 199 So. 3d at 1097-98. In a direct claim, plaintiff is seeking to vindicate legal rights belonging to herself. In a derivative action, plaintiff is seeking to vindicate legal rights belonging to an entirely different party—the entity on whose behalf the claim is brought. As one appellate court put it, "[t]here is a clear and necessary distinction between an individual action and a derivative one." *Alario v. Miller,* 354 So. 2d 925, 926 (Fla. 2d DCA 1978). And a claim brought by one party does not relate-back to a claim brought by an entirely different party, even if both arise out of the same transaction or occurrence. *See, e.g., Castro v. Linfante,* 307 So. 3d 110, 113 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1774a] (separate and distinct causes of action for loss of consortium "must be 'timely' in their own right for purposes of the statute of limitations," and do not relate back to claims brought by spouse seeking damages "for her own injuries," even though both claims arose out of the same act of alleged medical malpractice).[15]

B. Equitable Tolling

Plaintiff next says that the statute of limitations should be equitably tolled because he relied upon the Court's predecessors' denials of motions to dismiss. This argument is both factually and legally bankrupt.

As for the facts, in response to Scurtis' "Amended Complaint" and "Verified Second Amended Complaint," Defendants sought dismissal, claiming that Plaintiff had ". . . [i]mproperly Combine [d] a Direct Individual Action and a Derivative Suit." *See* Motion to Dismiss Amended Complaint, pp. 9 -11; "Motion to Dismiss Second Amended Complaint" pp. 27-29. That argument was factually incorrect because, as the Court pointed out earlier, Plaintiff never brought claims in a derivative capacity prior to January 8, 2021. What he did was try to recover, for himself, damages suffered by certain of the entities. In other words, in his direct action he sued both for damages suffered by himself and by other parties (*i.e.,* the entities). That, however, did not make his direct action a derivative case. It was a direct case that attempted to recover damages suffered by Scurtis and other parties (*i.e.,* the entities).

Then Circuit Judge Gordo—in an unelaborated order—denied Defendants' motion. *See* March 1, 2017 Order. The court did not, however, rule that Scurtis could combine direct and derivative claims—something Scurtis had not tried to do, and that is foreclosed by binding precedent. All Judge Gordo did was deny a motion to dismiss which raised arguments that were not confined to the four-corners of Plaintiffs pleading—nothing more. She did not rule that direct and derivative claims could be combined in the same case, or give Scurtis legal advice.

Defendants then made the same argument in seeking dismissal of Plaintiffs' Third Amended Complaint. *See* Motion to Dismiss Third Amended Complaint, pp. 36-37. But again, Plaintiff had not pled direct and derivative claims. He pled only direct claims which may have improperly sought damages belonging to one or more of the partnership entities. So Judge Santovenia—like Judge Gordo—denied the motion to dismiss in an unelaborated order. *See* September 11, 2019 Order. But like Judge Gordo, Judge Santovenia did not "green light" Plaintiff combining direct and derivative claims—something he again never tried to do.

Even assuming this Court's predecessors flat out told Scurtis that he could pursue direct and derivative claims together (something neither did), equitable tolling still would not rescue these time barred cases for two reasons. First, as the Court pointed out earlier, limitation periods are creatures of statute, and our legislature has specified the circumstances under which a limitation period may be tolled. *See* Fla.

Stat. § 95.051(2). Alleged reliance on a trial court's ruling is not one of those enumerated circumstances. *See, e.g., Baez v. Root,* 2014 WL 1414433, at *3 (S.D. Fla. Apr. 11, 2014) (". . . Florida Statute 95.051(2) provides for an exclusive list of circumstances where the statute of limitations is tolled and expressly precludes use of any tolling provision not listed"); *HCA Health Serv. of Fla., Inc. v. Hillman,* 906 So. 2d 1094, 1099 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D2760a] (noting that ". . . the supreme court [has] declined to create additional tolling exceptions to those listed in the statute and instead deferred to the legislative directive that there be no tolling exceptions other than those declared by the legislature"). *See also R.R.,* 303 So. 3d at 923 ("[t]o give proper effect to statutes of limitations, courts must also faithfully apply the accrual and tolling rules prescribed by the Legislature").

Second, even in the administrative context, which is where the doctrine of equitable tolling may be applied, *see Hillman,* 906 So. 2d at 1099, it is only triggered when a party "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." *Machules v. Dep't of Admin.,* 523 So. 2d 1132, 1134 (Fla. 1988). None of these circumstances are present here.

Again, neither Judge Gordo nor Judge Santovenia ruled that Plaintiffs could combine both direct and derivative causes of action. They did no more than deny motions to dismiss in unelaborated orders. And even if either (or both) of these jurists had unequivocally told Scurtis that this was permissible—despite binding appellate precedent to the contrary—it would not matter because litigants have no right to rely upon the erroneous advice of a court. *See, e.g., Godfrey v. Carlon, Inc.,* 760 So. 2d 1064, 1065 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1486b] (party who voluntarily dismissed case in reliance upon trial court's "painfully" wrong advice that statute of limitations had not run, and that case could therefore be refiled was not entitled to relief in subsequently refiled case that was in fact time-barred, as counsel was required to ascertain the consequences of the dismissal).

Scurtis and his counsel were charged with knowledge of binding precedent, and if he wanted to pursue claims belonging to any of the limited partnership entities, he was obligated to follow all procedures necessary to bring derivative claims, and was required to bring those claims within the applicable limitation period. *See, e.g., Rappaport v. Scherr,* 2021 WL 2125129, at *3 (Fla. 3d DCA May 26, 2021) [46 Fla. L. Weekly D1231b] (". . . before filing a derivative action, the shareholder must first make a presuit demand upon the corporation, giving the corporation itself an opportunity to act or to refuse to act"). He did neither, instead waiting until January 2021 to bring derivative actions which, by that time, were long time-barred.

In sum, no rulings of this Court's predecessors "misled" Scurtis or "lulled" him into inaction.[16] For whatever reason, Scurtis decided not to bring derivative claims until January 8, 2021. Perhaps Scurtis was hoping he could somehow recover damages suffered by the entities through his direct action, thereby receiving 100% (as opposed to 5%) of the recovery. *See Sinibaldi v. Sinibaldi ex rel. Get Strong, Inc.,* 100 So. 3d 72, 73 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D2411e] (as a derivative action is, by definition, brought "on behalf of a corporation," any judgment was required to be in favor of the entity itself). One thing, however, is clear: through their motions to dismiss Defendants repeatedly advised Plaintiff that he could not recover damages suffered by these juridical entities through his direct case. Yet, instead of covering all bases by bringing derivative cases at the time, Scurtis chose to forge ahead with his direct action only—filing these derivative suits for the first time in January 2021—long after the breach of fiduciary claim pled was time-barred.

VI. CONCLUSION

Limitation periods are statutory, and the Court's duty is to "faithfully apply" Section 95.11 and Rule 1.190(c) as plainly written. *R.R.,* 303 So. 2d at 923. The claims advanced in these thirteen (13) derivative cases accrued more than four (4) years prior to filing, and they do not relate-back to Scurtis' 2014 direct case. Nor are these untimely claims saved by the doctrine of equitable tolling.

The Court hereby grants Final Summary Judgment in favor of Defendants in each of these consolidated derivative claims. Plaintiffs shall take nothing from these actions and all Defendants shall go hence without day. The Court retains jurisdiction to entertain any authorized and timely post-judgment motions including, but not limited to, motions for attorney's fees and costs.

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[1]The thirteen derivative suits filed by Scurtis are cases: *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Cedar LLC and Cedar Acquisition, Ltd. as Nominal Defendant,* 2014-589 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Newport Pinetree and Lakeside I, LLC and Newport Pinetree and Lakeside I, Ltd. as Nominal Defendant,* 2021-590 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Normandy, LLC and Normandy Acquisition, L.P. as Nominal Defendant,* 2021-591 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Oak Courts, LLC and Oak Court Acquisition, L.P. as Nominal Defendant,* 2021-592 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Royal Gulf LLC and Royal Gulf Acquisition, L.P. as Nominal Defendant,* 2021-672 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, ACREI, LLC and 6th Ave. Buildings, Ltd. as Nominal Defendant,* 2021-682 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, ACREI, LLC and 420 Apartments Ltd. as Nominal Defendant,* 2021-698 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, ACREI, LLC and 455 Building, Ltd. as Nominal Defendant,* 2021-699 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, ACREI, LLC and 2328 NE 6th Ave., Ltd. as Nominal Defendant,* 2021-700 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Wood Creek and Regency Park, LLC and Wood Creek and Regency Park Ltd. as Nominal Defendant,* 2021-701 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, Colony Oaks, LLC and Colony Oaks Acquisition, Ltd. as Nominal Defendant,* 2021-702 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, ACREI, LLC and Newport Property Ventures, Ltd. as Nominal Defendant,* 2021-703 CA 01; *Constantine Scurtis v. Alexander E. Rodriguez, Stuart Zook, ACREI, LLC and 500 NE 24 St. Ltd. as Nominal Defendant,* 2021-704 CA 01.

[2]Rodriguez was then a major league baseball player who was married to Scurtis' sister.

[3]ACREI, LLC was formed in March 2003. Scurtis was its sole member and its manager. *See* Limited Liability Operating Agreement, ACREI, LLC. Scurtis later formed, and was the sole manager and member of ACREI II, LLC and ACREI III, LLC, two other limited liability companies that also served as a general partner of certain Rodriguez-Scurtis limited partnerships. ACREI is an acronym for "Alex Constantine Real Estate Investments."

[4]*See, e.g.,* March 28, 2003 "Limited Partnership Agreement" for 2328 NE 6 Ave. Ltd.

[5]Scurtis does not deny executing an "Assignment and Assumption of Membership Interest" transferring, as "Assignor," his interest in ACREI, LLC, ACREI II, LLC and ACREI III, LLC to NPV, as "Assignee." But he alleges that he "never knowingly signed" these documents—whatever that may mean. Revised Fourth Amended Complaint, ¶ 164. He is nevertheless bound by these contracts. *Sabin v. Lowe's of Fla., Inc.,* 404 So. 2d 772, 773 (Fla. 5th DCA 1981) ("[a] party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions").

[6]*See* April 5, 2005 Limited Partnership Agreement for NPV.

[7]In a written consent executed by both Rodriguez and Scurtis, each acknowledged that Rodriguez was issued 1000 shares of, and named President of, NPV. Scurtis was not issued any shares.

[8]This resolution also authorized each entity to negotiate a redemption (*i.e.,* purchase) of any and all interests owned by Scurtis. This never occurred and Scurtis continues to own his 5% interest in these entities.

[9]Based upon this "right of first refusal," Scurtis has alleged that he had the right to acquire real estate assets sold by any of the limited partnerships and has sought, as damages, profit he says he would have made had he been afforded that opportunity. The Court has rejected this claim because the limited partnership agreements, as plainly written, only provide for a "right of first refusal" when a limited partner seeks to transfer "his interest in the Partnership . . . ." *See, e.g.,* March 28 2003 "Limited Partnership Agreement" for 2328 N.E. 6 Ave., Ltd., Article VI. No limited partner was granted a "right of first refusal" to purchase any asset belonging to the entity itself. The Court will enforce the contracts as plainly written. *See, e.g., Gulliver Sch., Inc. v. Snay,* 137 So. 3d 1045 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D457a].

[10]Given the fact that Scurtis assigned his interest in all three ACREI entities to NPV, the Court cannot discern how Scurtis had the authority to bring this case on their behalf.

[11]On February 4, 2021, the Court struck all allegations of Rodriguez' marital infidelities as "scandalous and wholly irrelevant," and directed Plaintiffs "to re-file their pleading absent these allegations." *See* February 4, 2021 Order. On February 9, 2021, Plaintiffs filed their "Revised Verified Fourth Amended Complaint," which is identical to the prior version *sans* the stricken allegations.

[12]Under settled Florida law direct and derivative claims may not be brought in a single lawsuit, as "one cannot in the same action sue in more than one distinct right or capacity." *Gen. Dynamics Corp. v. Hewitt,* 225 So. 2d 561, 563 (Fla. 3d DCA 1969); *Lobree v. ArdenX LLC,* 199 So. 3d 1094 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2095a].

[13]Derivative actions, which in most jurisdictions are now statutory, are in the public interest as shareholders Jack standing to bring an action for injuries suffered by the entity itself, and corporate insiders (who are often the targets of such claims) tend to, for obvious reasons, lack motivation to direct the filing of a lawsuit against themselves. *Lewis on Behalf of Citizens Sav. Bank & Tr. Co. v. Boyd,* 838 S.W.2d 215, 221 (Tenn. Ct. App. 1992) (derivative actions are "an extraordinary . . remedy available to shareholders when a corporate cause of action is, for some reason, not pursued by the corporation itself").

[14]For this reason, decisions such as *Mender v. Kauderer,* 143 So. 3d 1011 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1537b] and *Brewer v. Gen. Nutrition Corp.,* 2015 WL 5072039 (N.D. Cal. Aug. 27, 2015) provide Plaintiff no comfort, as each involved amendments to an original action, not a separate lawsuit.

[15]Assume, for example, that Smith and Jones are injured in a car accident caused by Johnson. Smith then brings an action against Johnson which seeks to recover damages sustained by both himself and Jones. Years later Jones brings his own case after the statute of limitation has expired. That time-barred suit obviously does not relate-back to the date on which Smith brought his case, even though Smith sued to recover damages suffered by Jones. The same analysis applies here. Despite the fact that Scurtis attempted to sue for damages suffered by these entities, he had no ability to obtain that relief in his direct case. And the claims on behalf of the entities Scurtis eventually filed derivatively in 2021 do not relate-back to his original direct filing.

[16]The Court notes that no case cited, or that it could locate, has ever applied the doctrine of equitable tolling in a circumstance when a litigant claimed to have been "misled" or lulled" into inaction by an erroneous court order, let alone an order they themselves secured. Here, Scurtis opposed the arguments Defendants made in their dismissal motions and secured favorable rulings. Thus, if the Court's predecessor erred (and they did not) such error was invited by Scurtis himself. Thus, his argument here is akin to a litigant arguing that an erroneous order she secured should not be reversed on appeal because she "relied" on it during trial proceedings. To articulate the argument exposes its absurdity.

* * *

Consumer law—Class actions—Florida Motor Vehicle Retail Sales Finance Act—Motion to dismiss amended complaint in class action seeking damages and incidental relief for alleged use of predatory interest rates in excess of FMVRSFA interest rate ceiling is denied—Complaint contains plain statement of ultimate facts, is not conclusory and does not impermissibly commingle claims against multiple defendants—No merit to argument that complaint should be dismissed for failure to contain alter ego or veil piercing allegations sufficient to impose liability on individual defendants where complaint alleges individual liability under FMVRSFA—Complaint adequately alleges facts and circumstances as to typicality and adequacy of representation of class consisting of persons who entered into credit agreement with unlicensed lender at interest rates far above FMVRSFA rate ceiling

DEANNE C. JENKINS, Plaintiff, v. E.R. TRUCK & EQUIPMENT CORPORATION, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-024681-CA-01, Section CA15. September 29, 2021. Jose Rodriguez, Judge. Counsel: Robert W. Murphy, Murphy Law Firm, Ft. Lauderdale; and Joshua Feygin, Joshua Feygin, PLLC, Hallandale, for Plaintiff. Alejandro Miyar and Charles H. Lichtman, Berger Singerman, LLP, Ft. Lauderdale, for Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR DAMAGES AND INCIDENTAL RELIEF

THIS CAUSE came before this Court on August 20, 2021 on Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Damages and Incidental Relief. This Court, having heard argument of counsel, reviewed the memoranda of law, and otherwise being advised in the premises, **DENIES** said motion and finds as follows:

1. This matter involves the purchase and financing of equipment (a commercial vehicle). On February 9, 2017, Plaintiff Deanne C. Jenkins (Jenkins) allegedly entered into an Equipment Finance Agreement or Truck Loan Agreement (Agreement) with "East Harbor" [Defendant E.R. Truck & Equipment Corp. d/b/a "East Harbor"] to finance the amount of $27,230.00 for the purchase of a used commercial truck (a 2006 Freightliner). The term of loan was for thirty-six months with payments in the amount of $1,279.00. The total price paid (with interest) by Jenkins after the last monthly installment was $46,044.05. The interest rate for the extension of credit to Jenkins was 38.0352%.

2. On November 16, 2020, Jenkins filed a class-action Complaint for Damages and Incidental Relief and on June 25, 2021 an Amended Complaint for Damages and Incidental Relief [class action amended complaint] asserting that Defendants E.R. Truck & Equipment Corp., d/b/a "East Harbor," Azares 3, LLC d/b/a "East Harbor," and East Harbor, Inc. d/b/a "East Harbor" as well as individual Defendants Bruno Raschio and Gian F. Raschio (Messrs. Raschio) sold a used commercial truck using predatory interest rates in excess of the interest rate ceiling of the Florida Motor Vehicle Retail Sales Finance Act (FRSFA).

3. A motion to dismiss tests the legal sufficiency of the complaint. *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D648a]. The allegations are taken as true, but they must be "reviewed in light of the applicable substantive law to determine the existence of a cause of action." *Blue Supply Corp. v. Novos Electro Mech., Inc.,* 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2149a]. Defendants seek to dismiss the entire class action amended complaint under Florida Civil Procedure Rules 1.110 and 1.220(c)(2) with prejudice.

4. Initially, Defendants argue that all three counts of the class action amended complaint, Count I, a violation of the FRSFA, Count II, declaratory relief, and Count III, restitution and unjust enrichment, should be dismissed with prejudice since the class action amended complaint is an improper pleading under Florida Rule of Civil Procedure 1.110 because the class action amended complaint commingles five lumped in "Defendants" as to each of the three Counts.

5. Defendants argue that all sixty-four paragraphs of the class action amended complaint commingle allegations and legal conclusions against the five lumped in "Defendants." Defendants argue that commingling separate and distinct claims against multiple defendants warrants a dismissal of the class action amended complaint in its entirety because the pleading fails to show how any defendant caused the injury and damages alleged. Jenkins argues that Defendants' position is misplaced and inapposite to the allegations in the class action amended complaint which is against multiple Defendants for the same claims on the same operative facts in the same Count and is not impermissibly commingling claims against multiple Defendants by alleging different causes of action in a single count or claim.

6. Florida Rule of Civil Procedure 1.110 (Rule 1.110) provides that a complaint "shall contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." *Collado v. Baroukh*, 226 So. 3d 924, 927 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1916a]. A review of the class action amended complaint shows that it contains such a plain statement, is not conclusory, and uses the term "Defendants." While the term "Defendants" is utilized throughout the entire class action amended complaint, Defendants are not necessarily "lumped in" (as Defendants argue). This is because, concerning the separate corporate Defendants, the class action amended complaint shows that each has been doing business as "East Harbor" (a tradename) to allegedly make and collect loans at predatory high interest rates above the interest rate ceiling of the FRSFA. Also, the face of the attached Agreement repeatedly indicates that

"East Harbor" is the finance company, the equipment (used commercial truck) remained the personal property of the finance company, and that the financing or a financing program is provided by "East Harbor." Jenkins correctly points out that on a motion to dismiss, all allegations of the class action amended complaint are taken as true.

7. It is well established that each separate count should allege "each claim founded upon a separate transaction or occurrence." *Id.* at 928 (commingling separate and distinct claims against multiple defendants together may also warrant a dismissal of the complaint); *K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL,* 48 So. 3d 889, 893 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2317a] ("A party should plead each distinct claim in a separate count of the complaint, rather than plead the various claims against all of the defendants together."). A review of the three Counts of the class action amended complaint show that each Count is founded on a separate transaction. Based on this record, this Court finds that the class action amended complaint for damages and incidental relief is not dismissed under Rule 1.110 for commingling five lumped in "Defendants."

8. Defendants also argue that all three counts of the class action complaint, Count I, a violation of the FRSFA, Count II, declaratory relief, and Count III, restitution and unjust enrichment, should be dismissed with prejudice since the class action amended complaint is an improper pleading under Florida Rule of Civil Procedure 1.110 because it fails to meet the threshold pleading requirements to impose individual or alter ego liability on Messrs. Raschio.

9. Without any evidence to support their position, Defendants raise corporate veil arguments. Defendants assert that the allegations in the class action amended complaint as to Messrs. Raschio in the group of "Defendants" are without adequate alter ego or veil piercing allegations and are therefore insufficient and conclusory to disregard the three commingled corporations, since they were alleged to have entered into the subject Agreement. Defendants rely on *Houri v. Boaziz*, 196 So. 3d 383 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D625a] (citations omitted) to assert that the class action amended complaint fails to allege how the identities of any of the East Harbor entities were not lawfully maintained. ("?[E]ven if a corporation is merely an alter ego of its dominant shareholder . . . the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained.' " *Id.* at 390). However, Jenkins correctly points out that the separate corporate Defendants were alleged in the class action amended complaint to be using the same tradename "East Harbor" at the same business address. Further, on a motion to dismiss, all allegations of the class action amended complaint are taken as true.

10. Additionally, Messrs. Raschio allegedly operated the three different corporations using the same tradename "East Harbor" at the same business address. Jenkins argues that Messrs. Raschio are personally liable for a violation of the FRSFA (Count I) as they were engaged in predatory high interest rate loans above the interest rate ceiling of FRSFA and Defendants commingle individual liability with alter ego or veil piercing theories.

11. Concerning a violation of the FRSFA (Count I), Jenkins argues that a license must be obtained and that an application must "disclose the material information concerning officers, directors and control persons." The class action amended complaint alleges that Messrs. Raschio were control persons as defined under section 520.01(4), Florida Statutes (2016). It alleges that the Loan Agreements used by Defendants did not provide the disclosures necessary under the FRSFA and concealed the true cost of the credit and predatory interest exacted from Jenkins and the purported putative class members.

12. Jenkins argues that the civil remedies section of the FRSFA imposes individual liability on "any person" (including Messrs. Raschio) who willfully and intentionally violates the disclosure requirements of the statute or engages in the business of retail installment seller without obtaining a license. The class action amended complaint alleges that Messrs. Raschio were in the business of retail installment sellers without obtaining the required license. Defendants (including Messrs. Raschio) allegedly flaunted their noncompliance of the FRSFA by not obtaining a compliant license until July 1, 2020. Based on this record, this Court finds that the class action amended complaint for damages and incidental relief is not dismissed under Rule 1.110 since, as pled, as it alleges individual liability on Messers. Raschio.

13. Next, Defendants rely on *Dade County Police Benevolent Ass'n, Inc. v. Metropolitan Dade County,* 452 So. 2d 6 (Fla. 3d DCA 1984) and argue that the class action amended complaint should be dismissed with prejudice for the failure to plead the class action representation allegations of typicality and adequacy of representation under Florida Rule of Civil Procedure 1.220(c)(2). Rule 1.220(c)(2)(A-E) states as follows:

> (c) Pleading Requirements: Any pleading. . .alleging the existence of a class shall contain the following:
>
> * * *
>
> (2) Under a separate heading, designated as "Class Representation Allegations," specific recitation of:
>
> (A) the particular provision of subdivision (b) under which it is claimed that the claim or defense is maintainable on behalf of a class;
>
> (B) the questions of law or fact that are common to the claim or defense of the representative party and the claim or defense of each member of the class;
>
> (C) the particular facts and circumstances that show the claim or defense advanced by the representative party is typical of the claim or defense of each member of the class.
>
> (D) (i) the appropriate number of class members, (ii) a definition of the alleged class, and (iii) the particular facts and circumstances that show the representative party will fairly and adequately protect and represent the interest of each member of the class; and
>
> (E) The particular facts and circumstances that support the conclusions required of the court in determining that the action may be maintained as a class action pursuant to the particular provision of subdivision (b) under which it is claimed that the claim or defense is maintainable on behalf of a class.
>
> (Rule) by repeatedly making conclusory allegations. Defendants particularly maintain without any further explanation that paragraphs 37 to 46 of the class action amended complaint are boilerplate class action representation allegations that do not show a common nexus between Jenkins' claims and the putative class of plaintiffs.

14. Jenkins correctly argues that Defendants improperly commingle certification of a class action under the Rule with the allegation of the existence of a class and they rely on legal authority that seeks class certification. Jenkins argues that she is not seeking to establish entitlement to class certification or that her allegations are sufficient to support certification of a class action but that she has met the minimum pleading requirements of the Rule. Jenkins has not filed a motion for class certification on this record.

15. Regarding the minimum pleading allegation requirements of the existence of a class action, Jenkins correctly argues that the class action amended complaint adequately contains facts and circumstances that meet the pleading requirements. First, to comply with subdivisions (A-E) of the Rule (alleging the existence of a class) the class action amended complaint alleges that "this is a case maintainable on a class-wide basis pursuant to Rule 1.220(b)(2) and (b)(3) . . . and the Class Representative brings this action on behalf of herself and a class of all other persons similarly situated (the "Class"), to remedy the ongoing usurious business practices alleged herein . . . ." While Defendants claim boiler plate allegations exist, paragraph 37 of the class action amended complaint specifically defines the class as "[a]ll borrowers under a Loan Agreement entered into from four years

prior to the filing of the instant action to July 1, 2020." Additionally, as to the subdivisions of the Rule, the class action amended complaint (in its allegations section and counts therein) alleges particular facts and circumstances as to the common questions of law and fact regarding the three violations of the FRSFA by Defendants in using the Loan Agreements.

16. Unlike in *Dade County Police Benevolent Ass'n, Inc.,* Jenkins correctly argues the class action amended complaint adequately alleges facts and circumstances as to the typicality requirement (addresses the relationship of the class representative's claim to a putative class member's claim). The class action amended complaint alleges that: "the claims asserted by the named Plaintiff in this action are typical of the claims of the members of the Class(es) because, upon information and belief, Defendants used standardized loan agreements as a routine business practice. The claims of the Plaintiff and of the Class(es) originate from the same conduct, practice, and procedure on the part of Defendants. Plaintiff possesses the same interests and has suffered the same injuries as each Class member. There are no individual facts which distinguish the Plaintiff from other Class members."

17. Likewise, unlike in *Dade County Police Benevolent Ass'n, Inc.,* Jenkins correctly argues the class action amended complaint asserts facts and circumstances as to the adequacy of representation requirement, i.e., the particular facts and circumstances that show the representative party will fairly and adequately represent the class members. The class action amended complaint alleges that the "named Plaintiff will fairly and adequately represent and protect the interest of the members of the Class(es) because she has no interest antagonistic to the Class . . . . Whether the Defendants' lending practices violate state law is an issue that will be decided for all other consumers with similar or identical Loan Agreements."

18. Jenkins argues that the well pled nexus is that each putative class member entered into a credit agreement with an unlicensed lender [Defendants] at interest rates far above the interest rate ceiling of the FRSFA. All putative class members are alleged to seek the same remedy as Jenkins. Accordingly, this Court does not dismiss the class action amended complaint for damages and incidental relief under Florida Rule of Civil Procedure 1.220(c)(2), as it sufficiently pleads facts and circumstances regarding the typicality and adequacy of class representation for valid class action allegations.

It is thereupon, **ORDERED** and **ADJUDGED** that:

Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Damages and Incidental Relief is **DENIED.**

Defendant has twenty (20) days from the date of this Order to Answer the Complaint.

* * *

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

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. REBEKAH L. WILLIAMS, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County, Civil Division. Case No. 21-CA-000124. September 28, 2021. Joseph C. Fuller, Judge. Counsel: Robert Savage, Savage Villoch Law, PLLC, Tampa, for Plaintiff. Stephen Dommerich, Aloia, Roland, Lubell & Morgan, for Defendant.

ORDER ON PLAINTIFF DIRECT GENERAL INSURANCE COMPANY'S MOTION FOR FINAL SUMMARY JUDGMENT AGAINST DEFENDANT REBEKAH L. WILLIAMS

THIS CAUSE having come before this Court at the hearing on September 20, 2021, on the Plaintiff, Direct General Insurance Company's Motion for Final Summary Judgment against the Defendant, REBEKAH L. WILLIAMS, and the Court having considered the Motion and record evidence, and heard argument of counsel and otherwise being advised in the premises, it is hereby,

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

Factual Background

Plaintiff, DIRECT GENERAL INSURANCE COMPANY (hereinafter, "Plaintiff"), by and through its undersigned counsel, brought this action for Declaratory Judgment against the named insured Defendant, REBEKAH L. WILLAMS (hereinafter, "Defendant") to declare her insurance policy with insurance application date of January 26, 2020 ("Insurance Application") declared void *ab initio.* (A copy of the Insurance Application is attached to the Complaint as Exhibit "B.") Plaintiff rescinded Defendant's insurance policy on the basis that Defendant failed to disclose that her minor, aged 15 or older son M.D.E. was residing with her at the policy address.

Defendant failed to disclose in Section A. of the Insurance Application entitled: "**INFORMATION RE: OPERATORS, DRIVERS AND HOUSEHOLD RESIDENTS: Provide the following information for Applicant, Applicant's spouse and ALL persons age 15 years and older who reside with Applicant, whether or not they (1) operate any of the vehicles listed above, or (2) are licensed to drive. . .**" (emphasis in original) that her son M.D.E. was a household resident.

Defendant answered "NO" to question #4 in section D of the Insurance Application that asked "[a]re there any residents in your household who are 15 years and older, whether licensed or not, that you have not disclosed on this Application, including children/step-children who reside temporarily elsewhere?" Defendant knew at the time she answered "NO" that her age 15 or older son resided with her at the address listed on the Insurance Application.

Defendant, based on her responses in Sections A. and C. of the Insurance Application wherein she listed her spouse in Section A. as a household resident and then listed him as an excluded driver in Section C., understood the requests posed by Sections A. and C. of the Insurance Application.

Defendant, based on her April 22, 2020 modification to the Insurance Application wherein she changed her spouse from an excluded driver to a regular operator, understood how to make changes to the Insurance Application as needed. This April 22, 2020 modification is evidenced by the transcript of the June 14, 2021 deposition of Rose Chrustic, at page 24, lines 4-25 that Defendant's counsel filed with the Court.

In addition, Defendant acknowledged by her signature on the Insurance Application that she had, ". . .read and understood all the questions, statements, and information set forth in the Application, including this Applicant's Statement. I hereby represent that my answers and all information provided by me or on my behalf contained in this Application is accurate and complete."

Moreover, Defendant acknowledged by her signature on the Insurance Application's "**Fraud Statement: I understand that any policy issued by the Company is issued based on an in reliance upon the information provided in this Application and I agree that any policy issued may be null and void and no coverage provided is the information in this application is materially false or misleading**."(emphasis in original)

Defendant admitted in her December 4, 2020 Examination Under Oath (exhibit B to Plaintiff's Motion for Summary Judgment) at page 14, lines 1-6, that she read the request about listing all household members over the age of 14 but that she did not think it mattered.

Pursuant to the policy of insurance issued to the Defendant, Plaintiff Direct General Insurance Company may void the insurance policy as follows (emphasis in original):

Part VI—General Provisions

FRAUD AND MISREPRESENTATION

1. SIMPLEX END **[Editor's note: As on court's slipsheet.]**

The statements made by **you** in the application are deemed to be **your** representations. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under this policy if:

(1) the misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by us; or

(2) if the true facts had been known to **us, we** in good faith would not have issued the policy, would not have issued it at the same premium rate, would not have issued a policy in as large an amount, or would not have provided the coverage with respect to the hazard resulting in the loss.

We do not provide coverage for **you** or any insured person who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

Further, Florida Statutes §627.409(1) states:

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

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

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

Plaintiff Direct General argued in its summary judgment motion that both Florida Statute §627.409 and binding case law support Plaintiff's position that the insurer determines the materiality of the risk, not the insured. As the Fla. Supreme Court ruled "[t]he statute recognizes the principals of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. This Court cannot grant [**10] an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 409, (Fla. 1986). It was the Plaintiff's position that the terms of the Insurance Application were unambiguous.

The Court finds that the subject insurance policy was rescinded void *ab initio* pursuant to Florida Statute §627.409 and the terms of the insurance policy issued by Direct General Insurance Company.

CONCLUSION

The Court finds that the Plaintiff, Direct General Insurance Company's application for insurance unambiguously required Defendant REBEKAH L. WILLIAMS to disclose her son M.D.E. as a household member, that Plaintiff provided the required record evidence to establish that Defendant understood the Insurance Application and how to make changes to the Insurance Application yet failed to disclose her son as a household resident. Defendant's failure to disclose her son was a material misrepresentation or omission because the Plaintiff would not have issued the policy on the same terms as it did and therefore, Plaintiff properly rescinded the subject policy of insurance pursuant to the policy language and Florida Statute §627.409. As a result, Plaintiff properly denied coverage for the loss at issue and rescinded the policy void *ab initio.*

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

1. Plaintiff's Motion for Final Summary Judgment is **GRANTED,**

2. The Court **hereby enters final judgment** against Defendant REBEKAH L. WILLIAMS and for Plaintiff Direct General Insurance,

3. That Direct General Insurance Company policy #FLPA399519058 is rescinded and void *ab initio* because Defendant's material misrepresentations and omission are material to the acceptance of the risk and hazard assumed by Direct General Insurance Company and had the true facts been known to Direct General Insurance Company, it would not have issued the policy on the terms that it did, and Defendant's material misrepresentations and omissions increased the hazard by means within the control of the Defendant,

4. Any assignment of benefits are null and void because Direct General Insurance Company policy #FLPA399519058 is void *ab initio* because an assignee takes the assignment subject to all the equities and defenses that Plaintiff Direct General Insurance had against the assignor at the time of the assignment, and it is as though there never was an Insurance Contract,

5. Plaintiff has no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claim(s) for benefits that have been or will be made by any claimant under the Insurance Contract.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Demand letter—Sufficiency—Demand letter with attached itemized statement satisfied requirements of section 627.736(10)—Statute does not require that demand letter state exact amount owed, include previous payments made, or account for inconsistencies with demand letter sent by prior counsel—No merit to argument that insurer waived its right to raise demand letter defense by failing to put medical provider on notice of defect in its response to letter

TLC CHIROPRACTIC, INC., a/a/o Amanda Rollins, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2018 SC 2290. October 12, 2021. Stefanie M. Newlin, Judge. Counsel: Adam Saben, Shuster & Saben, LLC, Jacksonville, for Plaintiff. Rahma Sultan, Roig Lawyers, Jacksonville, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: DEMAND LETTER COMPLIANCE

THIS CAUSE. having come before the Court for hearing on August 2, 2021 on Plaintiff's Motion for Partial Summary Judgment Re: Demand Letter Compliance filed June 18, 2021. The Court, having reviewed the motion and entire court file, read relevant legal authority, heard argument, and otherwise being fully advised in the premises, finds as follows:

The issue before the Court involves the level of sufficiency needed to place an insurer on notice of an intent to initiate litigation for unpaid personal injury protection ("PIP") benefits pursuant §627.736(10), Florida Statutes. This notice is referred to as a Presuit Demand Letter ("PDL"). The enumerated requirements of a PDL are contained within §627.736(10), which states, in pertinent part:

> DEMAND LETTER.—
>
> (a) As a condition precedent to filing any action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. 627.736"and state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. . . (emphasis added).

A plain reading of the statute shows that if the Plaintiff attaches an itemized statement to its PDL, it has complied with the requirement of the condition precedent. An itemized statement containing the information above (underlined) gives the insurance carrier all the information it needs to confirm the dates and services at issue as well as each exact amount for that treatment, service, accommodation, or supply. Once the carrier is sent a PDL by a potential litigant, the Plaintiff cannot initiate litigation for thirty days. This "safe harbor" gives the insurance carrier a second opportunity to review the bills sent in by the provider during the treatment period and confirm that the bills were all properly received and adjusted by the insurance carrier.

In this case, Plaintiff attached an itemized statement giving the insurance carrier the requisite information it needed to confirm the dates at issue, the services rendered, and the exact charge for each service. The burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement stating each exact amount for each date of service, it complied with the requirements of §627.736(10). See, *MRI Associates of America, LLC a/a/o Ebba Register v. State Farm Fire & Casualty Company,* 61 So.3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b].

In its Answer filed on August 12, 2019, the Defendant alleged that inconsistencies on some calculations between the itemized statement and the PDL fail to place the insurance carrier on proper notice. Further, Defendant states that the PDL includes certain charges that are not reimbursable by PIP carriers, such as a "final report"; thus, nullifying the PDL. The Defendant also notes that the calculations and ledgers conflict with a PDL sent in by a prior attorney on the same claim.[1] Counsel for the Plaintiff stated at the hearing he was not aware of this prior PDL and was not given a copy of same until just prior to the hearing on the Plaintiff's Motion for Partial Summary Judgment. The fact that a prior PDL was sent to Defendant by another attorney was not raised in the Defendant's response letter of June 22, 2018 or the Defendant's Answer to the Complaint.[2]

Defendant further argues Plaintiff's PDL is lacking the exact amount *owed* and therefore does not comport with §627.736(10). This Court notes that many sister courts have rejected the argument the PDL must enumerate the exact amount *owed*. Recently in *Angels Diagnostic Group, Inc. v. Allstate Insurance Company*, 29 Fla. L. Weekly Supp. 211a (Fla. Miami-Dade Cty., April 20, 2021, the trial court held that there is no requirement to state the exact amount *owed,* stating that a court cannot:

> [R]ead into the statute what it does not say. Defendant is asking this Court to read into the statute that Plaintiff is required to provide an "exact amount owed," but such language simply does not exist in the statute. This Court cannot impose requirements upon the Plaintiff that are not set forth in the statute. If the legislature intended for the Plaintiff to essentially adjust the claim or conduct "an accounting" as the Defendant surmises, the legislature would have stated as such in the statute. However, despite several reiterations and amendments to the No-Fault Statute, the legislature has essentially left Section 627.736(10), Fla. Stat., untouched. *Angels Diagnostic Group, Inc. v. Allstate Insurance Company,* 29 Fla. L. Weekly Supp. 211a (Fla. Miami-Dade County, Order of April 20, 2021).[3]

Besides the fact that the statute does not require the PDL to state an exact amount *owed* or to account for alleged inconsistencies with a prior PDL, it is difficult to understand how a Plaintiff (usually a medical provider) would be able to account for such an amount. Again, many sister courts have rejected such an argument. *In Advanced MRI Diagnostics a/a/o Richard Avendano v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 357a (Fla. Duval Cty. August 15, 2014), the court wrote:

> [T]he Court is unclear, assuming it accepted the Defendant's interpretation of F.S. § 627.736(10), how a claimant is supposed to be able to adjust a PIP claim to make a determination as to the exact amount *owed*. When factors such as application of the deductible, knowledge as to the order in which bills were received from various medical providers, and whether the claimant purchased a MedPay provision on a policy (as well as other issues) are unknown to the medical provider, knowledge as to the exact amount owed is virtually impossible. A strict construction of the statute *only* says that a pre-suit demand must

specify "[t]o the extent applicable . . . an itemized statement specifying each exact amount . . . ." With the various factors that must be considered by the carrier when determining the exact amount to pay on a claim, and the fact that this information is readily available to the carrier and virtually never readily available to the medical provider submitting a claim, it is not reasonable to expect the provider to know the "exact amount owed" since said amount could vary amongst PIP applicants (depending on the language of each individual policy). Further, the Defendant fails to convince this Court of the consequence of failing to list the exact amount owed. This Court could surmise endless scenarios where the provider (or claimant) would need to know certain information in order to properly compute the exact amount owed based on a multitude of factors, including the ones listed above." *Id.* citing, *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a.

Again, the burden to adjust the claim is on the insurance company, not the provider. The provider has a duty to supply the insurance carrier with its bills in a timely manner, which was done in this case. Therefore, once the provider supplied this information to the carrier a second time in the form of an itemized statement, it complied with the requirements of §627.736(10).[4]

Defendant also relies on *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA Feb. 24, 2021) [46 Fla. L. Weekly D447a] ("*Rivera*") wherein the Third District found that the insured's PDL did not meet the specificity requirements of §627.736(10). In *Rivera,* a named insured sought reimbursement for his mileage to and from medical providers for treatment related to a covered loss. The Third DCA found that Rivera's failure to attach a proper itemized statement flawed his PDL; thus, suit was premature and not ripe. In instant case, this Court finds Plaintiff attached a proper itemized statement, listing each exact amount, date of treatment, service or accommodation making *Rivera* factually different.

This Court is also mindful of its constitutional duty to allow litigants access to courts. In *Pierrot v. Osceola Mental Health, Inc.,* 106 So.3d 491 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D131a], the Fifth District mandated that conditions precedent must be construed narrowly in order to allow Florida citizens access to courts. A PDL, is a condition precedent to filing a lawsuit pursuant to §627.736. Therefore, when examining a potential litigant's burden in complying with a condition precedent, "Florida courts are required to construe such requirements so as to not unduly restrict a Florida citizen's constitutionally guaranteed access to courts." *Apostolico v. Orlando Regional Health Care System,* 871 So.2d 283 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D750b]. Requiring the Plaintiff to *calculate* the exact amount owed or include prior payments made is nowhere listed as a requirement to satisfy §627.736(10). Moreover, any inconsistencies between the ledger and the amount allegedly owed, as noted in a PDL, do not nullify the fact that the Plaintiff supplied the Defendant with the information noted in 627.736(10). Defendant's position is that, not only must this information be included, but if the calculations do not mirror those of the insurance carrier, the PDL is still not compliant. This language is absent from §627.736(10). For a court to hold a potential litigant to the high standard suggested by the Defendant would effectively result in a constitutional denial of access to courts. Thus, this Court disagrees with the compliance standard argued by the Defendant, which sets the bar unduly high regarding §627.736(10).

WAIVER

The Plaintiff also contends that Defendant has waived its right to raise a defense regarding the PDL because Defendant failed to put Plaintiff on notice of the defect when it sent its response. However, courts throughout the State have held that insures do not have an obligation to respond to the PDL under the No-Fault statute, nor is it legally permissible to require a claims adjuster to anticipate every major legal defense to a potential lawsuit that may come about at a future date. *See Alliance Spine & Joint, Inc. v. USM Casualty Insurance Company,* 24 Fla. L. Weekly Supp. 555c (Fla. Miami-Dade Cty. Ct. 2016); *see also Spine Correction F/K/A Alignlift a/a/o Griselda Rubio v. State Farm Mutual Automobile Insurance Company,* 27 Fla. L. Weekly Supp. 974a (Fla. Polk Cty. Ct. 2019).

Since an insurer is not required to send a response to the PDL, it follows that any legal defenses regarding the defectiveness of a PDL would need to be raised as an affirmative defense to a plaintiff's complaint. Therefore, the Court finds that Defendant properly raised an affirmative defense at the time it served its Answer and did not waive any defenses to the PDL.

THEREFORE, it is ORDERED AND ADJUDGED that, for the reasons stated above, Plaintiff's Motion for Partial Summary Judgment Re: Demand Letter Compliance is GRANTED. The Defendant's affirmative answer with respect to demand letter compliance is HEREBY STRICKEN.

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[1]The inconsistencies between the two PDLs were not raised by the Defendant in its Answer or in any response to the Plaintiff's Motion for Summary Judgment. Instead, it was raised during the hearing on August 2, 2021. The PDL sent by the prior attorney was accepted into evidence, without objection. For reasons explained in this Order, any inconsistencies between the two PDLs would not change the ruling of this Court.

[2]The parties stipulated to the introduction of all documents noted herein and same were considered by the Court, including the PDL response from Peak Property on June 22, 2018.

[3]Also see *EBM Internal Medicine a/a/o Jasmine Gaskin v. State Farm Mutual Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 382a (Fla. Duval Cty. Ct. Dec. 9, 2011) (finding no requirement to include prior payments made or exact amount owed in a demand letter); *First Coast Medical Center, Inc. a/a/o Barbara Derouen v. State Farm Mut. Auto. Ins. Co.,* 17 Fla. L. Weekly Supp. 118a (Fla. Duval Cty. Ct. November 12, 2009); *EBM Internal Medicine a/a/o Bernadette Dorelien v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly Supp. 410a (Fla. Duval Cty. Ct. February 8, 2012); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Scott Bray v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 101b (Fla. Duval Cty. Ct. August 7, 2014); *Neurology Partners, P.A. d/b/a Emas Spine & Brain a/a/o Wendy Brody v. State Farm Mutual Automobile Insurance Company,* (Fla. Duval Cty. July 23, 2014); Case No.: 2012-SC-4885, Fla. Duval Cty. Ct, July 23, 2014); *Physicians Medical Center Jax a/a/o Melanie Wrenn v. State Farm Mut. Auto. Ins. Co*., 22 Fla. L. Weekly Supp. 359a (Fla. Duval Cty. Ct. August 25, 2014); and, *Ruth Beck v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 454b (Fla. Leon Cty. Ct. October 14, 2014). All of these sister courts found no requirement to include prior payments made or an accounting for the exact amount owed in order to comply with the requirements of F.S. 627.736(10).

[4]This Court's ruling is also consistent with two Orders on the exact same issue from Leon County, which this Court finds persuasive. See, *Whole Health Clinic d/b/a Healthsource of Tallahassee a/a/o Joshua Thomas v. State Farm Mut. Auto. Ins. Co.*, 26 Fla. L. Weekly Supp. 831a (Fla. Leon Cty. Dec. 13, 2018) and *Ruth Beck v. State Farm Mut. Auto. Ins. Co.,* 22 Fla. L. Weekly Supp. 454b (Fla. Leon Cty. Oct. 14, 2014).

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Reasonable suspicion—Tip—Restaurant worker who provided his name and telephone number when reporting details of reckless driving he had witnessed in restaurant drive-thru was citizen informant whose information had high inherent reliability—Responding deputy had reasonable suspicion to investigate and request that defendant perform field sobriety exercises where defendant was driver of only vehicle parked at restaurant that matched description given by tipster, and deputy noticed several indicators of impairment upon making contact with defendant—Motion to suppress is denied

STATE OF FLORIDA, v. RONNI GEO SCHMIDT, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2021 CT 69. August 26, 2021. D. Melissa Distler, Judge. Counsel: Adriana Laforest, Assistant State Attorney, Office of the State Attorney, for State. G. Kipling Miller, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS MATTER came before the Court on August 16, 2021 on the Defendant's Motion to Suppress Evidence. The Court, having heard testimony from Kale Britton, Deputy Allyssa Narciso and Deputy

Carl Parker, having reviewed the AXON videos and 911 recording admitted into evidence, and having heard argument from Counsel for the State and the Defendant, and being otherwise fully advised in the premises, this Court finds as follows:

Findings of fact:

Kale Britton testified he was working at Chic-fil-A in Palm Coast on December 18, 2020 when he was contacted by another team member about an unusual vehicle in the drive-thru. He testified that the vehicle had two ladies in it and that they appeared to be acting funny. He explained that the women were very clearly intoxicated and smelled the odor of alcohol when he came into contact with them. He and the team members were trying to get their attention, which they could not do, and consequently other customers were being held up by the vehicle. He testified that he then asked the vehicle to pull up to the window because the staff could not sufficiently get their attention at the pay station; at this time, the vehicle pulled out of their drive-thru lanes. Mr. Britton testified that he thought the vehicle might leave at that point, but it came back into the line; when it did, he testified that the vehicle came very close to hitting their wall. It was at this time that he called 911; the 911 call was admitted into evidence as Defendant's Exhibit 1 and published during the hearing.

On their cameras, Mr. Britton watched the vehicle pull up to the window and then move into the parking lot after receiving their food while on the phone with the 911 operator. He tells the dispatcher that there is a vehicle with two females in the drive-thru who are very intoxicated and driving recklessly through the drive-thru lanes. He gave the make, model, and ultimately the license plate of [Editor's note: Plate number redacted] for the vehicle as it was sitting in the parking lot of the restaurant. He also gave his name and telephone number to the dispatcher. As he is speaking to the dispatcher, he explains they pulled out of the line and are heading towards the exit and towards Boulder Rock Drive. When the dispatcher asked which direction the vehicle is traveling, he explained that it had turned towards the exit and pulled into a parking spot. He also explained that he thought the driver was intoxicated and that the vehicle was driving recklessly. He explained that it looked like the occupants were eating inside their vehicle and was asked to call dispatch back if they left the location before law enforcement arrived.

Deputy Narciso was dispatched to the Chic-fil-A in response to Mr. Britton's call, which was transmitted as an intoxicated driver who was driving recklessly through the drive-thru of a restaurant. When she arrived, she saw one vehicle in the parking lot which matched the description given by dispatch—a blue Kia Soul with a Florida tag [Editor's note: Plate number redacted]—and noted that there were two persons in the vehicle. Deputy Narciso parked her vehicle approximately one parking space away but not in a parking spot, rather perpendicular to the Defendant's vehicle with a full space between them. Deputy Narciso shined her spotlight on the back side of the vehicle for officer safety reasons. No other take down lights were illuminated; just her headlights and the spotlight. Deputy Narciso was wearing an AXON video recording, and the video recording from this incident was admitted into evidence as State's Exhibit 1.

The AXON video does reflect the Defendant RONNI GEO SCHMIDT seated in the drivers' seat of the vehicle. When first approaching, Deputy Narciso asks, "what are you guys doing?" The Defendant responds, "Just driving," and she points to the passenger. When Deputy Narciso asks where the passengers lives, the Defendant has trouble forming words but ultimately states "the L section of Palm Coast." Deputy Narciso testified that she immediately smelled an odor of alcohol and food coming from the vehicle when the Defendant started speaking She also testified that the Defendant was slurring her words with extremely bloodshot eyes, which is reflected on the video recording. When asked, the Defendant says the passenger was drinking a little bit and they want to go home. The Defendant denies having anything to drink. The Defendant repeats, "we are just driving home." The Deputy explains she is responding to a call of an intoxicated driver. The Defendant then states she is going home now.

Deputy Narciso asks the Defendant to turn off the vehicle at this point and requests drivers' licenses for the occupants. When requested, the passenger gives over her drivers' license. Deputy Narciso asks for the Defendant's license, to which she responds she does not have one. The Defendant eventually turns over a Florida Identification card and acknowledges that her drivers' license is not valid. The deputy confirms that she knows she is not supposed to be driving, to which the Defendant acknowledges. The Defendant's responses to the deputy's questions are not always coherent and not always responsive.

Since there was no challenge to the suspicion necessary for conducting field sobriety exercises or the probable cause for the arrest, there was no testimony in this regard. The Defendant argues that the specificity of the tip was insufficient to justify the interaction by law enforcement, namely parking one space away, turning on a spotlight, and approaching the Defendant in her parked vehicle. The Defendant cited *Baptiste v. State,* 995 So.2d 285 (Fla. 2008) [33 Fla. L. Weekly S662a], *Popple v. State,* 626 So.2d 185 (Fla. 1993), *Hrezo v. State,* 780 So.2d 194 (Fla. 2nd DCA 2001) [26 Fla. L. Weekly D363c], and several county court opinions. The State argued the citizen informant provided very specific detailed information about the make, model, tag number, and that the vehicle had been driving recklessly; when the deputy responded, she found only one vehicle in the parking lot, which matched the description given by the citizen informant. The State argued that there was sufficient reasonable suspicion to approach and investigate what was going on with the Defendant and the vehicle. The State cited published county court and circuit appellate opinions.

Conclusions of Law

Information relayed by citizen informants comes with more inherent reliability than information relayed by anonymous tips. *See State v. Maynard,* 783 So.2d 226 (Fla. 2001) [26 Fla. L. Weekly S182b]. The caller in this case provided the requisite information to be considered a citizen informant. Mr. Britton willingly provided his name and telephone number, as well as details of the reckless driving he was witnessing in the drive through at his place of business. Information relayed by a citizen informant is on the high end of the tip-reliability scale, as citizen informants are not motivated by pecuniary gain, not involved in criminal activity, and not someone who enjoys the confidence of criminals; rather, a citizen informant is motivated solely by the desire to further justice. *State v. Evans,* 692 So.2d 216 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D912a].

In the instant case, the Deputy found the vehicle within moments of Mr. Britton's call, with it being the only vehicle in the parking lot, matching the exact description given. The Court finds that there was competent substantial evidence to support a finding of sufficient reasonable suspicion to investigate the blue Kia Soul seen by Mr. Britton purchasing food at the drive-thru of the Chic-fil-A. After approaching the vehicle, Deputy Narciso immediately noticed several indicators of impairment, thereby providing the requisite reasonable suspicion to perform an investigation and to request field sobriety exercises.

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

* * *

Criminal law—Driving under influence—Search and seizure—Detention—Where officer lawfully stopped defendant for driving golf cart at night without headlights lit, and defendant had odor of alcohol and admitted to having just left bar and to drinking alcohol, officer had reasonable suspicion to detain defendant and request that he perform field sobriety exercises—Motion to suppress is denied

STATE OF FLORIDA, v. DAVID A. DUNKLE, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020 CT 446. October 7, 2021. D. Melissa Distler, Judge. Counsel: Adriana Laforest, Assistant State Attorney, Office of the State Attorney, for State. Flem Whited, for Defendant.

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

THIS MATTER came before the Court on Wednesday September 24, 2021 on the Defendant's Motion to Suppress. The Court, having heard testimony from the arresting officer, Officer Evan Scherr, and the Defendant DAVID DUNKLE, reviewed the video recordings admitted into evidence, and heard argument from both Counsel for the State and the Defendant, the Court makes the following findings of fact:

Findings of Fact:

Officer Scherr arrested the Defendant DAVID A. DUNKLE for Driving Under the Influence in Flagler Beach on May 30, 2021. The Defendant filed a Motion to Suppress based on insufficient evidence to detain and lack of probable cause to arrest the Defendant.

The testimony was undisputed that the Defendant DAVID A. DUNKLE was driving a golf cart without headlights around 12:20am on a holiday weekend. However, the direction and location of travel were in dispute between the officer and the Defendant; moreover, the video recording does not capture the golf carts' driving. The area in which this incident occurred is 2 blocks east of A1A in Flagler Beach. SR100 is a 4 lane divided highway for travel east and west with a center turn/median lane in this area. On the southwest corner of North Daytona Avenue and SR100 is a bar, Poor Walts.

Officer Scherr testified that he was stationary in his vehicle on the south side of SR100 facing north on Daytona Avenue when the dark colored golf cart caught his attention, driving without headlights heading north in front of him on SR100; he was unable to state where the vehicle came from but knew that it did not come from behind him. Officer Scherr testified that he witnessed motor vehicles driving on SR100 taking evasive action to avoid striking the golf cart. Driving a golf cart without headlights after sunset requires headlights pursuant to Flagler Beach ordinances. The officer testified that he proceeded across SR100 in pursuit of the golf cart for the alleged violations he witnessed.

The video recording begins with a view of Officer Scherr's steering wheel as he pursues the golf cart. There was extensive analysis of the driving of the officer's vehicle on cross-examination, in an effort to confirm where he was when he first saw the golf cart and therefore the path both vehicles may have traveled that evening. From the video recording, Officer Scherr seems to proceed straight (on South Daytona), then make a right (onto SR100), straight again, then 8 seconds into the recording a left (which would be onto Daytona Avenue), 10 seconds in emergency lights turn on, then another right and stops (which would be on North 2nd Street) approximately 25 seconds into the video.

Officer Scherr's interaction with the Defendant is brief. Their conversation proceeded as follows:

Officer Scherr: Okay, you got no lights on and you're driving down 100, you can't be driving down 100 in a golf cart. You got ID on you?

The Defendant: I do, I do, I apologize.

Officer Scherr: Where you guys coming from?

The Defendant: Poor Walts.

Officer Scherr: Poor Walts. Alright, how much have you all had to drink?

The Defendant: I've been drinking

Officer Scherr: Yeah I smell it on you.

While flipping through items in his wallet, the Defendant drops something from his wallet. Officer Scherr then picks it up and gives it back to the Defendant. The Defendant finds his drivers' license and is able to exchange his license with the other item that had fallen without any trouble. There is some conversation about having food at Finns with the passenger. The Defendant says he did have food at Finns. His speech is concise, not slurred; his responses to all questions are appropriate.

Officer Scherr testified that his decision to conduct a DUI investigation stemmed from the smell of alcohol, slurred voice, admission to drinking, and issues driving the vehicle. On cross-examination, Officer Scherr was questioned about several items noted in his report, which he initially verified was true and accurate. The report stated that he was located on South Central Avenue, which was an error that he noted and discussed with the Assistant State Attorney but not discussed or corrected on direct examination.

More significantly, the report stated the Defendant's face was flushed, his facial features seemed to droop, his eyelids were heavy with his expression blank and slightly dazed. None of those are reflected in the video recording. The report further states that the Defendant stared at him before getting his ID; the video recording contradicts this, reflecting the Defendant immediately reach towards his left front pocket where he retrieved his wallet. When flipping through the items in his wallet looking for his drivers' license, Officer Scherr wrote that the Defendants' movements were slow and uncoordinated and that he lacked dexterity necessary to properly manipulate the cards in his wallet. Again, the video recording does not reflect this. While the Defendant does drop one item, he does not pass over his driver's license but rather is flipping through items trying to find it. When he and the officer exchange items, the Defendant takes the item back from the officer with his middle and ring finger while handing the license in his pointer and thumb, demonstrating his dexterity with the items in his wallet and exchanging them with the officer. Lastly, the report states that the Defendant spoke with a thick tongue, frequently hesitating and pausing over his words; the video recording does not reflect any of these behaviors either.

The Defendant DAVID A. DUNKLE testified at the hearing as well. The Defendant testified that he was at Poor Walts immediately prior to driving the golf cart. He testified that he drove on the sidewalk directly in front of the building and turned left onto North Daytona Avenue on the sidewalk. He testified that he never drove on SR100 and was never around any other vehicles or traffic. On cross-examination, the Defendant acknowledged that the headlights were not on when he was driving the golf cart, but stated it was his first time driving it and was unfamiliar with the statutes pertaining to golf carts. He acknowledged that common sense would dictate the need to use headlights at midnight on a golf cart, and he again acknowledged that he had been drinking that night.

The Defendant contests the detention, citing insufficient evidence to detain and no probable cause for the arrest. The Defendant cited several cases in its motion, including *Wiggins v. Florida Department of Highway Safety and Motor Vehicles,* 209 So.3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a] and several County Court opinions. The State argued that the Officer had a lawful basis to stop the Defendant and that reasonable suspicion was developed based on the totality of the circumstances, citing *State v. Taylor,* 648 So.2d 701 (Fla. 1995) [20 Fla. L. Weekly S6b].

Conclusions of Law:

It is undisputed that the Defendant drove the golf cart after

midnight without headlights, a violation of both city ordinances and common sense. Once lawfully pulled over, the Defendant admitted to having just left a bar and drinking alcohol. Reasonable suspicion, defined as "one which has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience" is quite a low standard. *Origi v. State*, 912 So.2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a], quoting *State v. Davis*, 849 So.2d 389, 400 (Fla. 4th DCA 2003) [30 Fla. L. Weekly D1513a]. Having heard the testimony of Officer Scherr and the Defendant DAVID A. DUNKLE under oath, coupled with the AXON recording, the Court finds that there were the minimal number of indicators of impairment, based on the totality of the circumstances, for Officer Scherr to detain the Defendant and request his participation in field sobriety exercises. The question of whether there is sufficient evidence to sustain a conviction for DUI under these facts is a jury question for the trier of fact. Based upon the above findings of fact and conclusions of law, it is therefore ORDERED AND ADJUDGED as follows:

The Defendant's Motion to Suppress is DENIED.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Obscured tag—Deputy lacked probable cause to stop vehicle for obscured tag where alphanumeric portion of tag and registration sticker were not obscured and deputy was able to determine tag number and state—Traffic stop based on driver's license of registered owner of vehicle being suspended was lawful—In light of conflict between deputy's testimony and body camera video, deputy's observations of indicia of impairment were insufficient to justify request to submit to field sobriety exercises—Further, where deputy did not advise defendant that refusal to submit to exercises could be used against him in court or subject him to separate prosecution, refusal was not sufficiently probative of consciousness of guilt to be admissible—All evidence obtained after defendant was advised of DUI investigation is suppressed

STATE OF FLORIDA, v. THADIUS CRAWFORD, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2019 CT 881. September 15, 2020. D. Melissa Distler, Judge. Counsel: Raymond Dailey, Assistant State Attorney, Office of the State Attorney, for State. Jessica Damoth, for Defendant.

ORDER ON DEFENDANT'S SECOND AMENDED MOTION TO SUPPRESS UNLAWFULLY OBTAINED EVIDENCE

THIS MATTER came before the Court on the Defendant's Second Amended Motion to Suppress filed September 3, 2020 and heard on September 10, 2020. The Court, having heard testimony from Deputy Philip Conway, and having heard argument from both Counsel for the State and the Defendant, makes the following findings of fact:

Findings of Fact:

The Defendant THADIUS CRAWFORD was arrested on October 11, 2019 for DUI and Refusal to Submit to Testing. The Defendant's Amended Motion to Suppress alleges that there was no violation of Florida law as it pertains to an alleged obstructed tag under Florida Statute 316.605(1) or for any other violation, including driving while license suspended with or without knowledge; the Amended Motion further alleges that there was a custodial interrogation without proper advisement of *Miranda* warnings and that there was no probable cause to request field sobriety exercises. The Defendant also alleges that there were not sufficient advisements as to the consequences of refusing to submit to field sobriety exercises.

Deputy Conway testified that he was on duty with the Flagler County Sheriff's Office and on October 11, 2019 when the Defendant's vehicle came to his attention as it drove westbound on SR100. The Deputy testified that the vehicle was speeding up and slowing down, which caused him to turn around and see what was going on with the vehicle. Deputy Conway then testified that the tag was obscured in violation of Florida law and that the registered owner had a suspended driver's license.

The interaction between Deputy Conway and the Defendant are memorialized on the deputy's AXON body camera video. The AXON body camera video was admitted into evidence and taken into consideration by the Court. Also admitted into evidence was a photograph of the Defendant's license plate.

The video begins with the deputy still in his car, coming to a stop and placing his car in park, approaching the Defendant's vehicle. The first thirty seconds of all AXON body camera videos do not contain sound. The sound picks up as Deputy Conway approaches the passenger side of the vehicle. The AXON body camera is not helpful as to the tag obstruction issue.

Deputy Conway explains to the Defendant that he was pulled over for the obstructed tag only; no mention of the license suspension is made at this time, nor is there any inquiry as to whether the driver is the registered owner of the vehicle. The deputy asks for the drivers' license, registration, and insurance. Deputy Conway further testified that upon observing the Defendant, he noticed signs of impairment, including a strong odor of alcoholic beverage along with bloodshot and glossy eyes. The Defendant THADIUS CRAWFORD retrieves his license and other documentation without incident. The Defendant obtained his license from his wallet and then unlocked the glove box to retrieve an envelope that had the registration in it. Deputy Conway took this action of the Defendant handing an envelope with documents as being a sign of impairment as failure to comply with a "simple order." Deputy Conway then takes both the Defendant's drivers' license and the passenger's ID card to run the occupants for warrants. Deputy Conway then goes back to his vehicle and verifies that the Defendant is the registered owner with a suspended driver's license. After verifying such, he asks the Defendant to step out of vehicle, which he does, again without incident.

Deputy Conway testified that, having identified the driver as the registered owner who was suspended, and having smelled an odor of alcohol from the vehicle, he asked the Defendant to step out of the vehicle to determine if the odor was coming from the driver/defendant. Deputy Conway testified that the Defendant swayed to the side while walking, that his eyes were bloodshot and glossy, that there was a strong odor coming from his breath, and that his speech was slurred and thick tongued.

Deputy Conway then explains again about the tag being obstructed and also tells the Defendant that his license is suspended, either reference to child support and/or not keeping insurance on the vehicle. The Defendant THADIUS CRAWFORD immediately responds that his license is not suspended. Deputy Conway continues to speak with him about insurance and child support. The Defendant responds that his license is "straight;" when the deputy says that it is suspended, he responds that he does not know why.

Deputy Conway then states that there is another issue because of his eyes being glossy and an odor emitting from his breath. He then asks the Defendant if he has been drinking, to which the Defendant admits to two drinks. Deputy Conway then asks him to submit to field sobriety exercises, and the Defendant refuses. Deputy Conway explains that by refusing, he would have to make a determination whether he was driving intoxicated based upon what he has already seen thus far. The Defendant continues to refuse and insists that his license is valid. Deputy Conway then reads the Defendant his *Miranda* rights. Deputy Conway then asks him if he is willing to speak with him, to which the Defendant responds, "For what?" Deputy Conway responds by stating that he is giving him the opportunity to participate in field sobriety exercises. The Defendant again refuses,

and the deputy directs him to put his hands behind his back placing him under arrest.

On cross-examination, Deputy Conway admits that he never informed the Defendant that by refusing to submit to field sobriety exercises, that such refusal would be admissible against him in court. Deputy Conway admits that he never informed the Defendant that by refusing to submit to field sobriety exercises, that he could be subject to separate criminal prosecution for an additional charge for a second or subsequent refusal. Furthermore, Deputy Conway testified that he was unsure whether the Defendant was surprised or not about his driver's license being suspended, based upon the Defendant's reaction. The Court finds this testimony to be not credible, as it is clearly contradicted by the AXON video recording wherein the Defendant insists repeatedly that his license is valid. Furthermore, other observations testified to by the deputy, such as the swaying, leaning, and slurred speech are not reflected on the AXON video recording as well, thus further diminishing the deputy's credibility.

The Court notes that Florida Statute 316.605(1) requires all letters, numerals, printing, writing, the registration decal, and the alphanumeric designation be clear, distinct, and free from defacement, mutilation, grease or other obscuring matter so as to be plainly visible and legible at all times from 100 feet from the rear. The photograph reflects "Florida State" partially covering the "MYFLORIDA.COM" top portion of the tag and "Seminoles" covering the "SUNSHINE STATE" portion of the tag. The identifying alphanumeric numbers and letters as well as the registration sticker are all unobscured. Deputy Conway further testified that he knew it was a Florida tag based on the Florida state outline in the center with the oranges over top, and that he had no impairment in determining the tag number of the vehicle.

Conclusions of Law

The Court finds that there was no competent substantial evidence to support a finding of sufficient probable cause for civil traffic violation under Florida Statute 316.605(1) titled Licensing of vehicles. The Court finds and the deputy testified that he was fully capable of reading the alphanumeric portion and registration of the tag. However, the Court concludes that the initial traffic stop of the Defendant's vehicle was valid based upon the registered owner's driver's license being suspended. *See State v. Laina*, 175 So.3d 897 (Fla 5th DCA 2015) [40 Fla. L. Weekly D2117d]; *State v. Smith,* 574 So.2d 300 (Fla. 5th DCA 1991); and *State v. Carrs,* 568 So.2d 120 (Fla. 5th DCA 1990).

The Court finds that Deputy Conway's testimony contains significant and material contradictions as compared to the AXON video recording. Because appellate courts are restrained to the findings of fact of the trial judge, which are entitled to great weight and deference, the lower courts must carefully determine the credibility of witnesses and the weight of the evidence in each and every case. Having heard the testimony of Deputy Conway under oath, coupled with the report and AXON statements containing conflicts, errors and/or omissions, the Court finds that, as a factual matter, the observations of the indicators of impairment of the Defendant, were insufficient to justify the request to submit to field sobriety exercises. In addition, while the caselaw is clear that not all consequences must be advised (*see e.g. Grzelka v. State,* 881 So.2d 633 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1803a]), the Court finds that the complete lack of advisement about the refusal to submit to field sobriety exercises being admissible against him in court or being subject to separate criminal prosecution whatsoever makes the Defendant's refusal not sufficiently probative of his consciousness of guilt as to be admitted into evidence.

It is therefore ORDERED and ADJUDGED the Defendant, THADIUS CRAWFORD'S Second Amended Motion to Suppress is GRANTED as set forth herein, and any evidence obtained after the Defendant is told of the DUI investigation, including the Defendant's refusal to submit to field sobriety exercises and any additional evidence obtained thereafter, shall be excluded and inadmissible.

* * *

Insurance—Personal injury protection—Overdue claims—Interest—Attorney's fees—Entitlement—Action in which sole issue was the calculation of interest to be paid on overdue PIP claim which was paid in full—Plaintiff is not entitled to attorney's fees pursuant to section 627.428 or 627.736 where, although plaintiff was awarded prejudgment interest, no amount of PIP benefits were sought or awarded as part of the litigation—Defendant is granted requested relief from technical admissions which resulted from insurer's failure to respond to request for admissions regarding plaintiffs' entitlement to attorney's fees

BAKER FAMILY CHIROPRACTIC, a/a/o Hahn Dihn, Plaintiff, v. LIBERTY MUTUAL INSURANCE CO., Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019-37344COCI. October 13, 2021. Belle B. Schumann, Judge. Counsel: William England and Chad Barr, Law Office of Chad A. Barr, P.A., for Plaintiff. Melissa G. McDavitt, Conroy Simberg, West Palm Beach, for Defendant.

ORDER FINDING
NO ENTITLEMENT TO ATTORNEYS' FEES

This case comes before the Court upon remand from the District Court of Appeal, Fifth District, in case number 5D21-0136. In this case, Plaintiff was awarded $1.48 in prejudgment interest, but no amount of PIP benefits were sought or awarded as part of this litigation, and therefore, the Court concludes that Plaintiff is not entitled to attorneys' fees pursuant to section 627.428 or 627.736, Florida Statutes (2018).

Facts and Procedural History

The final judgment entered on September 2, 2020, in this case found as fact that the insured was involved in a motor vehicle accident on March 26, 2017, and sustained injuries as a result. Doc. # 31. Plaintiff provided medical services to the Insured and submitted medical bills in the amount of $420. On May 23, 2017, Defendant paid $168.

On March 12, 2019, Plaintiff submitted a pre-suit demand letter to Defendant claiming entitlement to an additional $168 in PIP benefits. Doc. #31. In response, Defendant agreed to pay the entire amount of benefits demanded, $168, and tendered payment of that amount plus interest it determined to be $16.60.

Neither the demand letter nor the policy specified the rate of interest for overdue PIP claims not paid within thirty days. Thus, the sole issue in this case was whether the interest paid on April 22, 2019, was correctly calculated. There was no issue regarding whether the ***benefit*** was properly paid; indeed, the Defendants paid the entire amount of benefits claimed in the pre-suit demand letter. The Court concluded that prejudgment interest on an overdue medical bill pursuant to section 627.736(4)(d) must be calculated annually using the interest rate established on January 1 of each subsequent year. The interest tendered with the benefit payment was incorrectly calculated at one rate for the entire time period. Once correctly calculated, judgment was entered in favor of Plaintiff for the difference of $1.48 (one dollar, forty-eight cents) in prejudgment interest.

Notice of Appeal was filed on September 30, 2020. That same day, Plaintiff filed a Motion for Attorney's Fees and Costs and Request for Admissions. Doc. #33, #34, #35. Subsequently, Liberty Mutual entered its voluntary dismissal of the appeal.

The order of the Fifth District accepted the Appellant's voluntary dismissal, and further, ordered as follows:

Appellee's Motion for Award of Appellate Attorney's Fees and Costs, filed November 16, 2020, in the lower tribunal, is granted *contingent upon the lower tribunal determining that Appellee is entitled to attorney's fees pursuant to section 627.428.* If so determined, the lower tribunal shall determine and assess reasonable attorney's fees for this appeal.

Liberty Mutual Insurance Co. v. Baker Family Chiro. a/a/o Hahn Dihn, Case No. 5D21-0136 (Fla. 5th DCA April 21, 2021)(emphasis added). Doc. #50.

At a hearing held on remand on August 25, 2021, Plaintiffs sought attorney's fees for work done to that date for a grand total of $73,810 (seventy three thousand, eight hundred ten dollars) on a judgment of $1.48 (one dollar, forty-eight cents). The parties agreed that the appropriate amount of attorney's fees for Chad Barr, appellate counsel, was 55.7 hours at a rate of $550 per hour ($30,635). Plaintiff's expert, Herb McMillan III, testified his fees to appear at the hearing were $650 an hour for 5.5 hours ($3,575). Testimony regarding compensation for William England, trial counsel, ranged from $425 (his historic rate) to $550 per hour (the requested rate for this case), and the time spent on this case varied from Defense's expert calculation of 23 hours to Mr. England's requested time of 72 hours. The primary difference in the amount of hours for Mr. England was the reduction for time for clerical functions and for conferring with appellate counsel about the appeal. *North Dade Church of God, Inc. v. JM Statewide, Inc.* 851 So. 2d 194 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b] ("Duplicate time by multiple attorneys working on the same case are generally not compensable.") Given the holding here, the Court need not determine the appropriate amount of compensation for these extremely capable and experienced attorneys.

Conclusions of law

The remand from the appellate court specifically compels this Court to determine whether Plaintiff is entitled to attorney's fees pursuant to section 627.428, Florida Statutes (2018). Defendant contends that where, as here, no benefits are in dispute, but only the calculation of prejudgment interest, the Plaintiff is not entitled to attorney's fees pursuant to *South Florida Rehab. Of West Dade v. Infinity Auto Insurance Co.,* 318 So. 3d 6 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D915a].

As an initial matter, Plaintiff contends that Defendant is bound by their failure to respond to the Request for Admissions regarding their entitlement to attorney's fees, which was filed the same day as the Notice of Appeal. Doc. #34, #35, #36. They seek to distinguish the *Infinity* case on a variety of grounds, including that this case involves interest and not postage and penalties, and that the acknowledgement of payment pursuant to the demand letter was sent eleven days after the thirty-day time limit. They acknowledge and agree that all benefits they demanded were paid in full prior to filing this lawsuit, which ultimately is the salient fact.

The Request for Admissions and Motion for Attorney's fees were filed the same day as the Notice of Appeal, divesting the trial court of jurisdiction to consider anything other than procedural matters. Fla. R. App. P. 9.600. There was no motion to relinquish jurisdiction for consideration of the attorney's fee issue.

The entitlement to attorney's fees is an issue with legal and factual components, and so a technical admission for failing to respond to the legal aspects of this issue is ineffective. The Court notes that no timesheets for work performed on this case were attached to the Request for Admissions so that the Defense could properly evaluate the factual component of the claim for attorney's fees. In any event, requests for admissions may not be applied to controverted legal issues lying at the heart of the case. Given the amount of the judgment versus the fees requested, it is abundantly clear that the attorney's fees are the very heart of this case. Additionally, the Court finds that the Defendant has "continually contradicted" the claim to entitlement to and the amount of attorneys' fees, which excuses its technical failure to respond to the Plaintiff's request for admission. *See, Moreland v. City of Fort Myers,* 164 So. 3d 111, 113 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1090b]. Finally, there is a liberal standard for the trial court to permit relief from technical admissions, which in turn should be liberally granted. *Clemens v. Namnum,* 233 So. 3d 1146 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2622a]; *Morgan v. Thompson,* 427 So. 2d 1134 (Fla. 5th DCA 1983). At the hearing, to the extent it was deemed necessary, Defendant requested relief from the technical admissions regarding entitlement to attorney's fees, and the Court hereby grants that request. Fla. R. Civ. P. 1.370(b)

Of most significance to this Court's determination regarding entitlement to attorney's fees is the instructions on remand from the District Court. The appeals court did not simply remand for determination of the appropriate amount of attorney's fees. Rather, this Court was instructed to initially determine whether Plaintiff was entitled to attorney's fees at all, and if so, to conduct a hearing to determine the appropriate amount.

The Defense contends that where, as here, the Plaintiff in a PIP case does not seek and is not awarded any PIP benefits, Plaintiff is not entitled to recover its attorneys' fees from Defendant, relying on *United Auto Insurance Co., v. ISO Diagnostic Testing, Inc. a/a/o Yoanne Quevedo,* 23 Fla. L. Weekly Supp. 1000(c) (Fla. 17th Cir. March 21, 2016) and *South Florida Pain and Rehabilitation of West Dade v. Infinity Auto Insurance Co.,* 318 So. 3d 6 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D915a]. As the Defense concedes, neither of these cases addressed the recovery of interest only, but rather, penalty and postage. However, they contend that the holdings are based on the fact that the Plaintiff did not sue the insurer for any PIP ***benefits*** as defined in 627.731, Florida Statutes (2018). PIP benefits are awarded for ". . .medical, surgical, funeral and disability benefits. . ." Neither interest nor postage nor penalties are PIP benefits as defined by statute. From the inception of this case, no PIP benefits were sought by Plaintiff. Judgment was entered for miscalculation of interest only in the amount of $1.48.

In the *Infinity* case, the Court recounted the applicable statutes and the process to claim benefits under the PIP statute. See, sections 627.730-627.7405, Florida Statutes (2018). The Court concluded that under the plain language of the statute, when the insurer pays the PIP benefit claimed in the pre-suit demand letter, the insurer is not obligated to pay attorney's fees. Courts have consistently held that awarding attorney's fees is in derogation of the common law rule that each party pay its own attorney's fees, and so must be strictly construed. *Willis Shaw Exp. Inc. v. Hilyer Sod, Inc.* 849 So. 2d 276 (Fla. 2003) [28 Fla. L. Weekly S225a].

The legislative purpose in creating the no fault statute is to ensure the payment of ". . .medical, surgical, funeral and disability insurance benefits without regard to fault. . ." § 627.731, Fla. Stat. (2018). "The purpose of the no-fault statutory scheme is to 'provide swift and virtually automatic payment so that the insured may get on with his life without undue financial interruption.' " *Custer Medical Center v. United Auto. Ins. Co.,* 63 So. 3d 1086 (Fla. 2011) [35 Fla. L. Weekly S640a] (citations omitted).

If a claim becomes overdue, the insurer is subject to specific penalty provisions once payment is made on an overdue claim, including interest. §627.736(4)(d), Fla. Stat. (2018). However, the entitlement to attorney's fees is dependent on the incorrect denial of benefits. It is clear that a medical provider may sue only for incorrectly calculated interest. *United Auto. Ins. Co. v. Rodriguez,* 808 So. 2d 82 (Fla. 2002) [26 Fla. L. Weekly S747a; rehearing denied Feb. 12, 2002]. The Court concludes that the award of attorney's fees under the

statute is dependent on the award of benefits, not just interest. "It is the incorrect denial of ***benefits,*** not the presence of some sinister concept of 'wrongfulness' that generates the basic entitlement to the fees if such denial is incorrect." *Ivey v. Allstate Ins. Co.* 774 So. 2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a] (emphasis added).

Plaintiff also relies upon *Peavy v. Dyer,* 605 So. 2d 1330 (Fla. 5th DCA 1992), for the proposition that postjudgment interest could be awarded on the total amount of the final judgment, which includes prejudgment interest. Plaintiff argues that the interest is part of the judgment. However, that case is distinguishable because there was a judgment awarded on the primary basis for the suit, namely, the real estate commission at issue. In this case, if there had been an award for **any** amount of PIP benefits, even $1.48, the result here would be different. Additionally, this issue arises from a unique statutory scheme where the entitlement to attorneys' fees are circumscribed by particular statutory provisions.

Here, the PIP benefits in the demand letter were paid, along with the calculation of interest, eleven days late. It is clear that the Defendant was willing to pay all requested PIP benefits and in fact did pay the entire amount of benefits claimed in this case, fulfilling the statutory intent to promptly pay benefits. Defendant substantially complied with its statutory responsibility and quickly remitted the entire amount of benefits and past due interest to the best of its ability, evincing an intention to promptly pay what it admittedly owed. Payment for benefits and interest was tendered long before this lawsuit was filed by Plaintiff. The award of interest only places this case within the holding of *Infininty.* Since there was no PIP benefit sought or awarded in this case, but judgment for miscalculated interest only in the amount of $1.48, the Court is unable to find that Plaintiff is entitled to attorneys' fees in the amount of $73,810.

WHEREFORE, based on the foregoing, the Court concludes that since Plaintiff did not seek and was not awarded any unpaid PIP benefits, but received judgment for merely a nominal amount of incorrectly calculated interest, Plaintiff is not entitled to have the Defendant pay their attorneys' fees under the controlling statute.

* * *

Criminal law—Driving under influence—Search and seizure—Traffic stop—Where defendant stopped on side of road with left tires on roadway but did not hinder or impede traffic, deputies did not have probable cause to detain defendant for obstructing roadway—Further, stopping partially off of roadway was not so unusual a manner of operating vehicle as to justify traffic stop to determine reason for unusual operation—Motion to suppress is granted

STATE OF FLORIDA, Plaintiff, v. LUCI MCBRIDE, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2020 CT 1053, Division 60. September 1, 2021. Andrea K. Totten, Judge.

ORDER GRANTING MOTION TO SUPPRESS

This cause came on before the Court for hearing on August 9, 2021, upon "Defendant's Motion to Suppress Unlawfully Obtained Evidence," filed June 10, 2021. Having considered the testimony and evidence presented, the Court finds as follows:

FACTUAL FINDINGS

Defense Counsel noted, and the State conceded, that law enforcement's actions in respect to the instant case were not pursuant to a search or arrest warrant.

Late in the evening of December 22, 2020, Deputy Alexander Wolfe and Deputy First Class Faircloth of the Flagler County Sheriff's Office (FCSO) were on patrol on Belle Terre Parkway in Palm Coast, Florida. DFC Faircloth was Deputy Wolfe's Field Training Officer at the time, and was the passenger in Deputy Wolfe's marked patrol car.

Deputy Wolfe and DFC Faircloth both testified that they observed the vehicle operated by Ms. McBride stopped partially in the roadway on the northbound lanes of Belle Terre Parkway. The front and rear left tires were on the roadway. Deputy Wolfe pulled his patrol car behind Ms. McBride's vehicle, at which point she pulled forward a few feet, before stopping again. Deputy McBride reported to dispatch that he was out with a "signal 16," meaning a disabled vehicle or vehicle obstructing the roadway. He also testified that he believed he could have issued Ms. McBride a citation for obstructing the roadway.

Deputy Wolfe testified at one point that he believed that the vehicle was disabled, but later stated that he did not know if the vehicle was disabled. He conceded that Ms. McBride's brake lights were on. In context, the Court interprets Deputy Wolfe's testimony as meaning that at first glance he believed that Ms. McBride's vehicle may have been disabled, but questioned his initial conclusion when she pulled ahead a few feet and stopped again. In any event, both deputies maintained, and the evidence supports, that Ms. McBride's vehicle was partially obstructing the roadway.

Deputy Wolfe and DFC Faircloth exited their patrol vehicle to make contact with Ms. McBride, at which time they observed various indicators of impairment, which ultimately lead to her arrested for DUI. When asked by the prosecutor about his primary purpose in making contact with Ms. McBride, Deputy Wolfe responded that it was "just to make sure to make sure she was okay." On cross-examination Deputy Wolfe reiterated however, that he called out his encounter with Ms. McBride's vehicle as a "signal 16." He agreed with Defense Counsel that he did not stop behind Ms. McBride in order to check on her well-being.

On cross-examination, Deputy Wolfe agreed that the emergency lane was narrow on the portion of Belle Terre Parkway where Ms. McBride was stopped, meaning that it would be difficult to be in the emergency lane without having at least part of your tires in the travel lane. However, Deputy Wolfe's testimony also indicated that there was sufficient space for a vehicle to pull all the way over and park legally.

The Court admitted into evidence a video from Deputy Wolfe's patrol vehicle. Both Deputy Wolfe and DFC Faircloth testified that Deputy Wolfe initiated only the rear emergency lights on his patrol vehicle. Deputy Faircloth indicated that he did so in order to ensure that neither he nor Ms. McBride were struck from behind. Defense Counsel questioned Deputy Wolfe extensively about the video, seeking a concession that Deputy Wolfe's overhead emergency lights were in fact activated at some point, Deputy Wolfe maintained that he did not recall his overhead lights being on, but eventually conceded that it was "possible" that they were on. Regardless of whether Deputy Wolfe's overhead lights were or were not activated, the reflection from Deputy Wolfe's rear emergency lights could be easily seen in the video offered into evidence.

Notwithstanding Defense Counsel's strenuous argument that the video demonstrates that Deputy Wolfe's overhead lights were activated for some period of time, the Court does not share Defense Counsel's confidence. It is not clear to the Court from the video whether Deputy Wolfe's overhead lights were activated, and the Court accepts the sworn, unrebutted, testimony of Deputy Wolfe and DFC Faircloth that the overhead lights were not activated.

In respect to whether the placement of Ms. McBride's vehicle interfered with traffic, Deputy Wolfe testified that he did not recall seeing any other northbound traffic before he pulled in behind her vehicle. However, cars drove past as he was speaking with Ms. McBride. Belle Terre Parkway has two northbound lanes.

Ms. McBride did not testify.

ANALYIS

When no search warrant has been issued, the State has the burden on a motion to suppress to establish that the evidence sought to be suppressed was obtained lawfully. *State v. Gay,* 823 So. 2d 153, 154-55 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1390c], *cause dismissed,* (Fla. Sept. 24, 2002).

Section 316.2045, Florida Statues, states that a person may not willfully obstruct a public roadway by impeding or hindering traffic, standing or remaining in the street, or endangering the safe movement of vehicles or pedestrians. As argued by the defense, this statute has been interpreted as requiring evidence that the defendant stopped in the roadway "with the specific intent to impede or hinder traffic." *Underwood v. State,* 801 So. 2d 200, 203 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2885b].

In *Underwood,* a deputy observed the defendant stopped in the middle of the road while a man stood in the street next to the vehicle. *Id*. at 201. The street was narrow, so vehicles would not have been able to pass around Underwood, but there were no other vehicles in the roadway. *Id*. When the deputy approached Underwood from behind in his patrol car, Underwood moved on, continuing down the street. *Id*. Nevertheless, the deputy stopped Underwood to issue a citation for obstructing the roadway. On these fact, the appellate court determined that there was no probable cause to detain Underwood for obstructing the roadway. Similarly, in *Koppelman v. State,* 876 So. 2d 618 (Fla 4th DCA 2004) [29 Fla. L. Weekly D1447b] (abrogated on other grounds), the court agreed with Koppelman that he was unlawfully detained for obstructing the roadway when his truck was stopped on a dirt road with his headlights on and no other cars around. *See also, C.W. v. State,* 76 So. 3d 1093, 1096 (Fla. 3d DCA 2011) [37 Fla. L. Weekly D34a] (juvenile's detention by law enforcement could not be justified as a pedestrian violation of obstructing the roadway where there was no evidence that the juvenile actually interfered with traffic); *Bent v. State,* 310 So. 3d 470 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1904a] ("Especially in the absence of traffic, simply being stopped in the road does not evince an intention to obstruct in violation of section 316.2045.").

Based on the foregoing authority, this Court must conclude that law enforcement did not have probable cause to believe that Ms. McBride committed the traffic violation of obstructing a roadway, and therefore could not be detained on that basis.

The State relied on section 316.1945, Florida Statutes, which the Court finds to be inapplicable, and the principle that "there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation." *Bailey v. Bailey,* 319 So. 2d 22 (Fla. 1975). However, the Court finds that the instant facts do not support a conclusion that Ms. McBride's operation of her vehicle was so unusual as to justify conducting a traffic stop to determine the reason.

Perhaps anticipating an argument by the State that Ms. McBride's encounter with law enforcement was consensual, the defense argued that, based on Deputy Wolfe's use of his patrol vehicle's emergency lights, a reasonable person would not have felt free to leave. However, the State did not argue or present evidence to suggest that the interaction between law enforcement and Ms. McBride began as a consensual encounter. The Court therefore rejects the possibility of a consensual encounter as a potential basis for finding law enforcement's encounter with Ms. McBride to be constitutionally permissible.

It is therefore ORDERED and ADJUDGED, Defendant's Motion to Suppress is hereby GRANTED.

Evidence of the defendant's physical appearance, statements to law enforcement, breath test results, and other evidence stemming from her encounter with law enforcement is suppressed.

* * *

Arbitration—Failure to participate—Sanctions—Where defendant sought to compel arbitration but failed to proceed with arbitration, defendant is ordered to show cause why monetary sanctions should not be entered—Affirmative defenses and answer that are captioned for and responsive to complaint in different case are stricken, and default is entered

CAROLYN CASTRO, an Individual, Plaintiff, v. WORLD AUTO, INC., a Florida Corporation, HUDSON INSURANCE COMPANY, a Foreign Corporation, Defendants. County Court, 9th Judicial Circuit in and for Orange County, Civil Division. Case No. 2020-CC-002110-O. September 22, 2021. Elizabeth Starr, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hallandale; and Darren Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiff. Shayan Elahi, Dallas, Texas, for Defendant World Auto, Inc. James S. Myers, McElroy, Deutsch, Mulvaney & Carpenter, LLP, Tampa, for Defendant Hudson Insurance Co.

ORDER COMPELLING PRODUCTION, STRIKING ANSWER AND AFFIRMATIVE DEFENSE AND ENTERING DEFAULT AND GRANTING MOTION FOR RULE TO SHOW CAUSE

THIS MATTER, having come before the Court on the Plaintiff's Motion for Rule to Show Cause [D.E. 23]; Motion to Compel Discovery [D.E. 20]; and, Motion to Strike Answer and Affirmative Defenses [D.E. 21] as to Defendant, WORLD AUTO, INC. (the "DEFENDANT") (collectively the "Motions") on August 30, 2021 before the Honorable Elizabeth Starr (the "hearing"), and the Court having reviewed the file and hearing argument from Plaintiff's Counsel:

1. The Court finds the following:

a. Upon review of the docket, the Motions were properly served upon the DEFENDANT [D.E. 20-21 & 23];

b. Upon review of the docket, the hearing was properly noticed to all parties [D.E. 28];

c. Furthermore, upon review of the communications between the parties and chambers, the parties coordinated and mutually agreed upon the hearing date and time.

d. Plaintiff appeared by and through her counsel of record, Joshua Feygin, Esq. at the hearing;

e. Defendant, Hudson Insurance Company, appeared by and through their counsel of record at the hearing; and,

f. DEFENDANT failed to appear in it's own capacity or through it's counsel of record at the hearing.

g. Upon review of the Plaintiff's Motion for Rule to Show Cause [D.E. 23], the incorporated attachments thereto, and the docket, the Court finds that on or about March 12, 2020, DEFENDANT, through counsel, filed its Motion to Dismiss and Compel Arbitration in this matter [D.E. 16]. On or about April 21, 2020, Plaintiff filed her response in opposition to the Motion to Dismiss and Compel Arbitration [D.E. 17]. Plaintiff attempted to resolve the Motion to Dismiss and Compel Arbitration in good faith with the DEFENDANT by agreeing to proceed with arbitration. DEFENDANT, through counsel, refused to enter into an agreed order compelling the matter to arbitration unless the Plaintiff agreed to tender $5,500.00 as and for the DEFENDANT's attorney's fees and costs for preparing the DEFENDANT's Motion to Compel Arbitration. Plaintiff refused and tried to advance the matter by scheduling the DEFENDANT's Motion to Dismiss and Compel Arbitration before the Court. DEFENDANT took no affirmative action to set its Motion to Dismiss and Compel Arbitration for hearing before the Court and instead let the matter languish. Plaintiff, on her own volition, initiated arbitration through Judicial Arbitration and Mediation Services, Inc. ("JAMS") on or about January 15, 2021. The arbitration proceedings were ultimately terminated by JAMS on or about March 3, 2021 for the Defendant's failure to participate in the proceedings and pay the filing fee.

h. Upon review of the Plaintiff's Motion to Compel and the docket, Plaintiff issued it's First Set of Requests for Production upon the DEFENDANT on February 14, 2020. [D.E. 8]. DEFENDANT failed to timely respond, object or seek a protective order.

i. Upon review of the Plaintiff's Motion to Strike Answer and Affirmative Defenses [D.E. 21] the DEFENDANT'S Answer to the Plaintiff's Complaint [D.E. 18], and the docket, on or about April 22, 2021, DEFENDANT filed a pleading that purported to be its Answer and Affirmative Defenses to the operative Complaint, wherein DEFENDANT raised one (1) affirmative defense. The case style of the DEFENDANT's Answer reflects the matter of "*Nathan Harden v. World Auto, Inc., Hudson Insurance Company*" bearing case number "*2020 CA 6203 O*". The Plaintiff herein is Ms. Carolyn Castro and the case number for the matter is 2020-CC-002110-O. Plaintiff's operative Complaint contains 108 allegation whereas the DEFENDANT's Answer and Affirmative Defenses only addresses 106 allegations. The Answer and Affirmative Defenses appears to set forth an affirmative defense pertaining to a claim of a breach of warranty. Plaintiff has not raised any claims pertaining to a breach of warranty.

2. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

a. Plaintiff's Motion to Compel is **GRANTED**. DEFENDANT shall produce all responsive documents to the Plaintiff's First Set of Requests for Production within TEN (10) days from the date of this Order and any objections to the same are deemed waived;

b. Plaintiff's Motion to Strike Answer and Affirmative Defenses is **GRANTED**. Having been properly noticed of the Plaintiff's Motion to Strike Answer and Affirmative Defenses, DEFENDANT's Answer and Affirmative Defense is hereby stricken and a **DEFAULT** is hereby entered;

c. Plaintiff's Motion for Rule to Show Cause is **GRANTED**. DEFENDANT has used the ruse of arbitration in a manner that damaged the efficiency of justice and the pocketbook of its adversary by delaying the prosecution of the instant matter in excess of a year. This conduct shall not be condoned by this Court. DEFENDANT shall have 7 days to show cause as to why monetary sanctions should not be entered for seeking to compel arbitration in this action and failing to proceed with the same.

d. Plaintiff shall be entitled to attorney's fees and costs for bringing the Motions before the Court. The Court reserves jurisdiction to determine the amount of reasonable attorney's fees and costs; and,

e. This Court further retains jurisdiction to enforce this Order.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Medical provider that is assignee of insured does not have cause of action to recover under PIP policy that has been declared void *ab initio* in declaratory action

CLEVELAND WELLNESS MEDICAL, LLC, a/s/o Robenson Neriede, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-54442-O. October 5, 2021. Carly S. Wish, Judge. Counsel: David T. Sooklal, Anthony-Smith Law, P.A., for Plaintiff. Cara F. Morehouse, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS AND ORDER ON DEFENDFANT'S MOTION TO TRANSFER VENUE

THIS CAUSE, having come before this Court on September 27, 2021, for a hearing on Defendant's Amended Motion to Dismiss and Defendant's Motion to Transfer Venue, and the Court having heard arguments from both parties, reviewed the Motions, court file, all filings by the parties, 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 breach of contract for alleged personal injury protection ("PIP") benefits under Defendant's policy of insurance numbered FLPA399575530 (the "Insurance Policy").

2. Defendant filed the instant Motion because a Circuit Court in the Twentieth Judicial Circuit had previously ruled that the Insurance Policy was void *ab initio*. *Direct General Ins. Co. v. Robenson Nereide, et al.*, No. 19-CA-004910 (Fla. 20th Cir. Ct. 2019, Judge Joseph C. Fuller) (the "Declaratory Action").

3. Accordingly, the Circuit Court in the Declaratory Action ruled that Defendant 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 section 90.202, Florida Statutes, the Court takes judicial notice of the Declaratory Action and Final Default 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. Specifically, the Motion to Dismiss tests the legal sufficiency of the Complaint, as the applicable case law states there is no duty owed and no valid contract exists, therefore, no cause of action exists. *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 300 (Fla. App. 4th DCA 1999) [24 Fla. L. Weekly D559a]; *Response Oncology, Inc. v. Metrahealth Ins. Co.*, 978 F. Supp. 1052, 1058) (S.D. Fla. 1997); *Brown v. City of Vero Beach*, 64 So. 3d 172 at 173 (Fla. App. 4th DCA 2011) [36 Fla. L. Weekly D1380a].

5. In opposition, Plaintiff argues that a default of one party defendant does not operate as an admission against a co-defendant. In support, Plaintiff cites a non-binding case, *Dade County v. Lambert*, 334 So. 2d 844 (Fla. 3d DCA 1976), involving a co-defendant bus driver and co-defendant Dade County. However, Plaintiff's cited case law is distinguishable pursuant to applicable Florida case law regarding the medical provider holding an assignment of benefits and that the due process rights of an assignee-medical provider are not implicated and have not been violated as its interest in the policy arose through or flowed from an assignment of benefits. Furthermore, the assignee-medical provider 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.

6. The Court finds that an assignee medical provider is not an indispensible 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 purported assignment of benefits, which was after the Insurance Policy Application and material misrepresentation took place, the medical provider has no knowledge concerning the Insurance Policy Application or material misrepresentation, and by standing in the shoes of the assignee, the parties are the same.

7. Additionally, Plaintiff's argument does not account for or acknowledge established assignment law in Florida. It is well settled that an assignee cannot possess any greater rights or benefits than the assignor. *See Shaw v. State Farm Fire & 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.*

8. Therefore, when taking Plaintiff's allegations as true in the Complaint, based on the Final Default Judgment, which the Court finds is applicable law, Plaintiff does not have a cause of action to 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.

9. As Plaintiff's standing derives from the Named Insured being a party to the Insurance Contract with Defendant, Plaintiff is unable to amend the pleading to state a cause of action under the now voided Policy. *See Hansen v. Central Adjustment Bureau, Inc.*, 348 So. 2d 608, 610 (Fla. 4th DCA 1977) (citing 10 Fla. Jur., Dismissal § 33, at p. 544). Further, amendment is futile as standing cannot be cured retroactively. *See Progressive Express Ins. Co., v. McGrath Community Chiropractic,* 913 So. 2d 1281 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b].

10. Because any amendment is futile, the Defendant's Amended Motion to Dismiss is hereby GRANTED with prejudice.

11. Defendant's Motion to Transfer Venue is MOOT.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Insurer's motion for summary judgment on defense of claim preclusion and estoppel based on declaratory judgment is denied—Where insurer obtained default declaratory judgment against insured who failed to appear for three examinations under oath but, despite having knowledge that medical provider had pending claim for benefits, insurer did not include provider in declaratory judgment action, insurer has failed to make sufficient showing to establish any essential elements of defense of res judicata and collateral estoppel—Insurer is precluded from using declaratory judgment against non-party to those proceedings by Declaratory Judgment Act and due process—Declaratory action that excluded provider who, as assignee of insured, was indispensable party was improper and resulting judgment cannot be used against provider

EAST COAST MEDICAL REHAB, INC., a/a/o Alberto Gonzalo Roguer Quinones, Plaintiff, v. IMPERIAL FIRE & CASUALTY INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-008905-CC-26, Section SD05. September 15, 2021. Michaelle Gonzalez-Paulson, Judge. Counsel: Tricia Neimand, Anthony-Smith Law, P.A., Orlando; and Michelle Babinsky, The Paredes Babinsky Law Firm, Miami Springs, for Plaintiff. Alexander Avarello, McFarlane, Dolan & Prince, Coral Springs, for Defendant.

ORDER GRANTING PLAINTIFF EAST COAST MEDICAL REHAB, INC.'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S DEFENSE OF CLAIM PRECLUSION AND COLLATERAL ESTOPPEL

THIS CAUSE, having come before the Court on Plaintiff, East Coast Medical Rehab, Inc.'s, Motion for Summary Judgment on Defendant's Defense of Claim Preclusion and Collateral Estoppel, and the Court having considered the same, as well as the filings and evidence submitted by both parties, the arguments of counsel presented at the July 8, 2021 hearing, and otherwise being fully advised in the premises, it is hereby ORDERED AND ADJUDGED:

Plaintiff's Motion for Summary Judgment on Defendant's Defense of Claim Preclusion and Collateral Estoppel is hereby **GRANTED** for the reasons set forth below.

Introduction

Defendant Imperial Fire & Casualty Insurance Company ("Imperial") has engaged in a practice to seek declaratory judgments in circuit courts, without bringing in all interested parties. In these declaratory actions, despite knowledge of other parties' interest in the claim, Imperial makes the conscious decision to not bring in all interested parties, such as the medial providers holding assignments from the named insureds and instead opts to only to sue its insureds. Imperial then obtains default judgments against the insureds and attempts to use those default judgements it obtained against the very parties it specifically chose to exclude from the declaratory action. Imperial continues this practice and injected it into the instant litigation.

Undisputed Facts

1. On February 10, 2020, Imperial filed its Complaint for Declaratory Judgment against one person, its insured Alberto Gonzalo Roguer Quinones in the Circuit Court of Miami-Dade County, Case No. 2019-3070-CA-01 ("Circuit Court Action").

2. The basis for Imperial's action for declaratory judgment was that it claimed there was no coverage under the subject policy of insurance because the insured failed to appear for three properly noticed examinations under oath.

3. It is undisputed that prior to Imperial's filing of the Circuit Court Action, Imperial received medical bills pursuant to an assignment of benefits dated April 17, 2019[1] from East Coast for dates of service April 17, 2019 through October 2, 2019.

4. Yet despite its knowledge that East Coast had a pending claim for medical benefits, Imperial made the choice to not include East Coast in the Circuit Court Action.

5. On June 4, 2020, after Imperial filed its Circuit Court Action, but before it obtained the default final judgment, East Coast filed the instant action.

6. Little more than a month later, on or about July 17, 2020, Imperial allegedly obtained a default final judgment in the Circuit Court Action against the only party to the litigation—Alberto Gonzalo Roguer Quinones.

7. Notably, there is no final judgment of any kind against East Coast.

8. In response to the instant action, Imperial filed its Motion to Dismiss on the basis of the newly obtained Default Final Judgment in the Circuit Court Action, which this Court denied.

9. After much motion practice, on or about March 31, 2021, Imperial filed its Amended Answer and Affirmative Defenses wherein it alleged claim preclusion and collateral estoppel as defenses as a result of the default judgment it obtained against the named insured in the Circuit Court Action.

10. East Coast filed the instant Motion for Summary Judgment asserting there are no facts upon which Imperial can establish the requisite elements of res judicata and collateral estoppel.

11. In response, Imperial did not file any evidence, but simply filed a response brief wherein it only made argument as to a portion of the requisite elements necessary to establish res judicata and collateral estoppel.

ANALYSIS OF LAW

Summary Judgment Standard

Pursuant to the newly amended Florida Rule of Civil Procedure 1.510(a) "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Summary judgment puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury. *Petruska v. Smartparks-Silver Springs, Inc.*, 914 So. 2d 502 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2614a]. Florida has adopted almost in its entirety the federal rule 56. In applying this new Rule 1.510 the Court is to look to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *and Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986), commonly referred to as the "Celotex trilogy", as well as the overall body of case law interpreting Rule 56.

In *Celotex*, the Supreme Court of the United States held

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). In *Anderson*, the Supreme Court of the United States made clear

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes, supra*, and *Cities Service, supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra*, 391 U.S., at 288-289, 88 S.Ct., at 1592. If the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (per curiam), or is not significantly probative, *Cities Service, supra*, at 290, 88 S.Ct., at 1592, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

In *Matsushita*, the Supreme Court of the United States expounded that to survive a motion for summary judgment there must be a "genuine" issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 585, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Thus, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *See id*. In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." *See id*. (quoting Fed. Rule Civ. Proc. 56(e)).

a. ***The Court finds Imperial has failed to make a showing sufficient to establish the existence of an element essential to its defenses of res judicata and collateral estoppel, which Imperial bears the burden of proof at trial.***

The Third District Court of Appeal stated

> The doctrine of res judicata, also known as claim preclusion, applies where four elements are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim in made.
>
> Whereas, collateral estoppel, also known as issue preclusion, applies only where: 1) the identical issues were presented in a prior proceeding; 2) there was a full and fair opportunity to litigate the issues in the prior proceeding; 3) the issues in the prior litigation were a critical and necessary part of the prior determination; 4) the parties in the two proceedings were identical; and 5) the issues were actually litigated in the prior proceeding.
>
> *Pro. Roofing & Sales, Inc. v. Flemmings*, 138 So. 3d 524, 527 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D910a] (citing *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a] and *Porter v. Saddlebrook Resorts, Inc*., 679 So. 2d 1212, 1214-15 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D1881a]).

Thus, Imperial bears the burden to bring forth evidence which establish as genuine issue of material fact as to each of these elements. Imperial has failed to do so. Under the undisputed facts, there is no scenario upon which a jury could enter a verdict in favor of Imperial as to the requisite elements of res judicata or collateral estoppel. As to the elements, "identity of persons and parties to the action" and "identical parties", it is undisputed that East Coast is not the same party as Alberto Roguer Quinones. Thus, as Plaintiff argued, Imperial must establish that East Coast is a "privy" to Alberto Roguer Quinones. *See Rhyne v. Miami-Dade Water & Sewer Auth*., 402 So. 2d 54, 55 (Fla. 3d DCA 1981).

At hearing, Plaintiff argued that East Coast could never be considered a privy for the purposes of res judicata because it is undisputed the assignment of benefits was executed long before either of the subject lawsuit were filed. Imperial argued that East Coast is a privy as a result of its assignment of benefits as East Coast "stands in the shoes of the assignor" and thus the identity of the parties is synonymous. Although it is true that East Coast does "stand in the shoes" of the assignor as a result of the assignment, the Court agrees with East Coast and finds Imperial's argument is without merit. The Third District Court of Appeal has repeatedly held that

> [u]nder this rule, privity denotes mutual or successive relationship to the same right of property, so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment.
>
> There is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, transferee, or lienor of property. This is in harmony with the view that a judgment is binding on privies because they are identified in interest, by their mutual or successive relationship to the same rights of property which were involved in the original litigation.
>
> *Rhyne v. Miami-Dade Water & Sewer Auth*., 402 So. 2d 54, 55 (Fla. 3d DCA 1981).

The Third District again affirmed this principle as recently as 2019 in *Brito v. Heritage Prop. & Cas. Ins. Co*. In *Brito*, the insurance carrier attempted to make the very argument Imperial brings before this Court and the Third District resoundingly rejected it. 276 So. 3d 990, 993 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1898b].

In *Brito*, the insurance carrier, like here, argued that an assignor (the insureds under the subject policy) and its assignee (a mold testing company) are "privies" (as a matter of law). The Third held this argument failed because

> [T]he mold testing company acquired its limited rights before either lawsuit was filed, such that the Insureds could have been impleaded as parties by the Insurer (but were not) to the mold testing company suit. The argument and case law advanced by the Insurer may be applicable in a case in which the assignee acquires its interests after the judgment in the first suit has been entered.
>
> *See id*. (internal citations omitted). This same scenario exists here.

It is undisputed that Alberto Roguer executed an assignment of benefits in favor of East Coast back in April of 2019—prior to both the Circuit Court Action and this instant action. Imperial could have simply impleaded East Coast to the Circuit Court Action, but instead it chose not to. Thus, because it is undisputed that East Coast acquired its interest over a year prior to Imperial obtaining its Final Default Judgment, there is no evidence Imperial can bring forth to establish that East Coast was a "privy" as required to establish the element of identity of the parties. Imperial urges that the Court should neverthe-

less consider East Coast a privy because it obtained its assignment after Alberto Roguer executed his contract with Imperial and therefore the assignment was post-contract. The Court finds no merit to this argument.

As to the element, "identity of the quality of the persons for or against whom the claim in made" the Court finds Imperial has failed to bring forth any evidence to which a jury could find in favor of Imperial.

As to the elements, "identity of the thing sued for", "identity of cause of action", and "identical issues presented in prior proceeding", the Court finds Imperial has failed to bring forth any evidence to which a jury could find in favor of Imperial. It is undisputed that Imperial filed its Circuit Court Action as an action for declaratory judgment seeking to declare there is no coverage under the subject policy in a court of equity pursuant to the Declaratory Judgments Act as a result of what it alleges to be a failure by the insured to attend an examination under oath. It is further undisputed that East Coast has filed its action for breach of contract in a court of law for unpaid personal injury protection benefits as well as its own petition for declaratory relief. Imperial argues that there is identity of the thing sued for and identical issues presented in the prior proceeding because in addition to its breach of contract count, East Coast also raises a declaratory action seeking coverage. The Court finds this argument is without merit.

First, East Coast has a pending breach of contract count, which negates this element. However, even if East Coast solely filed an action for declaratory relief, East Coast's action would not be barred as the Declaratory Judgment Act specifically precludes any declaration from prejudicing the rights of non-parties. East Coast was a not a party to the Circuit Court Action and thus that declaration cannot prejudice its rights. Thus, the law is clear that East Coast can litigate and seek a coverage determination, which would include a claim for declaratory relief. *See Restoration 1 CFL v. State Farm Fla. Ins. Co*., 189 So. 3d 340, 341 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D998c]; *Bioscience W. Inc. v. Gulfstream Prop. & Cas. Ins. Co*., 185 So. 3d 638, 642 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D349a]; *United Water Restoration Grp., Inc. v. State Farm Fla. Ins. Co*., 173 So. 3d 1025, 1028 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1569a].

As to the element that "there was a full and fair opportunity to litigate the issues in the prior proceeding", not only did Imperial make no argument or provide any evidence that it could establish this argument, but the undisputed facts unequivocally contravene same East Coast was excluded from the Circuit Court Action. As such, East Coast was precluded from raising its action for unpaid PIP benefits and litigating the merits of Imperial's claim that it properly noticed three examinations under oath. Thus, there is no evidence that jury that could find in favor of Imperial that East Coast had a full and fair opportunity to litigate these issues in the prior proceeding. These facts go hand in hand with the element that "the issues were actually litigated in the prior proceeding". Imperial has brought forth no evidence or made any argument that the merits of its claim that properly noticed three examinations under oath was actually litigated by any of the parties in the Circuit Court Action. In fact, the sole evidence upon which Imperial relies upon to support its defense of collateral estoppel is a "default" judgment, the very existence of which establishes there was no litigation of the merits—Imperial simply obtained a judgment by the insured failure to appear and defend the case.

As to the final element, "the issues in the prior litigation were a critical and necessary part of the prior determination", Imperial failed to present any evidence upon which a jury could rely to establish this element and Imperial made no argument regarding same at hearing. Additionally, the undisputed facts show there was no "prior determination" in the Circuit Court Action, it was simply a default judgment against the insured.

b. ***Imperial is prohibited from using the Default Final Judgment against East Coast by the Declaratory Judgment Act.***

Florida Statute Section 86.091 of the Declaratory Judgment Act states

> When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. **No declaration shall prejudice the rights of persons not parties to the proceedings**. In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard.

§ 86.091, Fla. Stat. (emphasis added). The Third District Court of Appeal has addressed this issue and held that a non-party to a declaratory action is not bound by any judgment where it was not a party. *See Independent Fire Ins. Co. v. Paulekas*, 633 So. 2d 1111, 1113 (Fla. 3d DCA 1994).

It is undisputed that Imperial brought its Circuit Court Action pursuant to the Declaratory Judgment Act and sought declaratory relief there under. Accordingly, the very statutes upon which Imperial premised its claim for res judicata and collateral estoppel makes explicitly and unambiguously clear that any judgment therein cannot be used against a non-party. *See* § 86.091, Fla. Stat.; *Independent Fire Ins. Co. v. Paulekas*, 633 So. 2d 1111, 1113 (Fla. 3d DCA 1994). Accordingly, Imperial is precluded from claiming that East Coast is bound by the default final judgment.

c. ***Imperial's contention that East Coast is bound by the later obtained default final judgment is thwarted by fundamental due process rights afforded by the Florida and United State Constitutions.***

Moreover, Article 1, Section Nine of the Florida Constitution states "Due process.—No person shall be deprived of life, liberty or property without due process of law." Art. I. 9, Fla. Const. The Fifth Amendment to the United State Constitution is clear that "No person shall . . . be deprived of life, liberty, or property, without due process of law." Amend. V, U.S. Const.

Due process requires notice and an opportunity to be heard. *State, Dept. of Fin. Services v. Branch Banking & Tr. Co.*, 40 So. 3d 829, 833 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1541a]; *Florida Pub. Serv. Comm'n v. Triple A Enterprises, Inc.*, 387 So. 2d 940, 943 (Fla. 1980).

Thus, the Florida Supreme Court has stated "[i]t is so fundamental to our concept of justice that a citation of supporting authorities is unnecessary to hold that the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party and from which he has literally been excluded by the failure of the moving party to bring him properly into court. Under our system a man's rights cannot be disposed of or otherwise determined by a judicial decree entered in absentia." *See Alger v. Peters,* 88 So. 2d 903, 906 (Fla. 1956). Thus, no judgment or decree in an action is binding upon non-parties, nor is any finding made in the course of arriving at the judgment. *See id*.; *Chase v. Turner,* 560 So. 2d 1317, 139 (Fla. 1st DCA 1990); *Chastain v. Uiterwyk*, 462 So. 2d 1212 (Fla. 2d DCA 1985); *ATM Ltd. v. Caporicci Footwear Ltd., Corp*., 867 So. 2d 413, 413 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2834b]; *Pace v. Blue LLC*, 48 So. 3d 1000, 1001 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D2663a].

Imperial knew of East Coast's interest in the claim and still specifically excluded East Coast from the Circuit Court Action. East Coast had no ability to protect its rights in the Circuit Court Action and litigate the merits of Imperial's claim. Yet, Imperial now comes to this Court attempting to seize on its tactics and preclude East Coast's

proper suit. Imperial's contention runs afoul of the very foundational constitutional principles upon which Florida's system is built. *See* Art. I. 9, Fla. Const.; Amend. V, U.S. Const.; *Alger v. Peters,* 88 So. 2d 903, 906 (Fla. 1956). Black letter law and fundamental due process rights require that East Coast be permitted notice and an opportunity to be heard before it can be bound by any judgment. It is undisputed that East Coast was not afforded that opportunity in the Circuit Court Action.

In response Imperial argues that this is not a criminal case and thus East Coast's due process rights are not violated. The Court finds Imperial's argument without merit. As East Coast correctly argues, due process applies in all cases—both civil and criminal.

d. ***East Coast's assignment of benefits required Imperial to bring East Coast in as a named party to the Circuit Court Action as East Coast was an indispensable party thereto.***

East Coast further argues that Imperial's Circuit Court Action was improper and any resulting judgment cannot be used against East Coast as the Florida Supreme Court has repeatedly held that an assignee is a necessary and indispensable party, whereas the assignor is merely an unnecessary, proper party. *See Sammis v. Wightman*, 31 Fla. 45, 55-56, 12 So. 536, 539 (Fla. 1893); *Berlack v. Halle*, 22 Fla. 236, 248 (Fla. 1886). This principle is followed by the district courts of appeal. *See Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185 (Fla. 4th DCA1983); *Allman v. Wolfe*, 592 So. 2d 1261, 1262-63 (Fla. 2d DCA 1992); *Grammer v. Roman*, 174 So. 2d 443, 445 (Fla. 2d DCA 1965).

East Coast held an assignment prior to the initiation of the Circuit Court Action. As argued by East Coast, the insured, although not an improper party, no longer had any interest in the litigation for the insured to have any incentive to make an appearance and defend against Imperial's declaratory action. This is because in a claim for personal injury protection benefits, the assignee is the owner of the claim and the insured assignor lacks standing to make a claim for the personal injury protection benefits. *See Oglesby v. State Farm Mut. Auto. Ins. Co.,* 781 So. 2d 469, 470 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D702a]; *Echo v. MGA Ins. Co*., 157 So. 3d 507, 511 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D442a]; *Price v. RLI Ins. Co.*, 914 So. 2d 1010, 1013-14 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2536a]; *Rose v. Teitler,* 736 So.2d 122 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1465a]). The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name. *See id*. (citing *Dove v. McCormick,* 698 So.2d 585 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1870a]; *State Farm Fire and Cas. Co. v. Ray,* 556 So.2d 811 (Fla. 5th DCA 1990) (quoting *Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp*., 864 So. 2d 55 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2865b].

Thus, once Alberto Roguer executed the assignment of benefits, he no longer held any interest in the claim for personal injury protection benefits. Imperial's decision to only file suit against its insured, who no longer had any interest in the personal injury protection claim, and specifically exclude the indispensable party East Coast, who did, should not be rewarded with preclusion of East Coast's proper suit related to same.

Plaintiff's Motion for Summary Judgment on Defendant's Defense of Claim Preclusion and Collateral Estoppel is hereby **GRANTED**.

[1]Once an assignment of benefits is executed only the provider of holds a cause of action for PIP benefits. *See Echo v. MGA Ins. Co*., 157 So. 3d 507, 512 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D442a] (noting Appellant (the named insured) lacked standing to sue for payment of PIP benefits under the policy by her assignment of those benefits).

* * *

Insurance—Personal injury protection—Coverage—Untimely claims—Summary judgment—No disputed issue of material fact exists as to whether treatments were rendered more than 35 days before postmark date of claims where, despite medical provider's affidavit attesting to customary business practice of submitting claims within one week of treatment, claim forms for dates of service at issue were not signed by provider until 102 days after treatment was rendered

THOMAS ROUSH M.D. d/b/a COLUMNA INC., a/a/o Louis Behr, Plaintiff, v. THE STANDARD FIRE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No: 2019-000690-SP-21, Section HI01. September 16, 2021. Milena Abreu, Judge. Counsel: Richard Patino, The Patino Law Firm, Hialeah, for Plaintiff. Jeffrey W. Golovin, Dutton Law Group, Ft. Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Court, after hearing from both parties on Defendant's Motion for Summary Judgment on August 18, 2021, and after a review of the motion, evidence and affidavits filed both in support and in opposition to said motion, the pleadings, exhibits, applicable statutory authority and case law, the Court hereby rules as follows:

FACTUAL BACKGROUND:

1) THOMAS ROUSH M.D. d/b/a COLUMNA INC., a/a/o Louis Behr ("Plaintiff"), filed a lawsuit against The Standard Fire Insurance Company ("Defendant") based on the alleged breach of an automobile insurance contract for PIP benefits.

2.) Plaintiff is a healthcare provider that rendered services to the claimant, Louis Behr for injuries sustained in a motor vehicle accident that occurred on September 16, 2016.

3.) Plaintiff sues Defendant for two claimed dates of service: February 16, 2018 and February 28, 2018

4.) Specifically, Plaintiff alleges Defendant has failed to pay the full amount due for services rendered under a policy of automobile insurance issued by The Standard Fire Insurance Company.

5) Plaintiff submitted and Defendant paid for dates of service: 7/19/17, 8/16/17, 11/1/17, 7/18/18.

6) Defendant denied payment for the two February dates of service (February 16 and 28, 2018) alleging they did not receive the bills within 35 days of service pursuant to Florida Statute 627.736(5)(c).

7) In opposition to Defendant's Motion for Summary Judgment, Plaintiff submitted the affidavit of Thomas Roush MD, who is the owner and medical doctor of Plaintiff provider attesting to the usual and customary business practices of the provider to send out the medical bills one week after the rendered treatment.

LEGAL ANALYSIS:

The Florida Supreme Court recently adopted the federal summary judgment standard and amended Florida Rule of Civil Procedure 1.510. *See In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So.3d 72, 74 (Fla. 2021) [46 Fla. L. Weekly S95a]. Effective May 1, 2021, the amended rule adopts the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 US 317 (1986). On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp*., 475 US 574, 597 (1986). In addition, in opposing a motion for summary judgment, the nonmoving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See Fla. R. Civ. P. 1.510(c)*.

Florida Rule of Civil Procedure 1.510 states, in pertinent part:

(a) Motion for Summary Judgment or Partial Summary Judgment: A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

The existence of a mere "scintilla" of evidence in support of the nonmovant's position is insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 US 242, 252 (1986). A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita* at 586. "A court need not permit a case to go to a jury. . . when the inferences that are drawn from the evidence, or upon which the non-movant relies, are "implausible." *See Mize v. Jefferson City Bd. of Educ*., 92 F.3d 743 (11th Cir. 1996) (citing *Matsushita*, 475 US at 592-94).

Moreover, at the summary judgment stage, a court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. In making this determination, the court must decide which issues are material. A material fact is one that might affect the outcome of the case. *Id*. at 248. "Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

In opposition to Defendant's Motion, Plaintiff submitted the affidavit of Dr. Thomas Roush. Dr. Roush attests to the usual and customary business practice of the provider as follows:

a) to fill out the 1500 Health Insurance Claim Form ("HCFA") with the CPT code that corresponds to the treatment that is administered to the patient;

b) after treating the patient, the doctor finishes filing in the empty boxes, reviews the form in its entirety and then signs the form;

c) the completed HCFA form is then mailed to the patient's insurance company within one week after treatment of the patient;

Dr. Roush further attests to following this usual customary and business practice in this specific claim and treatment of patient, Louise Behr; indeed, a review of all the HCFA forms for the dates of service that were paid by the Defendant in this case, demonstrate Dr. Roush's acting in conformity with this normal business practice. (See HCFA form for date of service July 9, 2017 signed July 28, 2017, HCFA form for date of service August 16, 2017, signed August 21, 2017, HCFA form for date of service November 1, 2017, signed November 7, 2017 and HCFA form for date of service July 18, 2018, signed July 20, 2018.)

However, the dates of service at issue in this case are an entirely different matter. The HCFA forms for dates of service *February 16 and 28, 2018* are not signed by Dr. Roush until *May 29, 2018.* On its face, this uncontroverted evidence unequivocally demonstrates the Plaintiff did not act in conformity with nor follow its usual and customary business practice of mailing the bill within one week after treatment as the bill was not even signed, let alone mailed/postmarked until ***102*** days *after* the rendered treatment. As a result, the Court finds there is no evidence on which a jury could reasonably find for the nonmovant/Plaintiff.

Under Florida Statute 627.736(5)(c), an insurer is not obligated or required to pay PIP bills for "charges for treatment or services rendered more than 35 days before the postmark date of the statement;" an exception is made for bills submitted within "75 days before the postmark date of the statement" if the provider submitted a "notice of initiation or treatment within 21 days after its first examination or treatment." *Advanced Diagnostics and Pain Management, Inc. v. United Automobile Insurance Company*, 16 Fla. L. Weekly Supp. 358d (County Court, 17th Judicial Circuit in and for Broward County, Case No. 08-15390 COCE 53. Febraury 4, 2009. A provider that has failed to submit bills within the timeframe mandated by the statute has violated the express terms of the stattue by including untimely claims in the billing statement submitted to the insurer. *Coral Imaging Services a/a/o Virgilio Reyes v. Geico Indemnity Insurance Company*, 955 So.2d 11, 12 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a].

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment is **granted**. Plaintiff shall take nothing from this action and Defendant shall go hence without day. The Court reserves jurisdiction to determine entitlement and amount of attorney's fees and costs.

* * *

Insurance—Personal injury protection—Motion to strike or exclude unpled or waived issues is granted—Bar to injection of new claim or theory subsequent to a recent Florida Supreme Court ruling that undermined original claim or theory

NEWLIFE HEALTHCARE AND WELLNESS, a/a/o Yoleido Niebla, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-003136-CC-05, Section CC08. September 22, 2021. Maria D. Ortiz, Judge. Counsel: Carla C. Martinez, Miami, for Plaintiff. Manuel Negron and Victoria San Pedro Madani, Shutts & Bowen LLP, Miami, for Defendant.

ORDER GRANTING ALLSTATE'S MOTION TO EXCLUDE/STRIKE ISSUES NOT PLED BY THE PLAINTIFF IN ITS COMPLAINT

THIS CAUSE came before the Court on Allstate Fire and Casualty Insurance Company's ("Allstate") Motion to Exclude/Strike Issues not Pled, Improperly Pled and/or Waived by the Plaintiff ("Motion to Exclude/Strike"), and after hearing argument of counsel, reviewing the pleadings filed with the Court, and reviewing all applicable case law, the Court makes the following findings of fact and conclusions of law:

Findings of Facts

Plaintiff filed this lawsuit for PIP benefits on February 17, 2016. The Complaint asserted a claim for breach of contract, based on allegations that "Plaintiff. . . have submitted the following medical bills to Defendant, which are at issue in the instant case: for DOS 6/12/14 - 9/23/14 in the total owed amount of $10,000.00." Compl. at ¶ 13. The Complaint goes further to allege: "Statutory Demand was made upon Defendant to pay said medical benefits and/or benefits pursuant to the policy and Florida law by sending via certified mail the statutory demand letter. . .prior to the filing of this lawsuit. Please see demand attached as Exhibit B." Compl. at ¶ 16. Complaint's Complaint alleged a breach of contract, as a result of Allstate failing "to make any payments and/or acknowledge that payments would be forthcoming," and failing "to pay said medical expenses within thirty (30) days from notice of the loss and amount of the same." Compl. at ¶¶ 18, 24.

Attached as Exhibit B to Plaintiff's Complaint is a copy of one of the pre-suit demands sent by Plaintiff. The pre-suit demand listed an amount billed of $13,890. Plaintiff's letter demanded reimbursement of PIP benefits in the amount of $11,112, which is precisely 80% of the amount billed by Plaintiff. Similarly, Plaintiff sent Allstate a second demand letter dated August 21, 2014. The second demand letter listed an amount billed of $7,445, and demanded $5,956, which is also 80% of the amount billed.

Shortly after filing its Complaint, on March 21, 2016, Plaintiff filed initial discovery in this case, including its Request for Admissions. In Plaintiff's Request for Admissions, Plaintiff asked Allstate to admit:

Request for Admission No. 9.: Defendant has not paid, excluding any applicable PIP Deductible, 80% of the medical expenses incurred by the patient as a result of the automobile accident which is subject of the lawsuit.

Request for Admission No. 10: Defendant does not have evidence to establish that it is not responsible for paying, excluding any applicable PIP deductible, 80% of the medical expenses incurred by the patient as a result of the automobile accident which is subject of this lawsuit

Request for Admission No. 14: Defendant has not pay [sic] eighty percent of the medical bills submitted by Plaintiff within thirty (30) days after being furnished with written notice of said bills.

Allstate answered the Complaint, raising two defenses, the first being that that Allstate's policy expressly elected reimbursement based on the fee schedule limitations authorized by the Florida PIP statute. The Second Affirmative Defense addressed whether Plaintiff appropriately billed Allstate for the correct number of units of 95851 and 95831. Throughout the litigation, Plaintiff maintained the position that Allstate's policy did not properly elect the statutory fee schedules, and that Allstate was required to pay 80% of Plaintiff's charges for all of its charges.

On January 26, 2017, the Florida Supreme Court decided this issue in Allstate's favor. *Allstate Insurance Company v. Orthopedic Specialists,* 212 So. 3d 973 (Fla. 2017) [42 Fla. L. Weekly S38a] ("*Serridge*"). In its Answers to Interrogatories, which were answered more than four years after this lawsuit was initiated, Plaintiff raised a new issue. Plaintiff now claimed that payment at 80% of the billed amount was incorrect, and that Allstate should have paid Plaintiff 100% of its charges for 95851 and 95831 (the "Billed Amount Issue"). (Plaintiff also changed its claimed damages to $336.00.) Prior to this time, Plaintiff had maintained that payment at 80% of the billed amount was correct. Allstate responded by filing its Motion to Exclude/Strike.

Legal Standard and Conclusions of Law

I. Allstate's Motion to Exclude/Strike

Florida law is clear that a party is bound by the issues as framed in the pleadings, and the Complaint must be pled with sufficient particularity to permit a defendant to prepare its defense. *Right Choice Medical & Rehab Corp. a/a/o Evelyn Martinez v. Allstate Fire and Casualty Ins. Co.*, Case No. 3D21-105 (Fla. 3d DCA 2021); *Marshall Bronstein, D.C. a/a/o Claire Libasci v. Allstate Ins. Co.*, [315 So. 3d 44] 4D21-4 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D725b]; *see also Assad v. Mendell,* 550 So. 2d 52, 53 (Fla. 3d DCA 1989). The Florida Supreme Court has held that where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.,* 537 So. 2d 561 (Fla. 1988). Relying on *Arky Freed,* the Fourth District Court of Appeal has consistently held that parties are precluded from recovery on unpled claims tried without the consent of the parties. *E.I. Du Pont De Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A.,* 857 So. 2d 925, 930 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2171a]; *Straub v. Muir-Villas Homeowners Ass'n, Inc.,* 128 So. 3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a]. Many other Florida courts have concurred in finding error when a trial court allows a plaintiff to argue an unpled theory or cause of action at trial. *See Sunbeam Television Corp. v. Mitzel,* 83 So. 3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a]; ***Bloom v. Dorta-Duque,*** 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a]; ***Robbins v. Newhall,*** 692 So. 2d 947, 949 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D945b]; ***Cioffe v. Morris,*** 676 F.2d 539, 543 n. 8 (11th Cir. 1982).

It was not until after the Florida Supreme Court decided *Serridge* in favor of Allstate that Plaintiff attempted to inject the billed amount issue into this litigation. Plaintiff now seeks for the Court to allow it to take a position which is diametrically opposed to the position it took in its original Complaint and for almost four years of litigation that Allstate **could not** apply the fee schedules. Now Plaintiff claims Allstate can apply the fee schedules but somehow did so incorrectly. Florida law does not permit this. *See Noble v. Martin Memorial Hosp' Ass'n, Inc.,* 710 So. 2d 567 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]; *Inman v. Club on Sailboat Key, Inc.,* 342 So. 2d 1069 (Fla. 3d DCA 1977); *Bailey v. State Farm Mut. Auto. Ins.* Co., 789 So. 2d 1181 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1739b]. "[I]t is an abuse of the legal process, and the defendant, to permit a plaintiff to sue on one legal theory and after losing because he cannot support his allegations to come back and allege the same occurrence or transaction and seek relief in a different legal theory." *Quality Type & Graphics v. Guetzloe,* 513 So. 2d 1110 (Fla. 5th DCA 1987). Here, as evidenced by its Complaint, Plaintiff's Demand Letter, and Initial Discovery, Plaintiff was litigating fee schedule election theory. Plaintiff did not plead any other issue in the alternative, and the issue Plaintiff seeks to advance—the Billed Amount Issue—is diametrically opposed to what Plaintiff pled and litigated throughout the life of this case. Accordingly, Allstate's Motion to Exclude/Strike Issues not Pled, Improperly Pled, and/or Waived by Plaintiff is hereby granted as to the Billed Amount Issue.

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[1] [Editor's note: No reference in body of court document.] This is legally insufficient good cause. *Norflor Constr. Corp. v. City of Gainesville,* 512 So.2d 266 (Fla. 1st DCA 1987), *rev. denied,* 520 So.2d 585 (Fla. 1988) (non-record conferences, including the taking of a deposition, without filing the transcript with the Court, not found to be good cause); *Weaver v. The Center Business,* 578 So.2d 427, 430 (Fla. 5th DCA 1991), *rev, dismissed,* 582 So.2d 624 (Fla. 1991) (non-record conferences are insufficient good cause); *accord Weitzel v. Hargrove,* 543 So.2d 392 (Fla. 3d DCA 1989)

* * *

Insurance—Personal injury protection—"Confession of judgment" in amount less than amount alleged in suit for PIP benefits is not confession of judgment, but offer to settle

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Deivy Fajardo, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-002387-SP-24, Section MB01. October 4, 2021. Stephanie Silver, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, PL, Miami, for Plaintiff. Sean Sweeney, Miami Gardens, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR DEFAULT AND PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S CONFESSION OF JUDGMENT AND DEEM PAYMENT AS OFFER TO SETTLE

THIS CAUSE, having come before the Court on October 1, 2021, upon Plaintiff's Motion for Default and Plaintiff's Motion to Strike Defendant's Confession of Judgment and Deem Payment as Offer to Settle, after hearing argument of counsel for each party, and the Court after being fully advised on this issue, this Court hereby holds as follows:

FACTUAL AND PROCEDURAL BACKGROUND

1. This is an action for unpaid and/or underpaid Personal Injury Protection benefits. On April 13, 2021 Plaintiff filed its Complaint seeking Personal Injury Protection benefits, which included a jurisdictional statement for damages within $100.00 - $500.00.

2. On September 9, 2021, the Defendant, tendered payment in the amount of $2.20 for benefits and $.09 for interest. Defendant indicated that said payment was a Confession of Judgment and stipulated to Plaintiff's entitlement to reasonable attorney's fees and costs.

3. Plaintiff filed its Motion to Strike Defendant's Confession of Judgment and Deem Payment as an Offer to Settle. The Plaintiff alleges that the Confession of Judgment indicates forthcoming payment in an amount less than that sued upon and fails to take into consideration CPT S8948 which was not paid by the Defendant.

4. The Defendant on the other hand argues that it has issued payment in an amount it believes to be reasonable and thus brings finality to the subject action.

LEGAL ANALYSIS AND DISCUSSION

The Confession of Judgment doctrine is limited to situations where the filing of the lawsuit acted as a necessary catalyst to resolve the dispute **in its entirety** and force the insurer to satisfy its obligations under the insurance contract. *See, e.g.*, *State Farm Fla. Ins. Co. v. Lime Bay Condo., Inc.*, 187 So.3d 932, 935 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D730a] (emphasis added)

As indicated in *Wollard v. Lloyd's and Companies of Lloyd's*, 439 So. 2d 217, 218, (Fla. 1983), when a party Confesses Judgment it decline[s] to defend its position in the pending suit and admits to the allegations of Plaintiff's Complaint. *See also Amador v. Latin American Prop. & Cas. Ins. Co*., 552 So.2d 1132 (Fla. 3d DCA 1989) and *Losicco v. Aetna Cas. And Sur. Co.,* 588 So.2d 681 (Fla. 3rd DCA 1991).

Defendant unilaterally determined that the amount it believes to be due to Plaintiff in this action in contravention to the allegations in Plaintiff's Complaint. Thus, Defendant's "Confession" is nothing more than an offer to settle as it fails to provide the Plaintiff full and adequate relief as plead in its Complaint. *See, e.g.*, *MRI Assocs. of St. Pete. d/b/a Saint Pete MRI, a/a/o Maria Puente v. Progressive Select Inc. Co.*, 28 Fla. L. Weekly Supp. 348a, (Fla. 13th Circuit) (March 31, 2020); *Med. Spec. of Tampa Bay, LLC d/b/a Gulf Coast Injury Ctr. a/a/o James T. DuBois Jr. v. USAA Cas. Ins. Co.*, (Fla. 6th Circuit) (May 18, 2011) [18 Fla. L. Weekly Supp. 695b]

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

1. Defendant's Motion for Enlargement of Time to Respond to Plaintiff's Complaint is hereby GRANTED. Defendant shall provide a response to Plaintiff's Complaint within twenty (20) days of the granting of this Order.

2. Plaintiff's Motion to Strike Defendant's Confession of Judgment and Deem Payment as Offer to Settle is hereby GRANTED.

* * *

Insurance—Personal injury protection—Affirmative defenses—Amendment—Motion to amend affirmative defenses to add new defenses alleging insufficient demand letter over 5 years after insurer's receipt of letter and 3 ½ years after complaint was filed is denied—No merit to argument that medical provider would not be prejudiced by amendment because provider had itself injected new legal theory by providing recent court decision holding that use of 2007 limiting charge rather than 2007 participating physician fee schedule was correct way to reimburse PIP benefits where provider had argued from onset of case that insurer did not properly reimburse benefits under policy and fee schedule—Further, amendment would prejudice provider where statute of limitations on dates of service at issue expired prior to insurer filing motion to amend

HOLLYWOOD MEDICAL & REHABILITATION, INC., a/a/o Sharon Brown, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-002822-SP-25, Section CG01. October 12, 2021. Linda Melendez, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale; and Robert K. Hannat, Miami, for Plaintiff. Cristina M. Cabrera and Michael P. Hughes, Progressive PIP House Counsel, Medley, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND AFFIRMATIVE DEFENSES

THIS CAUSE, having come before the Court on September 23, 2021, upon Defendant's Motion for Leave to File Amended Answer and Affirmative Defenses, the Court having heard argument of counsel, reviewed the case law and the Court having been otherwise fully advised in the premises, the court finds as follows:

This action concerns medical treatment provided by the Plaintiff to Sharon Brown from September 1, 2015 to October 7, 2015. Sharon Brown was insured with Progressive American Insurance Company under a policy providing Personal Injury Protection benefits. On June 14, 2016, the Plaintiff sent a demand letter to the Defendant. On July 15, 2016, Progressive responded to the demand letter stating that "All charges were paid pursuant to the reimbursement limits provided under F.S. 627.736(5)(a)(2)(2008) and/or F.S. 627.736(5)(a)(2)(2013)."

Thereafter, claiming that Progressive did not pay properly pursuant to the fee schedules found in the referenced statutes, Plaintiff filed a 2 count complaint on February 11, 2018 alleging that Progressive did not properly pay and requesting a declaratory judgment declaring that Defendant is liable to Plaintiff for damages based upon breach of the subject insurance policy for failure to make the proper payments at the fee schedule and policy language. After a motion to dismiss on the declaratory action was ultimately denied, Defendant filed its First Amended Answer & Affirmative Defenses on July 6, 2018. Defendant's Amended Answer and Affirmative defenses contained only two affirmative defenses: (1) "Defendant has paid all benefits reasonably due under any contract of insurance and the Florida Motor Vehicle No-Fault Law. The dates of services submitted to the Defendant were paid in accordance with the Fee Schedule;" (2) "the dates of service submitted to the Defendant were paid in accordance with the Fee Schedule and 627.736(5)(a)(3). Defendant made the appropriate Multiple Procedure Payment Reduction (MPPR) pursuant to the CMS and Florida Motor Vehicle No-Fault Law." Importantly, there was no mention of a defective demand letter. Prior to filing its Amended Answer and Affirmative Defense, the Defendant filed its Motion for Final Summary Judgment and Incorporated Memorandum of Law on June 25, 2018. In its motion, the Defendant claimed that they provided notice of their intent to reimburse pursuant to the fee schedules found in Fla. Stat. 627.736(5)(a)(1-5) and that the previous payments made by the Defendant were properly paid. Therefore, Defendant asked for Summary Judgment in its favor. There was no mention of a defective demand letter as an additional reason for final judgment in its favor.

On July 30, 2019, the Plaintiff took the deposition of Antoinette Whittingham, Progressive's corporate representative. In that deposition, Ms. Whittingham testified that Progressive previously paid correctly pursuant to the fee schedule and that there were no other defenses other than fee schedule (Page 14-15 of Deposition Transcript of Antoinette Whittingham, filed as an attachment to Defendant's Response to Plaintiff's Amended Response to Defendant's Motion for Leave to Amend Answer and Affirmative Defenses, Filed September 21, 2021). There was no mention of a defective demand letter.

Later, on March 12, 2021, the Defendant filed its Amended Motion for Final Summary Judgment and Incorporated Memorandum of Law. Again, Progressive pled that it gave the simple notice requirement to reimburse pursuant to the permissive fee schedules and that it allowed and paid Plaintiff's charges correctly pursuant to those fee schedules. There was no mention of a defective demand letter.

On March 12, 2021, the Defendant also filed the affidavit of Antoinette Whittingham, the Litigation Adjuster assigned to the file. She swore that all payments were properly made in accordance with the terms and conditions of the policy and that no further payment was due and owing. There was no mention of receiving a defective demand letter.

On March 29, 2021, the Defendant filed its Second Amended Motion for Final Summary Judgment and Incorporated Memorandum of Law. Again, there was no mention of receiving a defective demand letter.

On April 28, 2021, the 3rd DCA held in *Priority Medical Centers, LLC v. Allstate Ins. Co.*, 319 So.3d 724 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D978b], that the correct way to reimburse diagnostic images under the fee schedules found in Fla. Stat. 627.736(5)(a)(1-5) was using the 2007 Limiting Charge, not the 2007 participating physicians fee schedule. On May 4, 2021, the Plaintiff filed its notice of filing supplemental authority in Opposition to Defendant's Motion for Summary Judgment providing the Court a copy of this new decision. This decision was pertinent to the legal issues before the Court as Progressive had continuously argued in its pleadings and motions that it previously paid the Plaintiff properly pursuant to its policy and the "Fee Schedule". The explanations of benefits attached to Defendant's Affidavit in Support of its motion proved otherwise as they indicated Progressive paid the participating physician's fee schedule for 2007, not the Limiting Charge.

On May 5, 2021, the Defendant filed its Motion for Leave to File Amended Answer and Affirmative Defenses and attached a copy of its proposed Second Amended Answer and Affirmative Defenses. The proposed affirmative defenses included two new affirmative defenses: (3) Plaintiff's failure to submit a valid pre-suit demand letter and (4) equitable estoppel due to Plaintiff's failure to serve a valid pre-suit demand letter. The court's review of the docket and all filings thereto shows this is the first time at any point in the litigation that Defendant has specifically and with particularity disputed the validity of the Plaintiff's demand letter.

On May 6, 2021, the Court denied Defendant's emergency motion for continuance of the previously rescheduled hearing on both parties summary judgments that Defendant filed in an attempt to insert its new defenses.

On May 7, 2021, the Court held a hearing on Defendant's Motion for Final Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. Ultimately, based on the only pleadings in front of the Court in the three plus (3+) years of litigation, the Court denied Defendant's Motion for Final Summary Judgment as the Court found Defendant did not previously make proper payments under the Fee Schedule and Defendant's policy.

On September 23, 2021, the Court held a hearing on Defendant's Motion for Leave to Amend Answer and Affirmative Defenses. During the hearing, Progressive argued that because Plaintiff injected a new legal theory (limiting charge) just before the hearing on both parties summary judgments, they would not be prejudiced by Defendant attempting to add two new insufficient condition precedent demand letter defenses over five (5) years after receiving the demand and three and a half (3.5) years after the complaint was filed. This court disagrees with both assertions.

First, the Plaintiff has not injected a new legal theory by arguing the Defendant should have paid based on the higher 2007 limiting charge. Throughout the case, the Plaintiff argued the Defendant did not properly pay pursuant to its policy and the fee schedule, and throughout the case the Defendant argued that it did. The Defendant did not make use of the discovery tools afforded by the rules to determine with precision the factual basis for the Plaintiff's assertion that the Defendant failed to properly pay under the fee schedules. Ultimately, the court ruled in favor of the Plaintiff and against the Defendant on this issue and there was no injection of any new legal theory as the Court denied Defendant's first and second pled affirmative defenses of proper payment pursuant to its policy and the Fee Schedule.

As for the Defendant's second argument, Rule 1.190, Fla. R. Civ. P., provides that leave to amend shall be freely given when justice so requires and a test of prejudice is the primary consideration in determining whether a motion for leave to amend should be granted. *New River Yachting Center, Inc. v. Bacchiocchi,* 407 So.2d 607 (Fla. 4th DCA 1981). While Florida courts enforce the liberality of Rule 1.190 in granting motions for leave to amend, Florida appellate courts regularly recognize that the trial courts possess the discretion to deny such motions where appropriate. *Noble v. Martin Mem'l Hosp. Ass'n*, 710 So.2d 567, 568 (Fla. 4th DCA 1997) [23 Fla. L. Weekly D58a]. There comes a point in litigation where each party is entitled to some finality. *Id.* "The rule of liberality gradually diminishes as the case progresses to trial." *Versen v. Versen*, 347 So.2d 1047, 1050 (Fla. 4th DCA 1977). A party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment. *Inman v. Club on Sailboat Key, Inc.*, 342 So.2d 1069 (Fla. 3rd DCA 1977). The 4th DCA recently held that it was not an abuse of discretion to deny a motion for leave to amend when a motion for summary judgment was pending and the case was set for trial. *Bronstein v. Allstate Ins. Co.*, 315 So. 3d 44 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D725b].

This court is most persuaded by the Florida Supreme Court's ruling in *Ingersoll v. Hoffman*, 589 So.3d 223 (Fla. 1991). In *Ingersoll,* the Court had to decide whether a Defendant could amend their affirmative defenses to avert a specific denial of a condition precedent after the statute of limitations for the case had expired. Rule 1.120(c), Fla. R. Civ. P. states that a Plaintiff can aver generally that a condition precedent was performed or has occurred, but a denial of the performance or occurrence ***shall*** be made with particularity. *Id.* 224. Ultimately, the Supreme Court ruled that while a defendant may be able to amend an answer to specifically deny the performance of a condition precedent, the test as to whether an amendment to a pleading should be allowed is whether the amendment will prejudice the other side. *Id.* at 225. The Court ruled that had the Defendant timely raised the defense of failure to comply with condition precedent, the Plaintiff could have attempted to comply with the condition precedent, but by attempting to do it after the expiration of the statute of limitations, it would unfairly prejudice the Plaintiff.

The facts of this case are nearly identical. The Defendant attempted to argue at the hearing on their motion for leave to amend that the general denial to Plaintiff's assertion that it complied with condition precedent was enough to put Plaintiff on notice that it was challenging the demand letter. However, pursuant to Rule 1.1210(c), a denial of performance or occurrence of a condition precedent shall be made specifically and with particularity. There is no question that Defendant did not specifically and with particularity claim that the Plaintiff sent an invalid demand letter until its Second Amended Answer filed on May 5, 2021. This was after both of Defendant's initial answers and affirmative defenses, all three of its motions for summary judgment, the deposition of the Defendant's litigation adjuster, the affidavit of the litigation adjuster, and all three years of heavily litigating this case. Moreover, there is no question that the statute of limitations for these 2015 dates of service expired prior to the Defendant's motion for leave to amend in May 2021.

As such, after review of the pleadings, both parties' arguments, all supplemental authority provided to this court, and the court otherwise being fully advised in the premises, the court, within its discretion, finds that the Plaintiff would be severely prejudiced by allowing Defendant to amend its affirmative defenses to add in a specific

condition precedent defense for the first time after the statute of limitations has expired.

Accordingly it is **ORDERED AND ADJUDGED** that Defendant's Motion for Leave to Amend is hereby **DENIED.**

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Final summary judgment is entered in favor of medical provider where insurer stipulated that services were related to accident and medically necessary in response to interrogatories, and provider stipulates that policy permits insurer to calculate reimbursement pursuant to statutory fee schedule

LIGHTHOUSE MEDICAL GROUP OF FLORIDA, INC., a/a/o Sebastian Della Valle, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-004155-CC-25, Section CG01. October 12, 2021. Linda Melendez, Judge. Counsel: Walter A. Arguelles, Arguelles Legal, PL, Miami, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on September 29, 2021, upon Plaintiff's Motion for Final Summary Judgment and the Court after being fully advised on this issue, it is hereby

ORDERED AND ADJUDGED, as follows:

The issue before the Court is whether the services at issue are reasonable in pricing, medically necessary and related to the subject automobile accident.

On or about September 15, 2020, Sebastian Della Valle (hereinafter referred to as "Claimant") was involved in an automobile accident in which she sustained injuries. As a result, the claimant sought medical attention at Lighthouse Medical Group of Florida, Inc. (herein after referred to as "Plaintiff"). Pursuant to an Assignment of Benefits, bills were submitted by the Plaintiff to Geico General Insurance Company (herein after referred to as "Defendant") for services rendered to the claimant. The Defendant failed to tender payment on the subject bills, as such, suit was filed by the Plaintiff.

The Defendant, by way of its Answer and Affirmative Defenses, has indicated that "it is not liable for payment of PIP benefits to the Plaintiff in this action because the treatment was not lawfully rendered. Specifically, Defendant's investigation of the claim revealed during Claimant's examination under oath that Plaintiff billed the Defendant for services that were not rendered and/or not rendered as billed. Therefore, no further amounts are due and owing." In response, Plaintiff has filed its Motion for Final Summary Judgment, along with the affidavit of its Corporate Representative.

Under Rule 1.510, a Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Furthermore, a moving party is not required to support its motion with affidavits or other materials negating the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Instead, "the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

A material fact, for purposes of a summary judgment motion, is a fact that is essential to the resolution of the legal questions raised in the case. *Nichols v. Tarsches*, 429 So.2d 409 (Fla. 3 DCA 1983). When the pleadings, depositions, answers to interrogatories and admissions on file together with any affidavits demonstrate that no genuine issue of material fact exists and the movant is entitled to a judgment as a matter of law, the motion for summary judgment must be granted. *Gonzalez v. Chase Home Finance, LLC.*, 37 So.3d 955 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1344a]; *Rodriguez v. City of Key West*, 981 So.2d 664 (Fla. 3rd DCA 2008) [33 Fla. L. Weekly D1369a]. This is especially applicable where the evidence supports the moving party's factual assertion, and nothing exists in the record which disputes it. *Hatcher v. Roberts*, 478 So.2d 1083 at 1090, 1091 (Fla. 1st DCA 1985).

Simply stated, in the instant matter, the burden is on Plaintiff to establish that the charges/services at issue are reasonable, related and medically necessary. Once the Plaintiff has established its prima facie case, the burden then shifts to the Defendant to establish a genuine issue of material fact. Moreover, it is not sufficient for the Defendant to simply state that the Plaintiff's services are unreasonable, not medically necessary or related without providing insight as to how this determination was made. See *Progressive Express Ins. Co. v. Freidman, M.D., P.A.*, 14 Fla. L. Weekly Supp. 320c.

Relatedness and medical necessity is established by showing that injuries and subsequence medical treatment arose out of a subject accident. *See Sevila & Witt Pressley Weston v. United Automobile Insurance Company,* 21 Fla. L. Weekly Supp. 306b (11th Judicial Circuit)(Appellate Capacity, November 26, 2013). *See also In re Standard Jury Instruction in Civil Cases,* 966 So. 2d 940, 942 (Fla. 2007) [32 Fla. L. Weekly S563a] (medical treatment covered by the insurance policy is treatment to the bodily injury arising out of the ownership, maintenance, or use of the motor vehicle). As reflected per the record, the Plaintiff propounded upon the Defendant is Notice of Service of Interrogatories regarding Relatedness and Medical Necessity. Defendant responded to Plaintiff's Interrogatories and stipulated to the issue of Relatedness and Medical Necessity as indicated per its response to items number (2) and (4) of Plaintiff's Interrogatories. Interrogatory Number Two (2) states as follows:

> "Were the medical services Plaintiff performed related to the subject motor vehicle accident?"

Interrogatory Number Four (4) states as follows:

> "Were the medical services Plaintiff performed medically necessary?"

The Defendant answered each interrogatory in the affirmative thus stipulating to the issue of Relatedness and Medical Necessity.

On the issue of reasonableness, the Plaintiff stipulates that Defendant's policy permits it to tender payment pursuant to the schedule of maximum charges as referenced in Fla. Stat. 627.736(5)(a)(1).

In support of its Motion for Summary Judgment, the Plaintiff has filed the affidavit of its Corporate Representative, Javier Ortiz. Mr. Ortiz's affidavit authenticates the billing/medical records and attests that the services at issue were rendered to the claimant. As the Defendant has failed to submit any timely evidence to dispute the Plaintiff's affidavit, this Court finds that there is no genuine dispute as to any material facts.

Accordingly, it is ORDERED and ADJUDGED that as a matter of law, Plaintiff's Motion for Final Summary Judgment is hereby **GRANTED**. The Plaintiff shall submit a Final Judgment to Court.

* * *

Attorney's fees—Experts—Witness fee—Waiver—Court cannot waive an expert witness fee if witness expects to be compensated for testimony

NORTH MIAMI THERAPY CENTER, INC., a/a/o Marc-Sony Metayer, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-006353-SP-21, Section HI01. August 31, 2021. Milena Abreu, Judge. Counsel: Susan Guller, The Law Offices of Justin G. Morgan, P.A., Weston, for Plaintiff. Sherria Williams, House Counsel of United Automobile Insurance Company, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION TO WAIVE ATTORNEY ATTORNEY FEE EXPERT WITNESS FEE

COMES NOW, the Court, after hearing on Defendant's Motion to Waive Attorney Fee Expert Witness Fee, and after a review of the applicable statutory authority, relevant case law and hearing argu-

ments of both parties, the Court hereby rules as follows:

Defendant's Motion is *denied*. While the Court recognizes Defendant's attempts to resolve the case in an economical fashion with minimal costs on a case that was settled rather quickly, the Court finds it cannot waive an expert witness fee if the expert witness testifying expects to be compensated for his testimony. See *Travieso v. Travieso*, 474 So.2d 1184 (Fla.1985). Moreover, "Florida has a long-standing practice of requiring testimony of expert fee witnesses to establish the reasonableness of attorney's fees." *Ghannam v. Shelnutt*, 199 So.2d 295,299 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D2626a], quoting, *Snow v. Harlan Bakeries, Inc*., 932 So.2d 411, 412 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1128a].

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Motion is ***denied***.

* * *

Civil procedure—Summary judgment—Failure of non-moving party to file anything in opposition to motion

MONIQUE MCFARLANE, Plaintiff/Petitioner, v. OCEAN HARBOR CASUALTY INSURANCE COMPANY, Defendant/Respondent. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-004707. October 28, 2021. Lisa A. Allen, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

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

THIS MATTER having come before the court on October 27, 2021 on Plaintiff's Motion for Summary Judgment Timothy A. Patrick appeared for Plaintiff. No one appeared for Defendant. The court having reviewed the file, considered the Motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action based upon Defendant's rescission of the Plaintiff/insured's policy of insurance.

2. In support of its Motion, Plaintiff filed the deposition transcripts of Defendant's Claims Corporate Representative, Jeff Riley and Defendant's Underwriting Corporate Representative, Joseph Celli. Plaintiff also filed an Affidavit from the Plaintiff/insured Monique Mcfarlane.

3. Defendant failed to file anything in opposition to Plaintiff's Motion for Summary Judgment.

4. On July 23, 2021, Plaintiff's Motion for Summary Judgment was noticed via a Notice of Hearing.

5. On October 27, 2021, Defendant and Defendant's counsel failed to appear for the hearing.

6. Plaintiff's Motion for Summary Judgment was filed on June 18, 2021. As such, the Court applied the new summary judgment standard approved by the Florida Supreme Court on May 1, 2021.

7. The party seeking summary judgment will bear the initial burden of proof in informing the court of the basis for the motion and identifying evidence demonstrating that there is no genuine issue of material fact. *Kitchen v. Ebonite Rec. Ctrs., Inc*., 856 So. 2d 1083, 1085 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2401a], (*citing Fisel v. Wynns*, 667 So. 2d 761, 764 (Fla.1996) [21 Fla. L. Weekly S59a]). The moving party is then entitled to judgment when the non-moving party fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). "It is not sufficient in defense of a motion for summary judgment to rely on the paper issues created by the pleadings, but it is incumbent upon the party moved against to submit evidence to rebut the motion for summary judgment and affidavits in support thereof or the court will presume that he had gone as far as he could and a summary judgment could be properly entered." *Id*., (*quoting Hardcastle v. Mobley*, 143 So. 2d 715, 717 (Fla. 3d DCA 1962)).

8. Plaintiff's Motion for Summary Judgment is **HEREBY GRANTED**.

9. A Final Declaratory Judgment is entered in favor of Plaintiff as Plaintiff is the prevailing party.

10. The Court reserves jurisdiction as to attorney's fees and costs.

* * *

Insurance—Personal injury protection—Standing—Assignment—Where assignment attached to demand letter lists individual other than medical provider as assignee, provider failed to satisfy condition precedent to PIP suit and lacks standing—Lack of standing cannot be cured where provider did not have standing at inception of suit—Provider cannot amend complaint to substitute new plaintiff where none of circumstances under which party substitution is permissible under rule 1.260 are present, and amendment would be futile due to expiration of statute of limitations

CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC, a/a/o Tyrone Saxton, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY and WINDHAVEN INSURANCE COMPANY, Defendants. County Court, 12th Judicial Circuit in and for Sarasota County, Civil Division. Case No. 2017 SC 003839 NC. June 9, 2021. Charles Williams, Judge. Counsel: Christina Goldberg, Lakewood Ranch, for Plaintiff. Coleman P. Hengesbach, Marshall Dennehey, Tampa, for Defendant Progressive Select Insurance Company.

ORDER GRANTING DEFENDANT'S (PROGRESSIVE) MOTION FOR FINAL SUMMARY JUDGMENT BASED ON LACK OF STANDING/FAILURE TO MEET A CONDITION PRECEDENT

THIS CAUSE having come before the Court on May 12, 2021, for consideration of Defendant's (Progressive) Motion for Final Summary Judgment Based on Lack of Standing/Failure to Meet a Condition Precedent (certificate of service: 12/12/2019) and the Court having reviewed all record evidence, pleadings, and motions, having considered argument of Counsel and legal authority submitted by the parties, and being otherwise fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT/PROCEDURAL HISTORY

1. On or about February 10, 2013, Tyrone Saxton (hereinafter "claimant") was purportedly involved in an accident that gave rise to the underlying claim for personal injury protection ("PIP") benefits originally filed by CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC.

2. On April 3, 2017, over four (4) years following the purported loss, PROGRESSIVE, received a Notice of Intent to Initiate Litigation (hereinafter "demand letter") from CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC.

3. Attached to this demand letter was a written document alleged to be an Assignment of Benefits.

4. However, despite the demand letter being sent by CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC., the Assignment of Benefits attached lists a completely separate and distinct party/individual, W. MARTIN UNDERWOOD, D.C. as the authorized assignee of the assignment. No where on this Assignment of Benefits does it list CHIROPRACTIC & PHYSICAL THEREAPY OF FLORIDA, LLC. in any fashion.

5. Additionally, there was no other written assignment of benefits attached to this demand letter that listed CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. as the assignee.

6. PROGRESSIVE filed sworn testimony attesting to the fact that it never received an assignment of benefits listing CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC.

7. Plaintiff, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. never filed any record evidence opposing the facts attested to by PROGRESSIVE in its affidavit filed with this Court on December 12, 2019.

8. On January 6, 2020, this Honorable Court heard argument on PROGRESSIVE'S Motion for Final Summary Judgment Based on Lack of Standing/Failure to Meet a Condition Precedent.

9. After hearing argument, this Court agreed with PROGRESSIVE and granted its Motion for Final Summary Judgment Based on Lack of Standing/Failure to Meet a Condition Precedent. In its Order, however, this Court allowed Plaintiff to file an Amended Complaint to cure the standing/condition precedent issues identified in PROGRESSIVE'S Motion for Final Summary Judgment.

10. On January 19, 2020, PROGRESSIVE moved for Re-Hearing of its Motion for Final Summary Judgment because it is PROGRESSIVE's position that standing and a statutory condition precedent requirement cannot be cured once a lawsuit has already been filed.

11. On April 19, 2021, this Court issued an Order granting PROGRESSIVE's Motion for Re-Hearing of its Motion for Final Summary Judgement Based on Lack of Standing/Condition Precedent.

12. On May 12, 2021, a second hearing on Defendant's Motion for Final Summary Judgment Based on Lack of Standing/Condition Precedent occurred.

13. As set out more extensively below, based on the record admissible evidence and all materials filed by the parties as summary judgment evidence, this Court finds that CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. lacked standing and failed to meet a statutory condition precedent at the inception of this lawsuit. Therefore, PROGRESSIVE is entitled to the entry of final summary judgment as a matter of law.

ANALYSIS AND CONCLUSIONS OF LAW

A. PLAINTIFF LACKS STANDING

Plaintiff, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. who filed the instant lawsuit against PROGRESSIVE, lacks standing because it does not possess a valid, written assignment of benefits giving it the rights to file the instant cause of action. Standing is required to bring suit in Florida and must be present before any such suit is filed. *See* Florida Rule of Civil Procedure 1.120. *See also Askew v. Hold the Bulkhead-Save Our Boys, Inc.,* 269 So. 2d 696, 698 (Fla. 2d DCA 1972). A medical provider in a PIP action may not bring suit on the insured's behalf against an insurer unless it first obtains an assignment of the insured's rights under the policy issued by the carrier. *See Hartford Ins. Co. of the Southeast v. St. Mary's Hospital, Inc.,* 771 So. 2d 1210, 1212 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2523a].

This Court finds that Plaintiff, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. cannot rely on the assignment executed to W. MARTIN UNDERWOOD, D.C., to confer itself standing to bring this cause of action against Defendant. The law in Florida is very clear that only one person or entity can hold a single cause of action. "[A]n assignment of benefits must be made to a legal person **or** a legal corporation and only one party can own a cause of action at any time." *Mobile Diagnostics, Inc. v. Geico Indemnity Co.;* 12 Fla. L. Weekly Supp. 890b (18th Cir. Seminole Cty. June 17, 2005). "Only the insured or the medical provider owns the cause of action against the insurer at any one time. And the one that owns the claim must bring the action if an action is to be brought." *Oglesby v. State Farm Mut. Auto. Ins. Co.,* 781 So. 2d 469 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D702a]. *See also Livingston v. State Farm Mut. Auto. Ins. Co.,* 774 So. 2d 716 (Fla. 2nd DCA 2000) [25 Fla. L. Weekly D533c].

B. PLAINTIFF FAILED TO COMPLY WITH A STATUTORY CONDITION PRECEDENT

The Court finds that Plaintiff, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. has failed to comply a statutory condition precedent as set Florida Stat. §627.736 (10)(a). Fla. Stat. 627.736(10)(a) states that "as a condition precedent to filing an action for benefits under this section, written notice of an intent to initiate litigation must be provided to the insurer.". Florida Stat. §627.736 (10)(b) goes on to say, "the notice must state that it is a demand letter under s. 627.736(b)(1) and state with specificity: 'the name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured' ". In this case, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. did not attach an assignment of benefits to its demand letter naming itself as the assignee of this claim. In fact, the record evidence before this Court reflects that the only assignment of benefits attached to CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC.'s demand letter belongs to a separate and distinct entity. Therefore, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. failed to comply with the express requirements laid out by the Legislature in Fla. Stat. 627.736(10)(b)(1). Where the assignment of benefits attached to the demand is invalid, the condition precedent to suit has not been satisfied. *Florida Emergency Physicians Kang & Assoc., M.D., P.A. v. Progressive Express Ins. Co.,* 12 Fla. L. Weekly Supp. 479a (9th Cir. Orange Cty. Jan. 24, 2005); *Suncoast Spinal Centers, Inc. v. Progressive Express Ins. Co.,* 12 Fla. L. Weekly Supp. 254b (13th Cir. Hillsborough Cty. Nov. 24, 2004). *Leonard Linardos, D.C. P.A., d/b/a West Coast Spine and Injury Center a/a/o Latanya Cross v. United Services Automobile Association,* 15 Fla. L. Weekly Supp. 613a (6th Cir. Pinellas Cty. March 27, 2008).\

C. STANDING CANNOT BE CURED IF PLAINTIFF DID NOT HAVE STANDING AT THE INCEPTION OF THE LAWSUIT

At the time the subject lawsuit was filed, CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. did not possess the requisite standing to bring the cause of action against PROGRESSIVE because it did not have a written assignment of benefits. As such, this Court finds that CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. cannot cure standing given it did not possess standing at the inception of the lawsuit. The Second District Court of Appeal has previously held that lack of standing cannot be cured if a Plaintiff in a PIP suit lacks standing at the inception of the case. *See Progressive Exp. Ins. Co. v. McGrath Community Chiropractic,* 913 So. 2d 1281, 1285 (Fla. 2nd DCA 2005) [30 Fla. L. Weekly D2622b]. *See also Sarasota Memorial Hospital v. Auto Owners Insurance Company,* 22 Fla. L. Weekly Supp. 1085b (Judge Denkin, 12th Circuit Sarasota County 2015).

D. PLAINTIFF (CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC) CANNOT AMEND TO SUBSTITUTE A NEW PARTY

This Court finds that allowing CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. to dismiss itself from this action and substitute a different individual in its place would be improper under Florida law. In effect, allowing such an amendment, would be run contrary to the binding precedent laid out by the Second District Court of Appeal that a party cannot cure standing if it did not possess same at the inception of the lawsuit.

This Court also finds that the Florida Rules of Civil Procedure 1.260 provides narrow circumstances wherein a party may be substituted with another. It provides that a party may only be substituted in the event of (1) death of a party (2) a transfer of interest or (3)

a public officer's death or separation of office. None of these circumstances are present in this case and there is no record evidence before this Court to suggest otherwise.

Furthermore, this Court finds that it is well settled in Florida that "as a general rule, a refusal to allow an amendment of a pleading constitutes an abuse of discretion *unless* it clearly appears that allowing the amendment would (1) prejudice the opposing party (2) the privilege to amend has been abused or (3) amendment would be futile." (emphasis added). *See Craig v. East Pasco Medical Center, Inc.,* 650 So. 2d 179 (2nd DCA 1995) [20 Fla. L. Weekly D395b]. When a claim or defense is asserted in the amended pleading arouse out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading. This rule does not allow for the addition of a new party, and the general rule is that the addition of a new party will not relate back to the date of the original pleading. *See Arnwine v. Huntington Nat. Bank, N.A.,* 818 So. 2d 621 (Fla. 2nd DCA 2002) [27 Fla. L. Weekly D1335a]. *See also Darden v. Beverly Health & Rehab.*, 763 So. 2d 542 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1802a]; *Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.,* 725 So.2d 451, 453 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D403a]. The Court finds that in this case CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. and W. MARTIN UNDERWOOD, D.C. are two separate and distinct parties from each other. It is clear on its face that one is a business entity and the other is an individual person. Plaintiff has proffered no record evidence pursuant to the Florida Rules of Civil Procedure to suggest otherwise. Therefore, because the relation back doctrine does not apply given the addition of a separate party, allowing an amendment under these circumstances would be futile since the statute of limitations would bar a cause of action asserted by the new party attempting to be added to this litigation.

Based on the foregoing, it is ORDERED AND ADJUSTED that Defendant's (PROGRESSIVE) Motion for Final Summary Judgment Based on Lack of Standing/Failure to Meeting a Condition Precedent is hereby GRANTED.

FINAL SUMMARY JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANT, PROGRESSIVE SELECT INSURANCE COMPANY.

PLAINTIFF SHALL TAKE NOTHING BY THIS ACTION AND SHALL GO HENCE FORTH WITHOUT DAY. Progressive is the prevailing party in this action asserted by CHIROPRACTIC & PHYSICAL THERAPY OF FLORIDA, LLC. The Court reserves jurisdiction to determine Progressive's entitlement to reasonable attorney's fees and costs.

* * *

Insurance—Personal injury protection—Declaratory action—Motion to file amended complaint alleging that insured was in doubt as to whether PIP coverage was afforded because insurer failed to produce pre-suit PIP log is denied—Amendment would be futile since there is no pre-suit right to PIP log

TORRI FITZPATRICK, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20CC087391. September 28, 2021. Lisa A. Allen, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Philip L. Colesanti II, Roig Lawyers, Tampa, for Defendant.

ORDER ON PLAINTIFF'S SECOND MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

THIS CAUSE having come before the Court on Plaintiff's Second Motion for Leave to File Amended Complaint and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said motion be, and the same is hereby:

DENIED WITHOUT PREJUDICE. The Court makes the following findings:

1. On August 25, 2021, Plaintiff filed its "Second Motion for Leave to File Amended Complaint." A copy of the proposed Amended Petition for Declaratory Judgment was attached as an exhibit for consideration.

2. On September 9, 2021, the Court heard argument from Plaintiff and Defendant regarding the request for leave to amend pursuant to Fla. R. Civ. P. 1.190.

3. Plaintiff's proposed Amended Petition alleged she was in doubt as to whether PIP Coverage was afforded due to Defendant's failure to produce a pre-suit PIP Log. Plaintiff sought to change the question of actual controversy from the original petition to "Whether or not, prior to the filing of this lawsuit, Century-National communicated to Plaintiff that it had actually afforded PIP coverage and begun making PIP payments."

4. The Court agrees that amendments to pleadings are liberally allowed, but they are not without exception. An amendment shall not be granted if there is prejudice to the other party, an abuse of the privilege to seek amendment, or the amendment would be futile. *Grover v. Karl,* 164 So. 3d 1285 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1388a].

5. The Court finds the proposed Amended Complaint as attached to Plaintiff's Second Motion for Leave to File Amended Complaint is futile. An amendment is deemed futile if it is not pled with sufficient particularity or is insufficient as a matter of law. *Morgan v. Bank of New York Mellon,* 200 So. 3d 792 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2157a]. Said plainly, an amendment is futile if it would not survive a Motion to Dismiss.

6. To prevail on a Declaratory Action under Chapter 86 of the Florida Statutes, Plaintiff must prove the following four elements:

A. The existence of a bona fide dispute between the parties

B. A justiciable question regarding the existence of a power, privilege, right or immunity.

C. The Complainant is in doubt as to the power, privilege, right, or immunity.

D. Bona fide, actual, and present need for the declaration.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952).

7. The Court finds Plaintiff's allegations raised in the proposed amendment requiring Defendant to produce a pre-suit PIP log are futile as it does not present a justiciable question regarding the existence of a power, privilege, right or immunity.

8. There is no pre-suit right under case law or the Florida Motor Vehicle No-Fault Law to a PIP log. *See Southern Group Indem. v. Humanitary Health Care, Inc.,* 975 So. 2d 1247 (Fla. 3rd DCA 2008) [33 Fla. L. Weekly D752a] and *GEICO Gen. Ins. Co. v. Fla. Emerg. Phys.,* 972 So. 2d 966 (Fla. 5th 2007) [33 Fla. L. Weekly D35b]. *See also*, § 627.736(4)(j), Fla. Stat.:

> An insurer shall create and maintain for each insured a log of personal injury protection benefits paid by the insurer on behalf of the insured. If litigation is commenced, the insurer shall provide to the insured a copy of the log within 30 days after receiving a request for the log from the insured.

9. Plaintiff shall have twenty (20) days from the September 9, 2021 hearing to file a third Motion for Leave to amend (at its discretion).

10. The Petition as filed on December 7, 2020 shall remain pending continued litigation.

* * *

Insurance—Personal injury protection—Coverage—Void policy—Medical provider that is assignee of insured does not have cause of action to recover under PIP policy that has been declared void *ab initio* in declaratory action

AJ THERAPY CENTER, INC., a/a/o Anniel Brito Hector, Plaintiff, v. IMPERIAL FIRE & CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit of Hillsborough County, County Civil Division. Case No. 21-CC-026846, Division K. September 27, 2021. Jessica G. Costello, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, 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 16, 2021, regarding Defendant's Motion to Dismiss (the "Motion to Dismiss"), and the Court having heard arguments from both parties, 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 declaratory judgment as to the rights, obligations, and exclusions of the personal injury protection ("PIP") coverage under Defendant's policy of insurance numbered 200665740 (the "Insurance Policy").

2. Defendant filed the Motion to Dismiss because a Circuit Court in the Thirteenth Judicial Circuit had previously ruled that the Insurance Policy was void *ab initio*. *Imperial Fire & Cas. Ins. Co. v. Anniel Brito Hector*, No. 2020-CC-2756 (Fla. 13th Cir. Ct. 2020, Judge Daryl Manning) (the "Declaratory Action").

3. Plaintiff's assignor and named insured, Anniel Brito Hector, signed a Consent Final Judgment, and acknowledged that he had made a material misrepresentation in the insurance application.

4. Accordingly, the Circuit Court in the Declaratory Action ruled that Defendant has "no duty to defend or indemnify any named insured or omnibus insured on the Insurance Contract for any claim(s) for benefits". *Id.*

5. Pursuant to section 90.202, Florida Statutes, the Court takes judicial notice of the Declaratory Action and Consent 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. Specifically, the Motion to Dismiss tests the legal sufficiency of the Complaint, as the applicable case law states there is no duty owed and no valid contract exists, therefore, no cause of action exists. *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 300 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D559a]; *Response Oncology, Inc. v. Metrahealth Ins. Co.*, 978 F. Supp. 1052, 1058) (S.D. Fla. 1997); *Brown v. City of Vero Beach*, 64 So. 3d 172 at 173 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1380a].

6. In opposition, Plaintiff argues that it was not named in the prior Declaratory Action and, therefore, it should neither be affected nor bound by the Consent Final Judgment. The language in section 86.091, Florida Statutes, states, in relevant part, "no declaration shall prejudice the rights of persons not parties to the proceedings."

7. In support, Plaintiff cites a non-binding order for the legal proposition that Defendant's Motion to Dismiss would deprive Plaintiff of notice and an opportunity to be heard, and Plaintiff, as assignee, was an indispensable party to the prior Declaratory Action.

8. This Court recognizes, however, that these same arguments have been soundly rejected by at least three courts in the same judicial circuit. Those courts have ruled that the due process rights of an assignee-medical provider are not implicated and have not been violated as its interest in the policy arose through or flowed from an assignment of benefits. Furthermore, the assignee-medical provider 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 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 Ins. Co. vs. Cereena K. Humphrey*, Case No. 48-2019-CA-000385-O (9th Jud. Cir. Mar. 18, 2021, Judge Reginald K. Whitehead); and *Direct General Ins. Co. vs. Cynthia Joseph*, Case No. 2018- CA-000049 (9th Jud. Cir. Feb. 4. 2020, Judge Michael Murphy).

9. This Court finds these latter rulings more persuasive as (i) an assignee medical provider is not an indispensible party to an action pertaining to material misrepresentation on an Insurance Contract to which they are not a party, (ii) 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, (iii) the medical provider has no knowledge concerning the Insurance Policy Application or material misrepresentation, and (iv) by standing in the shoes of the assignee, the parties are the same.

10. Additionally, Plaintiff's argument does not account for or acknowledge established assignment law in Florida. It is well settled that an assignee cannot possess any greater rights or benefits than the assignor. *See Shaw v. State Farm Fire & 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 Consent Final Judgment, which the Court finds is applicable law, Plaintiff does not have a cause of action to 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—Affirmative defenses—Reply—Motion to have late-filed reply to affirmative defenses deemed timely is denied where motion does not demonstrate excusable neglect—Reply that contains no additional factual allegations is insufficient and is stricken

PALMA CEIA CHIROPRACTIC AND WELLNESS CENTER, LLC, a/a/o Kathy Gerson, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-012154, Division J. October 7, 2021. J. Logan Murphy, Judge. Counsel: Jesse D. Ochoa, Daly & Barber, P.A., Plantation, for Plaintiff. Alexander D. Licznerski, Ramey & Kampf, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S ALLEGATIONS AS TO BAD FAITH, STRIKING REPLY TO AFFIRMATIVE DEFENSES, AND DENYING MOTION FOR LATE REPLY

BEFORE THE COURT is Defendant's, State Farm Mutual Automobile Insurance Company, Motion to Strike Plaintiff's Allegations as to Bad Faith and Reply to Affirmative Defenses and Motion for Late Reply, filed May 4, 2021. Both parties appeared through counsel at a hearing on September 20, 2021. Upon consideration and for the reasons stated below, Defendant's Motion to Strike is GRANTED, Plaintiff's Motion for Late Reply is DENIED, and Plaintiff's Reply is STRICKEN.

Defendant filed its Answer and Affirmative Defenses on March 17, 2021. On April 19—13 days too late—Plaintiff a Reply to Affirmative Defenses accompanied by a Motion for Reply. Fla. R. Civ. P. 1.140(a)(1). The reply contains no "additional factual allegations" and is therefore insufficient. *Buss Aluminum Prods., Inc. v. Crown Window Co.*, 651 So. 2d 694, 695 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D138a]. *See Abston v. Bryan*, 519 So. 2d 1125, 1127 (Fla. 5th DCA 1988) ("A reply to an affirmative defense is permitted only in order to allege new facts that may be sufficient to avoid the legal effect of the facts contained in the affirmative defense."). *See generally Moore Meats, Inc. v. Strawn*, 313 So. 2d 660 (Fla. 1975) (discussing, in reliance on Professor Trawick, when a reply is necessary).

Recognizing the reply was filed late, Plaintiff moves to have the reply "deemed timely." Essentially, Plaintiff asks for an enlargement of time to file a reply after the time for doing so had expired. That circumstance is governed by Rule 1.090(b)(1)(B) and requires the movant to demonstrate "excusable neglect." But the motion contains no suggestion of excusable neglect, nor does it describe any facts or circumstances that could satisfy Rule 1.090(b)(1)(B). *See Madill v. Rivercrest Cmty. Ass'n, Inc.*, 273 So. 3d 1157, 1160 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1461a]; *Geer v. Jacobsen*, 880 So. 2d 717, 720 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1102a].

Accordingly,

1. Defendant's, State Farm Mutual Automobile Insurance Company, Motion to Strike Plaintiff's Allegations as to Bad Faith and Reply to Affirmative Defenses and Motion for Late Reply is GRANTED.

2. Plaintiff's Motion for Late Reply is DENIED.

3. Plaintiff's Reply to Affirmative Defenses is STRICKEN.

* * *

Insurance—Personal injury protection—Declaratory action—Where legal issues on which medical provider seeks determination in declaratory action have been decided by binding precedent, motion to dismiss is granted

MILLER CHIROPRACTIC & MEDICAL CENTERS, INC., a/a/o E. Kelly, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-046077, Division I. January 20, 2021. Joelle Ann Ober, Judge. Counsel: Christopher P. Calkin and Mike N. Koulianos, for Plaintiff. Coleman P. Hengesbach, Marshall Dennehey, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

THIS MATTER came before the Court for hearing on November 2, 2020 on Defendant's Motion to Dismiss Plaintiff's Complaint filed October 11, 2019. Having reviewed and considered Defendant's Motion, Plaintiff's Complaint, the argument of the parties, relevant case law, and being otherwise fully advised, the Court finds:

1. The determinations Plaintiff appears to seek in this action have been decided by courts in decisions that are binding on this Court. *See Progressive Select Insurance Company v. Florida Hospital Medical Center*, 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a]; *State Farm Mutual Automobile Insurance Company v. MRI Associates of Tampa, Inc. d/b/a Park Place MRI*, 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a]; *Progressive American Insurance Company v. Hess Spinal Centers a/a/o Stefan Iliev*, 27 Fla. L. Weekly Supp. 607a (Fla. 13th Cir. Ct. (appellate) Aug. 27, 2019).

2. In as much as the issues as presented in Plaintiff's Complaint have been resolved, there does not appear to be a bona fide, actual, present need for the declaration or a reasonable basis on which Plaintiff can allege a doubt as to its rights on these issues. This action does not fulfill a purpose of declaratory relief statutes noted by the Second District Court of Appeal in *Colby v. Colby*, 120 So. 2d 797, 800 (Fla. 2d DCA 1960)—"a purpose of statutes affording declaratory relief is to adjudicate the rights of parties who have not theretofore had those rights determined"—the parties' respective rights on these issues have been determined, there is no need to for another determination by this Court.

3. While facts can be determined in a declaratory judgment action if necessary to make the legal declaration sought, *see* section 86.011(2), such an action is not meant to resolve purely factual issues. In as much as the legal determinations sought in the Complaint, as pled, have been resolved, Plaintiff is truly seeking resolutions of factual issues within the scope of a breach of contract action, not in conjunction with a need for a declaration of its rights.[1]

4. As such, Plaintiff has not sufficiently pled a cause of action showing entitlement to a declaration of rights.

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

A. Defendant's Motion to Dismiss Plaintiff's Complaint filed October 11, 2019 is hereby **GRANTED**;

B. Plaintiff's Complaint is hereby dismissed without prejudice;

C. Plaintiff shall have twenty (20) days within which to file and serve an amended complaint.

[1]The Court is also mindful of Defendant's argument that the use of a declaratory judgment action for these types of determinations appears to attempt to circumvent the required conditions precedent to the filing PIP breach of contract actions—in particular the need for the submission of a presuit demand letter under Florida Statutes section 627.736(10).

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint to assert that insurer breached contract by improperly exhausting PIP benefits on payments to another medical provider is granted—Fact that argument may be asserted as avoidance of affirmative defense in reply does not necessarily mean it may not be asserted in amended complaint or that amendment would be futile

INTEGRATED HEALTH AND PERFORMANCE SYSTEMS, P.A., a/a/o Adam Szlendak, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2021-SC-001030-XXXX-SB. October 5, 2021. Marni A. Bryson, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Benjamin Scutellaro, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

THIS CAUSE having come before the Court on September 21, 2021 upon Plaintiff's Motion for Leave to Amend Complaint filed September 3, 2021, and the Court having considered the motion, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Plaintiff's Motion for Leave to Amend Complaint is GRANTED, for the following reasons:

On April 27, 2021, Plaintiff filed its initial motion to amend the complaint and proposed amended complaint. The Court did not rule upon that initial motion to amend, as it was never noticed for hearing. Instead, on September 3, 2021, Plaintiff noticed the withdrawal of the initial motion to amend and the proposed amended complaint that was the subject of that motion to amend. Also on September 3, 2021, Plaintiff filed the Motion for Leave to Amend Complaint that was noticed for hearing on September 21, 2021. Plaintiff argues in that motion that "the proposed amendment seeks to clarify the manner in which Defendant committed the contractual breach, by improperly exhausting benefits as a result of its failure to apply Multiple Procedure Payment Reduction (a Medicare payment methodology of the federal Centers for Medicare and Medicaid Services), to the bill of another medical provider." In opposition to Plaintiff's Motion for Leave to Amend Complaint, counsel for Defendant argued that the

proposed amendment is futile, as it is simply an avoidance to the affirmative defense of exhaustion of PIP benefits, which is more properly asserted as a reply to the affirmative defense.

Rule 1.190(a) of the Florida Rules of Civil Procedure "reflects a clear policy that, absent exceptional circumstances, requests for leave to amend pleadings should be granted." *The Marquesa at Pembroke Pines Condominium Ass'n. v. Powell*, 183 So.3d 1278 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D312b]. "A trial court's refusal to allow amendment . . . generally constitutes an abuse of discretion 'unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile.' " *JBJ Investment of South Florida v. Southern Title Group*, 43 Fla. L. Weekly D1518a (Fla. 4th DCA, July 5, 2018); *Mancinelli v. Davis*, 217 So. 3d 1034 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D784a]; *Preudhomme v. Bailey*, 211 So.3d 127 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D291a].

This Court does not find that exceptional circumstances exist in this case that should cause the Court to deny Plaintiff's Motion for Leave to Amend. Plaintiff has not abused the privilege to amend, there is no prejudice to Defendant and contrary to Defendant's position, the Court does not find that the amendment would be futile. Defendant has cited no authority for the proposition that simply because an argument may be asserted as an avoidance to an affirmative defense in a reply, that the argument necessarily may not be asserted in an amended complaint or that the amended complaint would otherwise be futile.

Accordingly, the Amended Complaint that accompanied Plaintiff's September 3, 2021 Motion for Leave to Amend shall be deemed filed as of the date of this Order and Defendant shall have twenty (20) days within which to respond.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Statutory fee schedules—Clear and unambiguous election by insurer—Policy language that expressly limits reimbursement to fee schedule is sufficient to place insureds on notice of limitation

THREE AMIGOS HEALTHCARE, INC., a/a/o Rosa Zavala, Plaintiff, v. MGA INSURANCE COMPANY, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE19006445, Division 52. August 26, 2021. Giuseppina Miranda, Judge. Counsel: Matthew Barber, for Plaintiff. Scott E. Danner and Matthew Tolzman, Kirwan Spellacy Danner Watkins & Brownstein, P.A., Fort Lauderdale, for Defendant.

ORDER GRANTING PARTIAL SUMMARY DISPOSITION IN FAVOR OF DEFENDANT AND ORDER SPECIFYING REMAINING ISSUES IN CONTROVERSY WITH RELATED REQUIREMENTS

THIS CAUSE was before the Court for hearing on August 25, 2021 in preparation for the upcoming jury trial scheduled for September 8, 2021. Defendant has a pending Motion for Summary Disposition concerning the reimbursement of medical bills utilizing the schedule of maximum charges. The Court, having reviewed the relevant filings, providing the parties' attorneys an opportunity to be heard and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. Defendant's policy of insurance includes mandatory language expressly limiting reimbursement for reasonable medical expenses to the schedule of maximum charges set forth in section 627.736(5)(a)(1)(a)-(f). This language is sufficient to place insureds and service providers on notice as required by section 627.736(5)(a)(5).

2. Accordingly, Defendant's Motion for Summary Disposition is hereby GRANTED on this limited issue. This case will proceed to final disposition utilizing the schedule of maximum charges as the correct reimbursement limitation for all services found to be related and medically necessary.

3. That the remaining issues of fact and law which are controverted are listed in the parties' Joint Pretrial Stipulation dated July 19, 2021 and this Court's Order on Case Status Conference dated August 24, 2021.

4. Plaintiff maintains that Defendant improperly reimbursed specific CPT Codes utilizing the §627.736(5)(a)1 limitation. Accordingly, it is further ORDERED that, no later than close of business on *Monday, August 30, 2021,* Plaintiff shall provide a list of all CPT Codes which are at issue to the Court and opposing counsel and file same with the Clerk of Court. Thereafter, the parties shall file their cross Motions for Summary Disposition relative to the reimbursements of the delineated CPT Codes no later than close of business on *Friday, September 3, 2021*.[1] The Court will then determine if the determination if the amount of reimbursement is a legal issue that can be resolved by summary disposition or, if the question of the amount for the proper reimbursement should be addressed by the fact finder.

[1]The parties must also provide courtesy copies to the Court at: div52@17th.flcourts.org.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law

CLOUD CHIROPRACTIC & REHABILITATION CENTER, a/a/o Yosuany Milian, Plaintiff, v. AMICA MUTUAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO21003128, Division 70. October 11, 2021. John D. Fry, Judge. Counsel: Evan S. Brown and David Edwards, Reifkind, Thompson & Rudzinski, LLP, Fort Lauderdale, for Plaintiff. Justin L. Seekamp, Dutton Law Group, P.A., Orlando, for Defendant.

ORDER ON MOTION FOR SANCTIONS

THIS CAUSE having come before the Court on Defendant, AMICA MUTUAL INSURANCE COMPANY, ("Defendant"), Motion for Sanctions Pursuant to Fla. Stat. §57.105 and the Court having heard arguments of counsel on August 18, 2021, and being otherwise advised in the Premises, it is hereby:

ORDERED AND ADJUDGED as follows:

1. On February 04, 2021, Plaintiff, CLOUD CHIROPRACTIC & REHABILITATION CENTER A/A/O YOSUANY MILIAN, ("Plaintiff"), filed this instant suit claiming a breach of contract by Defendant regarding Personal Injury Protection benefits following a motor vehicle accident that occurred on June 30, 2018.

2. Prior to the filing of this suit, Plaintiff, by and through their counsel, submitted correspondence, dated April 12, 2019 and received on April 16, 2019, to Defendant claiming to be a "pre-suit demand" pursuant to Fla. Stat. §627.736(10) and sought from Defendant benefits of $8.23 and interest, penalty and postage from Defendant.

3. On or about May 15, 2019, Defendant sent correspondence to Plaintiff's counsel in response to counsel's "pre-suit demand" issuing payment of $8.23 in benefits and $8.20 in interest, penalty and postage to satisfy Plainiff's demand.

4. Despite the foregoing, Plaintiff and their counsel proceeded to intiate this suit against Defendant.

5. On March 25, 2021, Defendant, by and through their counsel, Justin L. Seekamp, filed and provided Plaintiff with Defendant's Answer, Affirmative Defenses and Demand for Jury Trial, ("Answer").

6. Contained within Defendant's Answer was Defendant's Third Affirmative Defense which stated:

FIRST AFFIRMATIVE DEFENSE - Policy Complies with Fla. Stat. §627.736

Defendant issued a policy of insurance which provided coverage to the claimed Assignor/Insured, YOSVANY MILIAN, under which the subject claim has been made, which was in full force and effect on the

date of the purported motor vehicle accident and which provided Personal Injury Protection, ("PIP"), benefits subject to the terms and conditions of the policy of insurance itself, as well as all amendatory endorsements, governing Statutes, Administrative Codes and applicable case law. The specific policy of insurance under which the subject claim is being made provides that payments will be made at 80% (eighty percent) of the submitted charges for reasonable, related and medically necessary care with 80% paid with PIP benefits. Here, Plaintiff's charges for the compensable and non-duplicate "at issue" dates of service of "July 06, 2018 to August 10, 2018" were paid to Plaintiff at 80% of the timely submitted charges prior to the initiation of this suit with interest/penalty/postage where applicable (TOTAL CHARGES: $11,030.53; $11,030.53 X 80% = $8,824.42; TOTAL PAID: $8,824.42; interest/penalty/postage: $16.43) (Composite Exhibit "A"). Accordingly, Defendant has complied with Defendant's duties under both the PIP statute, Fla. Stat. §627.736, and the policy of insurance as Defendant has paid Plaintiff's compensable and non-duplicate submitted charges at 80% (eighty percent) of the submitted charges with interest/penalty/postage where applicable and therefore, no breach has occurred and this suit presently pending is without merit. (Emphasis Original)

7. On April 01, 2021, Defendant, by and through their counsel, Justin L. Seekamp, sent electronic mail correspondence to Plaintiff's counsel, Evan S. Brown, and Plaintiff's counsel's firm Reifkind, Thompson & Rudzinski, LLP. titled "FIRST REQUEST" wherein Defendant's counsel sought dismissal of Plaintiff's suit against Defendant due to Defendant's payment of Plaintiff's submitted charges at 80% of the billed amounts and Defendant's pre-suit payment, in response to Plaintiff's demand, of additional benefits, interest, penalty and posatge and included, as attachments to the electronic mail correspondence, a copy of the PIP logs, cashed benefits and interest, penalty and postage checks for Plaintiff and Plaintiff's counsel and a copy of the policy and declarations page for the policy of insurance providing coverage for Yosuany Milian.

8. On April 13, 2021, Defendant, by and through their counsel, Justin L. Seekamp, sent electronic mail correspondence to Plaintiff's counsel, Evan S. Brown, and Plaintiff's counsel's firm Reifkind, Thompson & Rudzinski, LLP. titled "SECOND REQUEST" wherein Defendant's counsel sought dismissal of Plaintiff's suit against Defendant due to Defendant's payment of Plaintiff's submitted charges at 80% of the billed amounts and Defendant's pre-suit payment, in response to Plaintiff's demand, of additional benefits, interest, penalty and posatge and included, as attachments to the electronic mail correspondence, a copy of the PIP logs, cashed benefits and interest, penalty and postage checks for Plaintiff and Plaintiff's counsel and a copy of the policy and declarations page for the policy of insurance providing coverage forYosuany Milian.

9. On April 19, 2021, Defendant, by and through their counsel, Justin L. Seekamp, sent electronic mail correspondence to Plaintiff's counsel, Evan S. Brown, and Plaintiff's counsel's firm Reifkind, Thompson & Rudzinski, LLP. titled "THIRD AND FINAL REQUEST" wherein Defendant's counsel sought dismissal of Plaintiff's suit against Defendant due to Defendant's payment of Plaintiff's submitted charges at 80% of the billed amounts and Defendant's pre-suit payment, in response to Plaintiff's demand, of additional benefits, interest, penalty and posatge and included, as attachments to the electronic mail correspondence, a copy of the PIP logs, cashed benefits and interest, penalty and postage checks for Plaintiff and Plaintiff's counsel and a copy of the policy and declarations page for the policy of insurance providing coverage forYosuany Milian.

10. On April 23, 2021, Defendant filed Defendant's Motion for Summary Judgment as to Plaintiff's Lack of Damages and Failure to Comply with the Conditions Precedent Outlined in Florida Statute §627.736(10) detailing, in sum, that Defendant was entitled to judgment as a matter of law due to Defendant's payment of Plaintiff's submitted charges at 80% of the billed amounts and Defendant's pre-suit payment, in response to Plaintiff's demand, of additional benefits, interest, penalty and posatge and included, as attachments to Defendant's motion, a copy of the PIP logs, cashed benefits and interest, penalty and postage checks for Plaintiff and Plaintiff's counsel and a copy of the policy and declarations page for the policy of insurance providing coverage for Yosuany Milian.

11. On May 06, 2021, Defendant sent correspondence to Plaintiff and their counsel commonly known as a "safe harbor" letter and Defendant's proposed Motion for Sanctions Purusant to Florida Statute 57.105 providing Plaintiff with twenty-one (21) days for Plaintiff to dismiss Plaintiff's suit against Defendant based on Defendant's payment of Plaintiff's submitted charges at 80% of the billed amounts and Defendant's pre-suit payment, in response to Plaintiff's demand, of additional benefits, interest, penalty and postage and included, as attachments to the motion for sanctions, a copy of the PIP logs, cashed benefits and interest, penalty and postage checks for Plaintiff and Plaintiff's counsel, the correspondences from April 1, 2021, April 13, 2021, and April 19, 2021 and a copy of the policy and declarations page for the policy of insurance providing coverage for Yosuany Milian.

12. Despite the foregoing and after the expiration of the twenty-one (21) day period provided by the "safe harbor" correspondence, Defendant, on May 28, 2021 filed Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105 as Plaintiff failed to dismiss this matter. Therefore, Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105 is properly before the Court for consideration.

13. On May 28, 2021, Plaintiff filed Plaintiff's Notice of Voluntary Dismissal without Prejudice AFTER Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105 was filed.

14. Despite Plaintiff's dismissal of this action, this Court retains jurisdiction to consider Defendant's duly filed Motion for Sanctions Pursuant to Florida Statute 57.105. See *Pino v. Bank of N.Y.*, 121 So.3d 23 (Fla. 2013) [38 Fla. L. Weekly S78a].

15. In the present matter, the Court finds, pursuant to Fla. Stat. §57.105(1)(a), that Plaintiff and Plaintiff's counsel knew or should have known that Plaintiff's suit were not supported by the material facts necessary to establish the claim. Even if this was not the case, once Plaintiff received Defendant's Answer, e-mail correspondences from April 01, 2021, April 13, 2021 and April 19, 2021, Motion for Sanctions and safe-harbor letters, Plaintiff knew or should have known that said suit was not supported by the material facts necessary to establish the suit, yet Plaintiff and Plaintiff's counsel continued to litigate this action against Defendant. Sanctions against Plaintiff, Plaintiff's counsel and Plaintiff's law firm, and in favor of AMICA MUTUAL INSURANCE COMPANY, based upon Plaintiff's violation of Fla. Stat. §57.105(1)(a) are appropriate in this matter.

16. Defendant's Motion for Sanctions Pursuant to Florida Statute 57.105 are hereby GRANTED. The Court finds that Defendant, AMICA MUTUAL INSURANCE COMPANY, is entitled to its reasonable attorneys' fees, as sanctions, against Plaintiff, CLOUD CHIROPRACTIC & REHABILITATION CENTER A/A/O YOSUANY MILIAN, Plaintiff's counsels, Evan S. Brown and David Edwards, and Plaintiff's law firm, Reifkind, Thompson & Rudzinski, LLP., pursuant to Fla. Stat. §57.105(1)(a) and Fla. Stat. §57.105(2). The Court hereby reserves ruling as to the amount of the sanctions. Said sanctions shall be paid by Plaintiff, Plaintiff's counsels and Plaintiff's law firm.

* * *

Landlord-tenant—Eviction—Judgment—Vacation—Where service of eviction complaint on tenants was made by substitute service on person who was not co-resident or family member of tenants but who was occupying premises that tenants had vacated, tenants were not properly served and judgment for possession is void—Further, landlord who knew that tenants had vacated premises knowingly and intentionally misrepresented material facts in eviction complaint—Judgment is vacated, complaint is dismissed and ruling on sanctions is reserved

JAW HOLDINGS, LLC, d/b/a PALM ISLAND CLUB APTS., Plaintiff, v. KIRK A. HASSOCK and PATRICIA HENRY, Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO19014720 (61). June 16, 2021. Corey Amanda Cawthon, Judge. Counsel: Andres Velez, for Plaintiff. Karen Williams North, The Williams North Law Firm, P.A., Plantation, for Defendant.

ORDER ON DEFENDANTS' MOTION TO VACATE FINAL JUDGMENT ENTERED DECEMBER 10, 2019 AND FOR SANCTIONS

THIS CAUSE having come before the Court on February 3, 2021 and on March 5, 2021 for hearing on Defendants' Motion to Vacate Final Judgment entered December 10, 2019 and for Sanctions, and the Court having reviewed the Motion and the relevant portions of the Court file; heard argument of counsel and testimony presented; reviewed relevant legal authorities; and being otherwise sufficiently advised in the premises, finds as follows:

BACKGROUND

1. This case is an eviction action based on a two-count Complaint filed on or about November 19, 2019. Count 1 of the Complaint seeks possession of the subject property, and Count 2 of the Complaint seeks damages for alleged unpaid rent.

2. Both Defendants were allegedly served via substitute service on November 22, 2019, and defaults were entered by the Clerk as to both Defendants on December 6, 2019.

3. A Final Judgment for Eviction as to Count 1 for possession only was entered against both Defendants on December 10, 2019.

4. Subsequently, on or about February 12, 2020, Defendants filed their initial Motion to Dismiss Final Judgment, pro se.

5. Thereafter, on August 12, 2020, Defendants, via counsel, filed their Motion to Vacate Final Judgment entered December 10, 2019 and for Sanctions.

6. Defendants' Motion to Vacate alleges that Defendants surrendered the keys to the subject property to Plaintiff and vacated the property in October 2019, though Plaintiff filed the instant action in November 2019. The Motion further alleges that the Final Judgment previously entered is void as the alleged "service" on Defendants was improper as the Returns of Service filed in this matter indicate substitute service on someone named "Fritz Vreau", who is apparently unknown to the Defendants and which service was made after the Defendants had vacated the property and returned the keys to Plaintiff.

7. Defendants' Motion to Vacate was set for hearing on February 3, 2021, and said hearing was continued for additional time and concluded on March 5, 2021.

8. At the hearings, testimony was presented to the Court from various witnesses, including (but not limited to) Defendant, Kirk Hassock, and property manager, Bonnie Patrice.

9. Though some of the testimony presented by the various witnesses differed as to certain recollections and points, a similar timeline of events was established amongst all witnesses.

10. According to the testimony presented, there is no dispute that the keys to the subject property were returned to Plaintiff at some point in October 2019, at which time the Defendants advised Plaintiff they had vacated the property.

11. There also seems to be no dispute that, after the keys were returned to Plaintiff, property manager, Bonnie Patrice, discovered another person (or persons) within the subject property, after which she immediately contacted the Defendants.

12. The parties all agree that Defendant, Kirk Hassock, advised Bonnie Patrice that he had no knowledge of anyone else residing within the subject property and that he had not given anyone else permission to reside therein.

13. During the course of property manager, Bonnie Patrice's testimony, she acknowledged that she was aware the Defendants were no longer residing within the subject property. Instead, she believed that perhaps the Defendants had given permission to the unknown, Fritz Vreau, to stay at the property.

14. Of note, despite the multiple witnesses presented to this Court to provide testimony during the 2 days over which the instant hearing was held, neither party subpoenaed nor attempted to produce "Fritz Vreau", despite the positions held by both parties.

15. Instead, the process server, Teresa Vila, presented testimony to the Court regarding the alleged service on Defendants in this case. Teresa Vila's testimony essentially set forth the same information included in the Verified Returns of Service, which indicated that both Defendants were substitute served via service on "Fritz Vreau," as "member of household" at the subject property address.

16. Interestingly, the Returns of Service do not indicate that Fritz Vreau was a co-resident or family member of the Defendants. Rather, he is simply identified as a "member of household" on both Returns of Service.

17. Again, no evidence was presented that the Defendants were still residing at the property at the time of service, and, in fact, all parties seem to agree that the Defendants themselves had already vacated the property.

18. Despite property manager, Bonnie Patrice's acknowledgment that the Defendants were no longer residing at the subject property, Plaintiff chose to file the instant eviction action.

ANALYSIS & OPINION

19. Pursuant to Fla. Rule Civ. Pro. 1.540(b) , the Court may relieve a party from a final judgment for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) That the judgment, decree, or order is void; or

(5) That the judgment, decree, or order has been satisfied. . .

20. Relief from a void judgment may be granted at any time. *Viets v. American Recruiters Enterprises, Inc,* 922 So.2d 1090, 1095 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D851a].

21. In this case, Defendants have alleged that the December 10, 2019 Final Judgment for Eviction should be vacated due to the following: (1) the judgment is void as the Defendants were never properly served; (2) the Defendants were unaware the eviction lawsuit had been filed and acted with due diligence to notify the Court that the Final Judgment was entered in error; and (3) the Plaintiff filed the instant eviction action misrepresenting to the Court that the Defendants were in possession of the subject property, despite Plaintiff's actual knowledge that the Defendants had already vacated the property.

22. Florida Statutes § 48.031(1)(a) states:

Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. . .

23. As previously stated, the Defendants were no longer residing at the subject property on the alleged date of service, and as such, the address on the Return of Service (the subject property) would not be the Defendants "usual place of abode". Further, as previously stated, no information was provided to establish that "Fritz Vreau" was in fact a co-resident or family member of the Defendants.

24. As such, this Court finds that the Defendants were not properly served in this case, rendering the Final Judgment entered on December 10, 2019 void.

25. Furthermore, pursuant to the testimony provided by Plaintiff's property manager, Bonnie Patrice, it appears Plaintiff was actually aware that Defendants were no longer residing in the subject property at the time the instant eviction action was filed. As previously stated, Bonnie Patrice provided testimony in which she acknowledged that the Defendants returned the keys to the subject property in October 2019, that Defendants had vacated the property, and that she believed, perhaps, the Defendants had granted permission to some unknown persons to reside within the unit.

26. In November 2019, rather than bringing forth an alternate action in order to eject the unknown persons from the subject unit, Plaintiff elected to file an eviction action against Kirk Hassock and Patricia Henry on November 19, 2019, in which Plaintiff specifically stated in its Complaint that "Defendant has possession of the property. . ." and that "Defendant has failed to pay rent or give possession as set forth in the abovementioned notice."

27. Accordingly, this Court finds that Plaintiff did knowingly and intentionally make a misrepresentation of a material fact to the Court (i.e. that Defendants were in possession of the premises at the time the Complaint was filed).

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

1. Defendants' Motion to Vacate Final Judgment entered on December 10, 2019 is hereby **GRANTED**.

2. The Final Judgment entered on December 10, 2019 is hereby **VACATED.**

3. This action, including Counts I and II, is dismissed.

4. This Court hereby reserves ruling as to the award of sanctions against Plaintiff.

* * *

Insurance—Personal injury protection—Discovery—Failure to comply—Insurer's conduct in failing to respond to medical provider's repeated requests for deposition dates and filing motion for protective order without good faith basis caused unnecessary litigation work for provider—Sanctions are conditionally awarded to provider

HEALTH FIRST INC, d/b/a HOLMES REGIONAL MEDICAL CENTER, a/a/o Michael Lester, Plaintiff, v. PEAK PROPERTY AND CASUALTY INSURANCE CORPORATION, Defendant. County Court, 18th Judicial Circuit in and for Brevard County, Civil Division. Case No. 05-2021-SC-018403-XXXX-XX. August 6, 2021. Michelle Baker, Judge. Counsel: Crystal Eiffert, Eiffert & Associates, P.A., Orlando, for Plaintiff. Dina Piedra, Kubicki Draper, P.A., for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER & PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION & PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER came before the Court on July 8, 2021, on Defendant's Motion for Protective Order and Plaintiff's Response to Defendant's Motion and Plaintiff's Motion for Sanctions and, being considered by the Court and otherwise being fully advised of the premises; it is hereby **ADJUDGED** that:

1. On May 18, 2021, Plaintiff filed its Notice of Taking Deposition of Defendant's Corporate Representative for the deposition to occur on July 14, 2021.

2. On June 2, 2021, Defendant filed its Motion for Protective Order claiming that the deposition has been unilaterally scheduled and requested that the deposition be mutually coordinated by the parties. The Motion made no reference that the witness or its counsel were unavailable for the July 14, 2021 deposition.

3. The evidence presented at the hearing demonstrated that the Plaintiff requested dates from the Defendant on April 15, 2021 to conduct the deposition of Defendant's representative.

4. When receiving no response to this request, Plaintiff sent a follow up request two (2) weeks later and provided three dates in which to conduct the deposition of Defendant. This request stated that if Plaintiff did not receive an objection to the dates proposed, Plaintiff would assume all dates are available and they would file their notice.

5. When Plaintiff did not receive an objection to the dates by May 18, 2021, almost three weeks later, Plaintiff filed its Notice of Deposition.

6. This resulted in the filing of the subject Motion for Protective Order by the Defendant on June 2, 2021.

7. The evidence further demonstrated that upon receipt of the Motion for Protective Order, Plaintiff again reached out to the Defendant and asked that Defendant provide a date to conduct the deposition. Plaintiff advised that if Plaintiff did not receive a response, Plaintiff would file a Motion with the court seeking sanctions.

8. Defendant did not respond to Plaintiff's request for deposition dates and Plaintiff thereafter filed its Response to the Motion for Protective Order and Motion for Sanctions.

9. While Defendant argued at the hearing that their Motion for Protective Order was moot as the deposition had been scheduled by the parties three (3) weeks prior, the Defendant did not cancel its hearing on their Motion for Protective Order.

10. Both Defendant's Motion for Protective Order and Plaintiff's Response and Motion for Sanctions were noticed for hearing.

11. The Court finds that the Defendant's conduct in failing to respond to Plaintiff's requests and filing the subject Motion for Protective Order without a good faith basis warranted unnecessary litigation work on the part of the Plaintiff.

12. The Court finds that the Defendant failed to present any evidence to substantially justify its failure to respond and act with due diligence where the record demonstrated that Defendant only provided deposition dates three weeks prior to the subject hearing, well after the subject motions were filed and scheduled for hearing.

13. The Court enters a conditional award of sanctions to the Plaintiff for Plaintiff's attempted scheduling of the defendant's deposition, preparation of their response to the Motion for Protective Order and Motion for Sanctions, attendance at the subject hearing and Court Reporter fees.

14. The Court reserves its ruling on the entry of the sanction allowing Defendant ten (10) days, or on or before July 19, 2021, to submit case law that such an award is improper.

15. Plaintiff shall submit an affidavit of time to the Court within ten (10) days, or on or before July 19, 2021.

16. After receiving the requested documents, the Court will enter its Order on Plaintiff's Motion for Sanctions.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—A judicial candidate may not make a contribution or pay a fee to attend a political action committee's fundraiser event, but may accept a campaign contribution from a non-partisan political organization's political action committee

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-16 (Election). Date of Issue: October 7, 2021.

ISSUE

1. May a judicial candidate make a contribution or pay a fee to attend a non-partisan political organization PAC's fundraiser event?

ANSWER: No.

2. May a judicial candidate accept a campaign contribution from a non-partisan political organization's political action committee (PAC)?

ANSWER: Yes.

FACTS

The inquiring judicial candidate has been invited to attend a program sponsored by a political organization's political action committee (PAC). The PAC's invitation describes the event as follows:

> At the event we will hear from past elected women from [Blank] County and current elected officials. They will share the stories of overcoming diversity and breaking thru (sic) the gender barrier to become leaders in their communities. If you are interested in speaking, we would love to hear your story. Your ticket is complimentary, and we hope you will let us honor you for your strength and commitment to [Blank] County.
>
> For more information or to RSVP please email [Blank]@gmail.com or reach out via Facebook. The PAC is a non-partisan group working to encourage and support women of [Blank] County who want to be leaders in their community. (Deletions made by Committee in accordance with Fla. R. Gen. Prac. & Jud. Admin. 2.420(c)(10)).

The PAC has represented that one of its stated purposes is to support qualified female candidates for public office. In order to do so, the PAC "intends to focus on fundraising efforts by hosting events, public outreach, and donor development." This event is one of those. The money raised "will financially help qualified candidates in local elections." The non-elected candidates or attendees are required to purchase a $50.00 ticket for the brunch and program. Also, the PAC provides "sponsorship opportunities." These opportunities are listed in the event's flyer as three levels starting at $250.00, $500.00 and $1,000.00. In addition to the different number of tickets allowed, for the bottom level of $250.00, the donor will receive "name recognition on social media marketing and at the event's sponsor board." For the $500.00 level, the donor will get "small logo recognition on all marketing materials both print and electronic, name recognition in event program and be able to set up a marketing table at the event. For the highest-level contribution of $1,000.00, the donor will receive large logo recognition on all marketing materials, be able to hang a banner, set up a marketing table, distribute materials at all the tables at the event and make a 10-minute presentation at the event.

DISCUSSION

The Code of Judicial Conduct defines a "political organization" as follows:

> "Political Organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office."

The PAC involved herein is a political organization, as one of its stated purposes is to further the candidacy of female candidates for public office and "help local leaders get elected into office." [PAC's Facebook page].

Canon 7 of the Code of Judicial Conduct provides, in relevant part:

> A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity
>
> A. All judges and Candidates.
>
> (1) . . .shall not:
>
> (a) act as a leader or hold an office in a political organization. . .;
>
> (c) make speeches on behalf of a political organization. . .;
>
> (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate. . .

The Committee has, as acknowledged by the inquirer, dealt with similar circumstances. In Fla. JEAC Op. 91-21, the Committee opined that a sitting judge could not attend a dinner/dance sponsored by a political organization, when a portion of the fee charged would constitute a prohibited contribution under Canon 7. In Fla. JEAC Op. 02-16 [9 Fla. L. Weekly Supp. 648a], the Committee held that a judicial candidate could not pay to attend a fund-raiser for a partisan political organization created to protect citizens against discrimination. Canon 7A(1)(e) clearly prohibits the inquirer candidate from attending this event as it is a fundraiser.

A candidate, however, may attend a political organizations' events and address the audience at those events so long as they are not fund-raisers. Fla. JEAC Op. 17-25 [25 Fla. L. Weekly Supp. 849a]. Additionally, the candidate's campaign may accept campaign contributions from a non-partisan political organization. Fla. JEAC Ops. 18-28 [26 Fla. L. Weekly Supp. 696a]; 12-01 [19 Fla. L. Weekly Supp. 506a].

The Committee cautions the candidate to be mindful of the prohibitions set forth in Canon 7A(3), which requires the candidate to prohibit campaign employees or others, subject to the candidate's direction and control, to do on the candidates' behalf what the candidate is prohibited from doing. Moreover, that subsection, further prohibits the candidate from authorizing or knowingly permitting any other person to do what the candidate is prohibited from doing under Canon 7.

REFERENCES

Fla. Code Jud. Conduct, Canon 7A
Fla. JEAC Ops. 1991-21; 2002-16; 2012-01; 2017-25; 2018-28

* * *