Volume 29, Number 9, January 31, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 631-695

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.

- **CONTRACTS—VENUE—FORUM SELECTION CLAUSE—NON-SIGNATORIES. In an action asserting claims for fraudulent inducement, breach of fiduciary duty, and civil conspiracy based on allegations that the defendants misled the plaintiff into entering into a securities acquisition and contribution agreement and diverted, dissipated, and unduly risked the plaintiff's corporate assets before subsequently entering into a termination agreement, the circuit court found that each claim raised in the complaint fell "comfortably within the scope of controlling mandatory forum clauses, and that Defendants, though non-signatories" were entitled to enforce the forum selection clauses. The defendants' enforcement of the mandatory forum clauses in the SACA and termination agreements was foreseeable by virtue of their close relationship to a corporate signatory. Moreover, the plaintiff was equitably estopped from avoiding its contractual undertaking because it raised claims against affiliates of the corporate signatory based upon substantially interdependent and concerted misconduct relating directly to the contracts sued upon. The court rejected the plaintiff's argument that a "no third-party beneficiaries" clause contained in the SACA prevented the defendants' enforcement of the forum selection clauses because, although the plaintiff had advanced claims based on both the SACA and the termination agreement, the termination agreement, which was the only contract still in force, did not contain a "no third-party beneficiaries" clause. Additionally, the court found that the defendants were more than just non-signatories to the agreements at issue, as they were defined as "affiliates" under both contracts, and the conduct they allegedly engaged in was on behalf of the corporate signatory. The plaintiff's tort claims were within the scope of the mandatory forum selection clause where the clauses in both agreements were broad, and each claim arose out of and related to the subject agreements. Finally, the court rejected the plaintiff's contention that the forum selection provision was unenforceable because it was contained in a contract alleged to have been induced by fraud. To avoid a forum selection provision, the fraud alleged must relate to the inclusion of the clause in the contract.** *MXY HOLDINGS LLC v. SCHOTTENSTEIN. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed September 21, 2021. Full Text at Circuit Courts-Original Section, page 664a.*

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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:

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CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
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TABLE OF CASES TREATED

TABLE OF CASES TREATED

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* * *

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January 31, 2022
Cite as 29 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of detention—Hearing officer did not err in determining that licensee's detention was not unlawfully prolonged where stopping officer noticed signs of impairment before and after stop, DUI investigator was dispatched within ten minutes of initial observation of licensee's erratic driving, and detention was not overly intrusive—Fact that stopping officer did not take steps to further DUI investigation while awaiting arrival of DUI investigator does not render detention unreasonable—No merit to argument that DUI investigator lacked probable cause for arrest because there is no competent substantial evidence that stopping officer who observed licensee in actual physical control of vehicle relayed that information to investigator—Inclusion of stopping officer's narrative within investigator's report and sequential organization of report constitutes sufficient evidence for hearing officer to determine that information was relayed to investigator before he conducted investigation—Petition for writ of certiorari is denied

MICHAEL EUGENE ANDERSON, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2020-AP-45, Division AP-A. October 19, 2021. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen and David M. Robbins, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM) This cause is before this Court on Petitioner Michael Eugene Anderson's "Petition for Writ of Certiorari," filed on October 26, 2020. Petitioner argues the hearing officer's order was not supported by competent, substantial evidence, departed from the essential requirements of the law, and denied due process when the hearing officer found Petitioner was lawfully arrested. Petitioner identifies two bases for this claim: (1) the Department failed to demonstrate Petitioner's detention was not unlawfully prolonged before the DUI investigation, and (2) the record evidence did not establish Officer Stanley spoke with Sergeant Wong before conducting the DUI investigation or arresting Petitioner.

On certiorari review of an administrative action, this Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety & Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety & Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

(1)

Petitioner alleges the hearing officer's finding that Petitioner was lawfully arrested was not supported by competent, substantial evidence, departed from the essential requirements of the law, and denied due process because the Department failed to prove Petitioner's detention was not unlawfully prolonged before the DUI investigation. The Arrest and Booking Report indicates Sergeant Wong stopped Petitioner at approximately 8:50 p.m. Officer Stanley was dispatched at 9:00 p.m. The Report details the time of arrest as 10:45 p.m., but it does not include the time of Officer Stanley's arrival or the time at which Officer Stanley began the DUI investigation. After arriving at the scene, Officer Stanley made contact with Petitioner, walked over to a nearby parking lot, had a brief conversation with Petitioner, and conducted field sobriety exercises. Officer Stanley then arrested Petitioner. Petitioner asserts "[c]ommon sense would show that it would not take an hour and forty five (45) minutes to complete these tasks." Therefore, the Department failed to demonstrate that an unreasonable delay did not occur between the initial detention and the DUI investigation.

A traffic stop must last no longer than the time it takes to write the citation. *Cresswell v. State,* 564 So. 2d 480, 481 (Fla. 1990). To justify an extended detention, a law enforcement officer must have reasonable suspicion of criminal activity. *See Rodriguez v. United States,* 575 U.S. 348, 355 (2015) [25 Fla. L. Weekly Fed. S191a]. "Whether the officer had reasonable suspicion is based on the totality of the circumstances in light of the officer's background and experience . . . ." *Napoleon v. State,* 985 So. 2d 1170, 1174 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1678a].

Here, the hearing officer's order was supported by competent, substantial evidence, did not depart from the essential requirements of the law, and did not deny due process when the hearing officer determined Petitioner was lawfully arrested. Sergeant Wong stopped Petitioner after observing him commit two traffic violations. Petitioner's vehicle swayed intermittently to the left and right on the roadway; the vehicle straddled the left and right lane lines multiple times. *See* □ 316.089(1), Fla. Stat. (2020). Sergeant Wong observed other vehicles on the roadway. Further, Sergeant Wong could not read the vehicle's tag because a faded plastic covering obscured his view. *See* □ 316.605(1), Fla. Stat. (2020).

Once Sergeant Wong stopped Petitioner's vehicle at 8:50 p.m., he developed reasonable suspicion to detain Petitioner for a DUI investigation. Petitioner's speech was slightly slurred; his eyes were bloodshot and watery; and the odor of an alcoholic beverage emitted from inside the vehicle. Petitioner ultimately admitted he had consumed some beers a few hours ago. After Sergeant Wong requested his license, registration, and insurance, Petitioner produced an expired insurance card. Sergeant Wong had to remind Petitioner to produce his license and registration.

The record does not reflect where Officer Stanley was or what Officer Stanley was doing when he received the dispatch. Petitioner's counsel did not introduce evidence that any delay in Officer Stanley's arrival was a pretext designed to allow Sergeant Wong to search for probable cause for an arrest. *See Sanchez v. Fla. Dep't of Highway Safety & Motor Vehicles,* 26 Fla. L. Weekly Supp. 73a (Fla. 4th Cir. Ct. Mar. 19, 2018); *see also Dep't of Highway Safety & Motor Vehicles v. Stewart,* 625 So. 2d 123, 124 (Fla. 5th DCA 1993) ("[T]he burden of proof is by a preponderance of the evidence and . . . submission of the law enforcement officer's written report to the hearing officer is enough to sustain the burden. This places on the suspendee the burden to call all witnesses, including the arresting officer, in order to rebut the state's prima facie case."). Rather, the record reflects that Sergeant Wong noticed signs of impairment before and after stopping Petitioner. Officer Stanley was dispatched at 9:00 p.m., only ten minutes after Sergeant Wong initially observed Petitioner's vehicle. The detention also was not overly intrusive because Petitioner was not handcuffed and was standing near the rear of his vehicle when Officer Stanley arrived at the scene. *See Bartholomew v. Fla. Dep't of Highway Safety & Motor Vehicles,* 20 Fla. L. Weekly Supp. 312b (Fla. 9th Cir. Ct. Jan. 11, 2013). Therefore, the hearing officer's order was supported by competent, substantial evidence, did not depart from the essential requirements of the law, and did not deny due process by determining Petitioner's detention was not unlawfully prolonged.

To the extent Petitioner argues he was unreasonably detained because Sergeant Wong did not take steps to further the investigation before Officer Stanley's arrival, this Court disagrees. The Twelfth

Judicial Circuit Court's interpretation of *Rodriguez v. United States* is persuasive: "[T]he United States Supreme Court made it clear in the *Rodriguez* case that additional reasonable suspicion developed during a stop obviates the requirement that law enforcement must either release a person or remain actively engaged in an investigation throughout the stop in order for the detention to be lawful." *State v. Guzman,* 27 Fla. L. Weekly Supp. 402a (Fla. 12th Cir. Ct. May 24, 2019). Petitioner's assumption that Sergeant Wong did not further the investigation before Officer Stanley's arrival does not by itself render the traffic stop unreasonable. Moreover, Sergeant Wong had reasonable suspicion to justify detaining Petitioner after observing him commit traffic violations and noticing signs of impairment during the traffic stop. Petitioner's claim is therefore denied.

(2)

Petitioner alleges the hearing officer's order was not supported by competent, substantial evidence, departed from the essential requirements of the law, and denied due process when the hearing officer found Petitioner was lawfully arrested because the record evidence did not establish Officer Stanley spoke with Sergeant Wong before conducting a DUI investigation or arresting Petitioner. When Officer Stanley arrived at the scene, Petitioner was not in actual physical control of a motor vehicle. Petitioner argues that Officer Stanley therefore could not lawfully arrest Petitioner without a warrant. Petitioner claims the fellow officer rule does not apply to the instant case because no evidence indicates Officer Stanley spoke with Sergeant Wong before conducting the DUI investigation and arresting Petitioner.

The hearing officer determined Officer Stanley composed the Arrest and Booking Report in chronological order. In the Report, Officer Stanley notes he was dispatched to assist Sergeant Wong, he includes Sergeant Wong's narrative describing his observations before stopping Petitioner, and Officer Stanley describes the DUI investigation. However, Petitioner argues the organization of the Report does not constitute sufficient evidence to establish whether Officer Stanley received and read the narrative from Sergeant Wong before conducting the DUI investigation.

Under the fellow officer rule, a law enforcement officer may develop probable cause to arrest based in part on information known to another officer. *Fla. Dep't of Highway Safety & Motor Vehicles v. Porter,* 791 So. 2d 32, 34 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D1161a]. In *Porter,* the arresting officer, Deputy Watson, authored an arrest affidavit that included observations from his fellow officer, Deputy Cox:

> The DEF did operate a 1984 GMC Jimmy Pickup Truck [. . .] on SR 52 WB. Deputy Cox stopped him for going 45 mph in a 35 mph zone and leaving his lane of travel over the right fog line twice. Upon contact I observed a strong odor of alcoholic beverage about him, glassy bloodshot eyes, and was unsteady on his feet. On video he started field sobriety tests then refused to perform them. I advised him it could be used against him. I then placed him under arrest for DUI. After Implied Consent he refused the breath test. He had 4 empty and 8 full Bud Light beers on ice in his truck.

Id. at 33. Deputy Watson also authored a sworn DUI report stating Porter "had been 'witnessed and stopped by Deputy Cox.' " *Id.* The hearing officer suspended Porter's license based solely on the documents submitted by the parties. *Id.* In granting the Department's petition for writ of certiorari, the Second District Court of Appeal noted the hearing officer could have easily inferred from the documents that Deputy Cox had observed Porter speeding and crossing the fog line twice while operating his vehicle and that he had passed this information to Deputy Watson, who included it in his report. *Id.* at 35.

Here, the hearing officer properly determined that Officer Stanley received information from Sergeant Wong to develop probable cause under the fellow officer rule. Officer Stanley authored the Report. After noting he was dispatched to assist Sergeant Wong with a "possibly impaired driver," Officer Stanley included Sergeant Wong's narrative. Sergeant Wong observed Petitioner's vehicle "swaying to the left and right," as well as straddle the lines on the roadway. After Sergeant Wong stopped Petitioner's vehicle, he noticed Petitioner's speech was slightly slurred and his eyes were bloodshot and watery. The slight odor of alcohol emitted from the vehicle's interior. Sergeant Wong asked Petitioner to produce his driver's license, registration, and proof of insurance. Petitioner produced an expired insurance card. Sergeant Wong had to remind Petitioner to provide his driver's license and registration. Officer Stanley followed Sergeant Wong's narrative with his own observations upon arrival at the scene. From the organization and detail in the Report, the hearing officer could infer Sergeant Wong had passed this information on to Officer Stanley. Similar to the arrest affidavit in *Porter,* the Report in the instant case did not include explicit language that Sergeant Wong relayed information to Officer Stanley before the latter conducted a DUI investigation. *See id.* at 33. Nevertheless, the inclusion of Sergeant Wong's narrative within the Report and the Report's organization constitute sufficient evidence for the hearing officer to determine the information has been relayed before the DUI investigation. Accordingly, Petitioner's claim is denied.

(3)

On November 23, 2020, Petitioner filed a "Motion for Oral Argument," requesting oral argument on the instant Petition. Since this Court finds Petitioner is not entitled to certiorari relief, his request for oral argument is moot.

Based on the foregoing, the "Petition for Writ of Certiorari" is **DENIED**, and the "Motion for Oral Argument" is **DENIED** as **MOOT**. (SALEM, SALVADOR, and ROBERSON, JJ., concur.)

* * *

Criminal law—Domestic battery—Jury trial—Waiver—Trial court erred by waiving defendant's right to a jury trial based on defense counsel's oral waiver without first conducting a colloquy to determine if defendant himself waived the right, and whether the waiver was knowing and intelligent

RICKY WINFRED REDDEN, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 20-AP-4. L.T. Case No. 19-MM-4817. UCN Case No. 512020AP000004APAXWS. October 28, 2021. On appeal from Pasco County Court, Honorable Debra Roberts, Judge. Counsel: Joseph Anthony Manzo, Largo, for Appellant. Jennifer Counts, Assistant State Attorney, for Appellee.

AMENDED ORDER AND OPINION

This amended opinion is issued to correct a scrivener's error. It is otherwise unchanged from the original:

Appellant argues that the trial court erred by waiving his right to a jury trial on his trial counsel's request without first conducting a colloquy to determine if Appellant himself waived the right and to determine whether the waiver was knowing and intelligent.[1] Appellee properly concedes error. Appellant's judgment and sentence must be reversed the case remanded for a new trial.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by Information with Domestic Battery. During the calendar call on the day before trial, Appellee requested a bench trial due to complications caused by the alleged victim checking herself into a rehabilitation facility. Counsel for Appellant stated that he agreed to Appellee's request because Appellee had indicated that a jail sentence would not be sought if Appellant was convicted. Appellee stipulated on the record to a no jail sentence. The trial court certified no jail and set the case for trial the next day. The

trial court did not inquire into whether Appellant himself agreed to waive his right to a jury trial or whether the waiver was knowing and intelligent.

After the bench trial, the trial court found Appellant guilty of domestic battery. The trial court withheld adjudication and sentenced him to 11 months and 27 days of probation. Appellant timely-appeals.

STANDARD OF REVIEW

The waiver of the right to a jury trial involves a pure question of law which is reviewed de novo. *Williams v. State*, 10 So. 3d 660, 661 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D721b] (*citing Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007) [32 Fla. L. Weekly S272a]).

LAW AND ANALYSIS

Appellant argues that the trial court erred by accepting his trial counsel's oral waiver of a jury trial without conducting a colloquy with Appellant himself to determine whether the waiver was knowing and intelligent. Appellee properly concedes error.

Florida Rule of Criminal Procedure 3.260 provides that "a defendant may in writing waive a jury trial with the consent of the state." A waiver can also be made orally in court. *Sansom v. State*, 642 So. 2d 631, 632 (Fla. 1st DCA 1994). However, if there is an oral waiver, the waiver is not valid unless and until the trial court conducts a colloquy with the defendant himself to establish that the waiver is knowing and voluntary. *Id*. (citing *Tucker v. State*, 559 So. 2d 218 (Fla. 1990)). Failure to conduct this colloquy is reversible error. *Id*. This is true even if the defendant's trial counsel orally waives the defendant's right to a jury trial in the defendant's presence and the defendant remains silent on the matter. *Id*. A no jail order or certification does not remove the colloquy requirement. *Id*.

The facts in this case are similar to *Sansom*. As in *Sansom*, Appellant's trial counsel orally waived Appellant's right to a jury trial after Appellee agreed that no jail time would be imposed if there was a conviction. As in *Sansom*, Appellant sat quietly while this occurred. As in *Sansom*, the trial court accepted trial counsel's oral waiver without conducting a colloquy with Appellant to determine whether the waiver was knowing and intelligent. Accordingly, the trial court erred. Appellant's judgment and sentence must be reversed and the case remanded for a new trial.

It is therefore ORDERED and ADJUDGED that the trial court's judgment and sentenced are hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion. (DANIEL D. DISKEY, KIMBERLY CAMPBELL, and LAURALEE WESTINE, JJ.)

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[1]Because the waiver of jury trial issue is dispositive, this Court does not address Appellant's second argument that the trial court erred by failing to conduct a *Richardson* hearing before sustaining Appellee's objection to the admission of photographs on the basis that they were not discovered to Appellee prior to trial.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Witnesses—Telephonic oath—Where arresting officer appeared telephonically at formal review hearing without person authorized to administer oath present with officer to independently verify his identity, and officer was not personally known to hearing officer, oath administered telephonically by hearing officer was invalid—While hearing officer has authority to administer oaths telephonically, for oath to be proper witness must be personally known to hearing officer or must appear before person authorized to administer oaths who can vouch for their identity—Hearing officer's order is quashed, but no further proceedings are required where issue of validity of license suspension has been rendered moot by expiration of suspension period—Licensee's request that appellate court order Department of Highway Safety and Motor Vehicles to remove now-moot suspension from his driving record is denied

WILLIAM J. DOROFY, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 19-CA-2539. UCN Case No. 512019CA002539CAAXES. November 1, 2021. Counsel: Keeley Karatinos, Karatinos Law, PLLC, Dade City, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER GRANTING IN PART AND DENYING IN PART, PETITIONER'S MOTION FOR CLARIFICATION; ORDER DISMISSING RESPONDENT'S MOTION FOR REHEARING; ORDER STRIKING PETITIONER'S REPLY TO DEPARTMENT'S RESPONSE TO PETITIONER'S MOTION FOR CLARIFICATION

[Original Opinion at 28 Fla. L. Weekly Supp. 570b]

THIS MATTER came to be heard upon Petitioner's "Motion for Clarification of Per Curiam Opinion Granting Petition for Writ of Certiorari" filed August 31, 2020, Respondent's "Motion for Rehearing and Response to the Petitioner's Motion for Clarification" filed on September 14, 2020, Petitioner's response to Respondent's motion for rehearing filed on October 5, 2020, and Petitioner's reply to Respondent's response to Petitioner's motion for clarification filed on October 5, 2020. The parties seek clarification or rehearing of the Court's August 25, 2020 order granting Petitioner's Petition for Writ of Certiorari.

Respondent's Motion for Rehearing and Petitioner's Reply to Respondent's Response to Petitioner's Motion for Clarification

The portion of Respondent's September 14, 2020 filing moving for rehearing is dismissed as untimely. *See* Fla. R. App. P. 9.330(a)(1) ("A motion for rehearing . . . may be filed within 15 days of an order or decision of the court. . ."). However, the Court did consider the portion of the filing responding to Petitioner's motion for clarification.

Petitioner's reply to Respondent's response to Petitioner's motion for clarification is stricken as an unauthorized filing. *See* Fla. R. App. P. 9.330(a)(3).

Petitioner's Motion for Clarification

Petitioner argues that because his driver license suspension ended prior to the Court issuing its order granting his petition, the matter was moot at the time the opinion was issued and therefore the Court should not remand the matter for a second hearing but should instead both quash the hearing officer's order and order the Department to remove from Petitioner's driving record the underlying suspension that Petitioner was challenging before the hearing officer. In support of his argument, Petitioner cites to *McLaughlin v. Dep't of Highway Safety & Motor Vehicles,* 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a].

Respondent correctly responds that Petitioner seeks greater relief than this Court is authorized to grant. As *McLaughlin* makes clear, the Court can only quash the hearing officer's order without remanding the matter for any further proceedings because the issue of the suspension's validity has been rendered moot by the suspension ending. Therefore, the Court cannot rule on or issue an order addressing the validity of the underlying suspension. Even if the matter were not moot, this Court would not have the authority to directly order the Department to remove the underlying suspension from Petitioner's driving record. The only matter under review before this Court was the hearing officer's decision to uphold the underlying suspension.

Accordingly, Petitioner's motion for clarification is granted in part and denied in part. The opinion dated August 25, 2020 is withdrawn

and the following opinion is substituted in its place.

(PER CURIAM.) Petitioner William Dorofy seeks certiorari review of the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer of the Bureau of Administrative Reviews, Department of Highway Safety and Motor Vehicles issued on June 26, 2019. The Decision upheld the suspension of Petitioner's driving privileges based upon his refusal to take a breath-alcohol test. The question before the Court is whether the Hearing Officer violated Petitioner's due process rights by administering the oath to a law enforcement witness over the telephone instead of requiring the officer to be in the presence of someone authorized to administer the oath. Upon review, the Petition for Writ of Certiorari is granted. However, because the suspension ended during the pendency of this proceeding, the relief the Court can grant is limited.

Statement of Case

Trooper Raeford Griffin of the Florida Highway Patrol conducted a traffic stop of Petitioner William Dorofy and subsequently arrested him for DUI. According to Trooper Griffin's report, Petitioner refused to submit to a breath-alcohol test. As a result, Petitioner's driver license was suspended. Petitioner sought formal review of the suspension. *See* § 322.2615(6)(a), Fla. Stat. (2018).

Prior to the formal hearing, Petitioner requested a subpoena for Trooper Griffin's appearance as a witness. *See* Rule 15A-6.012(1), F.A.C. (2007). The subpoena Petitioner submitted as part of the request, which was a form subpoena created by the Department,[1] directed that for a telephonic appearance, Trooper Griffin would be required to appear at a duty station so that a fellow officer could administer the oath in person. Before issuing the subpoena, the Hearing Officer crossed out the duty station reporting requirement and wrote "no longer required to report to a duty station."

In accordance with the subpoena, Trooper Griffin appeared telephonically. The Hearing Officer asked for, and Trooper Griffin provided, his name, rank, employment agency, and address. The Hearing Officer then administered the oath to Trooper Griffin over the phone. Petitioner objected, arguing that the oath must be administered by someone in Trooper Griffin's physical presence. The Hearing Officer overruled the objection, citing section 322.2615(6), Florida Statutes (2018), and a change in Department policy stating that hearing officers were now authorized to administer oaths over the phone.

Near the end of the hearing, Petitioner objected to the Hearing Officer considering Trooper Griffin's testimony based upon the lack of a proper oath. The Hearing Officer treated the objection as a motion and denied it. The Hearing Officer later issued the Decision upholding the driver license suspension.

Standard of Review

Circuit court certiorari review of an administrative agency decision is governed by a three-part standard: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *State, Dep't of Highway Safety & Motor Vehicles v. Sarmiento,* 989 So. 2d 692, 693 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1926a]. This Court is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and Decision. *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

Analysis

The sole issue before the Court is whether the Hearing Officer violated Petitioner's due process rights by administering the oath to Trooper Griffin telephonically. While the procedure laid out in section 322.2615, Florida Statutes (2018), satisfies due process on its face, the facts of a specific case may show that a petitioner's due process rights have not been respected. *Dep't of Highway Safety & Motor Vehicles v. Stewart,* 625 So. 2d 126,124 (Fla. 5th DCA 1993).

Section 322.2615(6)(b), Florida Statutes (2018), provides that a hearing officer may conduct a formal hearing using communications technology. It also provides that a hearing officer is authorized to administer oaths. However, these are general provisions regarding how a hearing officer may conduct a formal hearing. Contrary to Respondent's contention, nothing in section 322.2615(6)(b), Florida Statutes (2018), expressly authorizes a hearing officer to administer oaths to a witness telephonically. However, neither does the statute expressly forbid telephonic administration of an oath. *See also* Rule 15A-6.013(4), (8), F.A.C. (2007) (providing that oral evidence and witness testimony shall be taken under oath or affirmation but not providing how the oath shall be administered).

Respondent cites to three cases in support of the Hearing Officer's telephonic administration of the oath during the formal review hearing: *Dep't of Highway Safety & Motor Vehicles v. Edenfield,* 58 So. 2d 904 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D523a]; *Dep't of Highway Safety & Motor Vehicles v. Bennett,* 125 So. 3d 367 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D2376b]; *Dep't of Highway Safety & Motor Vehicles v. Canalejo,* 179 So. 3d 360 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2344a]. However, the cited cases only stand for the proposition that a law enforcement witness can testify telephonically during a formal hearing. They do not address whether a hearing officer can administer the oath telephonically. The Court could not find any controlling district court or supreme court case law ruling on this issue.

As persuasive authority, each party provided the Court with opinions or orders from sister circuit courts. *See Graca v. Dep't of Highway Safety & Motor Vehicles,* 24 Fla. L. Weekly Supp. 329c (Fla. 20th Cir. Ct. Jul 23, 2016) ("The effect of this statute [section 322.2615(6)(b)] authorized the Hearing Officer . . . to place Corporal Driscoll under oath in order to obtain his testimony by phone"); *Eckert v. Dep't of Highway Safety & Motor Vehicles,* Case No. 19-CA-10990 (Fla. 13th Cir. Ct. May 26, 2020) [28 Fla. L. Weekly Supp. 285a] (holding that administering the oath to the law enforcement officer by telephone without independent verification of the witness's identity failed to place the witness under a proper oath, resulting in the petitioner being denied due process).

Because of the purpose in administering an oath before a witness testifies, this Court holds that the Hearing Officer's method of administering the oath in this instance resulted in a violation of Petitioner's due process rights.

Without proper identification of the person giving the oath by the person administering the oath, an oath cannot properly be sworn and a witness's testimony, which the hearing officer then relies upon in upholding the suspension of a driver license, is not properly sworn. Upholding a driver license suspension after a formal review hearing based upon unsworn testimony violates the driver's due process rights. *Cf. Pena v. Rodriguez,* 273 So. 3d 237, 239 n2, 239-241 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a] (noting that "an unsworn witness is not competent to testify," and holding that a trial court committed a due process violation by considering a lawyer's proffer and not sworn testimony in determining parental responsibility, timesharing, and child support).

As did the Thirteenth Judicial Circuit Court in *Eckert,* this Court finds the reasoning in question 2 of an advisory opinion by the Florida Attorney General to be persuasive:

> Florida courts have stated that a valid oath must be an unequivocal act made in the presence of an officer who is authorized to administer oaths in which the declarant knowingly attests to the truth of the statement and assumes the obligations of an oath. The key to a valid oath is that perjury will lie for its falsity. Thus, an affiant is required to be in the personal presence of an officer administering an oath, not to the end that the officer knows him to be the person he represents himself to be, but that he can be certainly identified as the person who actually took the oath. This purpose cannot be accomplished by a notary public administering an oath over the telephone.

Atty. Gen. Opinion 92-95.

There is an obvious distinguishing feature between the situation addressed in the Attorney General's opinion and the formal hearing under review in this petition. The Attorney General's opinion addresses notaries under Chapter 117, Florida Statutes. It does not address hearing officers and formal hearings under section 322.2615, Florida Statutes. However, the reasoning underlying the Attorney General's opinion is applicable here.

As noted in the Attorney General's opinion, the purpose of an oath is that the declarant knowingly attests to the truth of his or her statements. And the key to an oath is that perjury will lie for false statements. This is true regardless of whether the oath is sworn in a courtroom or during an administrative hearing *See* §837.02(1), Florida Statutes (2020) ("whoever makes a false statement, which he or she does not believe to be true, under oath *in an official proceeding* in regard to any material matter, commits a felony of the third degree . . .") (emphasis added).

The Attorney General's opinion notes that for the oath to have any effect, the person administering the oath must be in the personal presence of the witness swearing the oath so that the person administering the oath can certainly identify the person who actually took the oath. In other words, if the witness makes a false statement under oath, the person who administered the oath needs to be able to point to the witness and say "that is the actual person that swore the oath."

However, unlike the Attorney General's opinion and contrary to Petitioner's argument, the Court is not convinced that this purpose can *never* be accomplished telephonically. As the Attorney General's opinion notes, the purpose of the witness being in the personal presence of the hearing officer, law enforcement officer, or notary administering the oath is not so that the officer or notary knows the witness to be the person he represents himself to be, but that he can be certainly identified as the person who actually took the oath.

But if a hearing officer administering the oath does, in fact, personally know the witness and on that basis knows that the witness is the person he represents himself to be, then under some circumstances the hearing officer would be able to point to the witness and say "that is the person who actually took the oath" even though the hearing officer administered the oath over the phone.

Accordingly, the Court holds that if the hearing officer can state on the record that he has previously met the law enforcement witness in person and therefore the law enforcement witness is personally known to him *and* the hearing officer can verify that the law enforcement witness is the person he knows based upon the witness's voice over the phone, then the hearing officer can administer the oath telephonically and the driver's due process rights are protected because the law enforcement witness's testimony is now properly sworn. This is because, in the unlikely event that the need arises, the hearing officer can later point to the law enforcement witness and say "that is the actual person that took the oath." However, if the hearing officer cannot so state on the record, then the proper swearing of the law enforcement witness, and consequently the protection of the driver's due process rights, requires the law enforcement witness to appear physically before someone authorized to administer an oath, such as a fellow officer.[2]

Because the oath was not properly administered on this record, Trooper Griffin's testimony was unsworn and the Hearing Officer's reliance on that unsworn testimony in upholding the driver license suspension violated Petitioner's due process rights. And Trooper Griffin's recitation of his name, rank, employment agency, and address did not correct this deficiency. No matter what information a witness provides over the phone, the hearing officer administering the oath telephonically will not be able to point at a particular witness in a courtroom and say "that is the actual person who took the oath" if he has never seen the witness before.

To be clear, we do not think that Trooper Griffin committed perjury or that the witness was not Trooper Griffin. Nor do we fault the Hearing Officer for following the Department's guidance with little to no explicit statutory, regulatory, or appellate case law to the contrary. We simply address the due process concerns attendant to a witness offering testimony against a driver at a formal hearing. *See generally Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a] (noting that section 322.2615 is designed to preserve a driver's due process rights and to protect the driver's significant interest in the driving privilege).

Conclusion

Because the Hearing Officer administered the oath telephonically to Trooper Griffin without any indication that the Hearing Officer personally knew the trooper and could identify his voice, Petitioner's due process rights were violated. Accordingly, the Petition for Writ of Certiorari is granted. The order of the Hearing Officer is quashed. Because Petitioner's suspension ended during this proceeding, the matter is now moot and no remand is required. *See McLaughlin v. Dep't of Highway Safety & Motor Vehicles,* 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a] ("[T]he suspension period expired while this matter was on review. Accordingly, other than quashing the administrative order, no further proceedings are necessary on remand because the issue of the validity of the suspension of [the petitioner's] driver's license is moot.").

Accordingly, it is:

ORDERED that Petitioner's "Motion for Clarification of Per Curiam Opinion Granting Petition for Writ of Certiorari" is hereby **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that Respondent's Motion for Rehearing is hereby **DISMISSED**.

IT IS FURTHER ORDERED that Petitioner's reply to Respondent's response to Petitioner's motion for clarification is hereby **STRICKEN**.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED**; "Findings of Fact, Conclusions of Law and Decision" **QUASHED**. (DISKEY, BABB, and WESTINE, JJ.)

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[1]*See* HSMV Form 72066 (Rev. 10/11).

[2]While not addressed by the parties, the Court notes that a hearing officer can likely administer the oath to a law enforcement witness appearing remotely by videoconference technology regardless of whether the hearing officer has met the witness before because the identification and due process concerns raised in this petition would likely be assuaged in that circumstance.

* * *

Municipal corporations—Historic preservation—Designation as local historic landmark—Where Historic Preservation Board failed to hold final hearing on historic preservation officer's preliminary determination that property that homeowners seek to demolish was eligible for designation as local historic landmark within 60 days of officer's determination, board departed from essential requirements of law—Homeowners who were not informed of designation criteria that officer believed warranted designation of property as local historic landmark until five days prior to final hearing before board were denied due process—Petition for writ of certiorari is granted

EDMUND J. ZAHAREWICZ and CECILIA M. DANGER, Petitioners, v. CITY OF CORAL GABLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 21-006-AP-01. November 23, 2021. Counsel: Enrique Arana, for Petitioners. John Luckacs, Sr. for Respondent.

(Before DARYL E. TRAWICK, MIGUEL M. DE LA O and RAMIRO C. ARECES, JJ.)

OPINION

(ARECES, J.) Petitioners, Edmund J. Zaharewicz and Cecilia M. Danger (collectively, "Petitioners"), filed a Petition for Writ of Certiorari wherein they contend this Court should quash the City of Coral Gables Commission's resolution designating their home, located at [Editor's note: address redacted] (hereinafter, the "Property"), a local historic landmark. Petitioners' Petition for Writ of Certiorari is GRANTED.

On a petition for writ of certiorari, this Court must determine "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings are supported by competent substantial evidence." *Miami Dade County v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a]. In this case, the City failed to observe the essential requirements of the law and failed to afford Petitioners procedural due process.[1]

Section 3-1107(G) of the City's Zoning Code provides that an applicant seeking the demolition of a building and/or structure that has not been previously designated as a local historic landmark must seek the approval of the City's Historic Preservation Officer. City of Coral Gables, Fla., Zoning Code § 3-1107(G) (2019). If the Historic Preservation Officer determines the property at issue is "eligible for designation," the Officer may request review by the Board. *Id.* The Historic Preservation Officer's eligibility determination is a "preliminary" determination. *Id.* The final determination is made by the Board at a final hearing, which "shall be within sixty (60) days from the Historic Preservation Officer's preliminary determination of 'eligibility.' " *Id.* (quotation marks in original). Specifically, Section 3-1107(G) provides, in full,

> All demolition permits for non-designated buildings and/or structures must be approved by the Historic Preservation Officer or designee. The approval is valid for eighteen (18) months from issuance and shall thereafter expire and the approval is deemed void unless the demolition permitted has been issued by the Development Services Department. **The Historic Preservation Officer may require review by the Historic Preservation Board *if* the building and/or structure to be demolished is eligible for designation as a local historic landmark** or as a contributing building, structure or property within an existing local historic landmark district. **This determination of eligibility is preliminary in nature and the final public hearing before the Historic Preservation Board on Local Historic Designation *shall* be within sixty (60) days from the Historic Preservation Officer determination of "eligibility."** Consideration by the Board may be deferred by the mutual agreement by the property owner and the Historic Preservation Officer. The Historic Preservation Officer may require the filing of a written application on the forms prepared by the Department and may request additional background information to assist the Board in its consideration of eligibility. Independent analysis by a consultant selected by the City may be required to assist in the review of the application. All fees associated with the analysis shall be the responsibility of the applicant. The types of reviews that could be conducted may include but are not limited to the following: property appraisals, archeological assessments, and historic assessments.

Id. (emphasis added).

In this case, Petitioners sought a demolition permit that would allow them to demolish their home of approximately thirteen years and build a larger home. Petitioners' plans were approved by the City's Board of Architects and the City's Zoning Department. Pursuant to section 3-1107(G), Petitioners sought the approval of the City's Historic Preservation Officer. *Id.* Petitioners sought said approval on August 27, 2020. *See* Appx. at A.010 ("I do not desire or seek any designation. This request is made pursuant to City requirements for a total demolition permit.").

Upon receiving Petitioners' request, the Historic Preservation Officer had two options: (1) determine that the Property was not eligible for historic designation and approve the permit; *or* (2) make a preliminary determination that the Property was eligible for historic designation and request review by the Board. *See* City of Coral Gables, Fla., Zoning Code § 3-1107(G) (the Officer "may require review by the Historic Preservation Board ***if*** the building and/or structure to be demolished is eligible for designation") (emphasis added).

On October 2, 2020, the City's Historic Preservation Officer made her decision. *See* Appx. At A.026. In a letter addressed to Petitioners, the Officer stated, "The above referenced property has been scheduled for historical significance review by the Historic Preservation Board." *Id.* The Board was required, pursuant to the Code, to hold a final hearing on the Property's designation within sixty days of October 2, 2020. *See* City of Coral Gables, Fla., Zoning Code § 3-1107(G) (the final hearing "shall be within sixty (60) days from the Historic Preservation Officer determination of "eligibility."). The Board, however, failed to hold a final hearing within sixty days of October 2, 2020. Instead, the Board held the final hearing on December 16, 2020. In so doing, it departed from the "essential requirements of the law." *Omnipoint Holdings, Inc.,* 863 So. 2d at 199.

This is not a complicated issue. Neither side has argued that sec. 3-1107(G) is ambiguous. The City argues, however, that the Historic Preservation Officer did not invoke the procedure set forth in sec. 3-1107(G) and instead placed the Property before the Board for discussion without having made a preliminary determination of eligibility. For example, in the proceedings below, the Assistant City Attorney said to the City Commission that the Property "went before the Board [on October 21, 2020] strictly for discussion, not for designation, not to review criteria, just to basically gauge the appetite of the Board to consider this particular style of home." Appx. at A. 705. The City has continued to make this argument despite the Historic Preservation Officer's own letters dated October 2, 2020 and October 26, 2020, wherein the Historic Preservation Officer very clearly scheduled the Property for historical significance review by the Board, and then confirmed that said review had taken place. *See* Appx. At A.026; *see also* Appx. at A.153 ("On Wednesday, October 21, 2020, **the Historic Preservation Board met to review the historical significance of the [Property]**.").

The City's argument, in addition to being contradicted by the record, is flawed. Pursuant to the Code, the Property would only be before the Board *if* the Historic Preservation Officer had made a preliminary determination of eligibility. By arguing otherwise, the City proposes—inadvertently, or not—an interpretation of sec. 3-

1107(G) that would conflate the "preliminary" and final determinations of eligibility, and would allow the Historic Preservation Officer to subject a property to historical significance review without a preliminary determination of eligibility. Such an interpretation is contrary to the plain meaning of sec. 3-1107(G).

Moreover, it would nullify the sixty-day deadline if the City could begin designation proceedings, place properties before the Board for review, and request additional reports without ever making a "preliminary determination of eligibility."[2] This would subject the homeowner to designation proceedings with no discernible end in sight and render the sixty-day window illusory. For this reason, even if sec. 31-107(G) were ambiguous, we would be constrained to reject the interpretation championed by the City. *See Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.,* 3 So. 3d 1220, 1233 (Fla. 2009) [34 Fla. L. Weekly S251a] ("Basic to our examination of statutes, . . . is the elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

Additionally, this Court would briefly note that the City's reliance on isolated statements by the Historic Preservation Officer on October 21, 2020 is misguided. For example, that the Officer referred to the Property as "potentially" historic is a *bad* fact for the City. This statement evinces a *preliminary* determination of eligibility warranting review by the Board.[3] Moreover, it does not matter that the Officer asked the Board if it wanted a full designation report. Sec. 3-1107(G) provides for said reports and anticipates they may be considered by the Board in its consideration of eligibility. Finally, that the Officer stated he was not asking for final designation on October 21, 2020 does not, in any way, evidence some failure to have made a preliminary determination of eligibility. Nothing in sec. 3-1107(G) requires the final hearing to be held the first time the Property comes before the Board. On the contrary, it envisions a preliminary determination of eligibility, some review by the Board, the possible request for additional information, and a final hearing within sixty days of the Historic Preservation Officer's preliminary determination of eligibility.

The City's interpretation of sec. 3-1107(G) is wrong. Its version of events is contradicted by the record—including the Historic Preservation Officer's own correspondence and statements before the Board on October 21, 2020.[4] The City departed from the essential requirements of the law when it failed to hold the final hearing within sixty days of the Historic Preservation Officer's preliminary determination of eligibility, which in this case necessarily occurred no later than October 2, 2020.[5]

The City also failed to afford Petitioners procedural due process. "[D]ue process requires that. . . decisions be reached by a means that preserves both the appearance and reality of fairness." *Pena v. Rodriguez,* 273 So. 3d 237, 240 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1346a] (citation and quotation marks omitted). Due process is generally understood to require that a party "be provided notice and a *meaningful* opportunity to be heard." *Id.* (emphasis added).

As stated above, on August 27, 2020, Petitioners asked the Historic Preservation Officer for approval of a demolition permit. Rather than approve the permit, the Historic Preservation Officer requested a historical significance review by the Board. *See* Appx. At A.026 ("The above referenced property has been scheduled for historical significance review by the Historic Preservation Board."). Petitioners were not informed at that time of the designation criteria the Historic Preservation Officer believed warranted designation of the Property as a local historic landmark.

On October 21, 2020, the Board conducted a historical review of the Property. Although the Historic Preservation Officer set forth a series of reasons why the Board might wish to designate the Property a local historic landmark, the Historic Preservation Officer did not formally identify any specific criteria she believed warranted historic designation of the Property under the Code. *See* Appx. at A.035-36.

Five days later, on October 26, 2020, Petitioners were informed a final hearing would be held on December 16, 2020. *See* Appx. at A.153. Still, Petitioners were not provided with any formal notice of what designation criteria the City believed warranted historical designation of the Property.

It was not until December 11, 2020, a mere five days prior to the final hearing, that Petitioners were for the first time provided with notice of the designation criteria that purported to establish their home was a "local historic landmark." The report purported to show that the Property met three separate criteria for historical designation.

In the proceedings below, Petitioners complained that they had not, until five days prior to the final hearing, been provided with any reason why their Property may be eligible for designation as a "local historic landmark." In response, the Assistant City Attorney stated the Code did not require the Historic Preservation Officer to base her preliminary eligibility determination on any criteria, and that Petitioners were not entitled to receive any designation report within any specific period of time. Specifically, the City stated,

> In terms of receiving the report, the Code is silent on when they need to receive it by. . .
>
> . . .
>
> [Petitioner Mr. Zaharewicz] did articulate originally that he needed criteria for that preliminary designation. Once again, our Code is silent on that. The Code does not require for a preliminary designation— not a designation, but the preliminary decision to move forward with designation does not have any criteria in our Code.

Appx. 434:16-17, 435:1-7. The City's position, therefore, appears to be that (1) the Historic Preservation Officer could make a *preliminary* determination of eligibility without considering any of the criteria that would factor into a *final* determination of eligibility; and (2) the City need not inform the homeowner why their property is being subjected to historic designation proceedings.

The City is wrong. A *preliminary* determination of eligibility must necessarily include a consideration of the same criteria used for a *final* determination of eligibility. To suggest otherwise would render the term "eligible" meaningless and lead to an absurd result, *i.e.* a preliminary determination of eligibility that does not take into account a property's actual eligibility for designation.

Additionally, the Code requires "all documentary evidence and written summaries of expert testimony" to be filed with the Clerk up to five days before the final hearing. *See* City of Coral Gables, Fla., Zoning Code § 15-104. This rule presupposes that one knows the substantive claims against which he, or she, must defend. If it were otherwise, parties would be incapable of filing documentary evidence or hiring experts to address or rebut any one or more claims. It is unreasonable to expect that homeowners, like Petitioners, could timely provide documentary evidence or summaries of expert testimony pertaining to matters they did not already know were at issue.

For example, in this case, Petitioner Mr. Zaharewicz, stated at the final hearing that he only became aware of the City's claim that his home fit a particular architectural style when the City filed the designation report on December 11, 2020—or five days prior to the hearing. Mr. Zaharewicz, who had researched the issue, attempted to explain why he did not believe his home was of a neoclassical architectural style. In response, the Historic Preservation Officer reminded the Board that Mr. Zaharewicz is not an architect or historian and that the City's designation report was, in contrast, prepared by an expert. Specifically, the Officer stated,

> So, the owner of the property is an attorney and did a bunch of research and has delved deep into architecture, but is not an architect, and is not a historian. And the staff report that was prepared for you was written by a PhD.

Appx. at A.431:5-9. And, of course, the Historic Preservation Officer is correct—at least as far as the record is concerned. It does not appear that Petitioner Mr. Zaharewicz is an architect or historian. But this is precisely the problem. The City failed to inform Petitioners of the criteria it believed justified designation of their home until five days before the hearing, and then faulted them for the quality of their response.

Worse, the City now asks this Court to find Petitioners were not, in fact, denied due process because Petitioners were told they would, *at some point,* receive the designation report, and Petitioners managed to present some opposition to the designation. *See* City's Resp. at 18 ("Petitioners were notified that a designation report was forthcoming. . ." and "Petitioners' preparation for the December 16th hearing actually began before they received the December 11 designation report."). The City, however, should not be made to benefit from Petitioners' due diligence in preparing for unknown claims.

Additionally, the City argues Petitioners rejected the offer of a continuance. The City, however, neglects to mention the continuance was conditioned on a waiver of Petitioners' argument that the final hearing was being unlawfully held beyond the sixty-day period set forth in the Code.

In short, the City has taken the following positions: (1) the Historic Preservation Officer need not consider any particular criteria in making a preliminary determination of eligibility; (2) no information about what criteria might warrant historic designation of a particular property need be provided to the homeowner; (3) a homeowner's request for a continuance can be conditioned on the waiver of a meritorious argument; (4) the homeowner cannot be heard to complain about a lack of notice if he or she has been diligent in preparing to contest unknown claims; and (5) anything the homeowner *does* present should be discounted, or ignored, because the homeowner is not himself an architect or historian.

This is not due process, and it certainly does not preserve the appearance of fairness. *Pena,* 273 So. 3d at 240 ("Due process requires that decisions be reached by a means that preserves both the appearance and reality of fairness.") (citation omitted). Historic preservation should not come at the expense of depriving the City's own residents of a meaningful opportunity to contest claims of purported historical significance against their homes.

Accordingly, the Petition is GRANTED. The City Commission's resolution is quashed and the decision by the Historic Preservation Board is reversed. (TRAWICK and DE LA O, JJ., CONCUR.)

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[1]This Court does not reach the issue of whether the City's decision to designate the Property was supported by competent, substantial evidence. This Court takes no position on whether the Property is, or is not, a local historic landmark.

[2]We note the City has been inconsistent as to the date on which they claim the preliminary determination of eligibility was made. In its brief, the City argues the notice of final hearing dated October 26, 2020 constituted the preliminary determination of eligibility. At oral argument, however, the City appeared to argue that the preliminary determination was made at the October 21, 2020 Board meeting. These two dates, not surprisingly, have the benefit of placing the City's final hearing date within the sixty-day window. Neither argument explains how the Property was before the Board for historical significance review without the Officer having made a preliminary determination of eligibility.

[3]In fact, the Historic Preservation Officer made *many* statements on October 21, 2020 concerning the Property and its history. For example, notwithstanding a failure to inform Petitioners of the specific criteria under which the Property was deemed eligible for designation, the Officer stated the home was "permitted in the 1940's," that she had reviewed an "early photograph of the house," that the Property was "designed by architect William Shanklin, Junior," and that the Property was "largely unaltered." The Officer had reviewed the original plans, pulled Google images of the Property, noted that "the front façade" was "largely unchanged," made note of the "remaining facades of the property," and found that the Property "has not had any additions made to it over the years." *See* Appx. at A.035-36.

[4]This issue has been presented to this Court as primarily one of legal interpretation. To the extent this Court has had to refer to the record for any facts, we note that the Board made no specific findings of fact concerning the date on which the preliminary determination was made. At best, throughout these proceedings, various persons, including the Historic Preservation Officer, one or more members of the Board and the Assistant City Attorney, have expressed their legal opinions of what the Code requires. To the extent any findings of fact *were* made by the Board or City Commission that would tend to establish that the preliminary determination of eligibility was made at any point after October 2, 2020, those findings would be clearly erroneous. The law and record in this case are abundantly clear.

[5]Additionally, the City cannot have it both ways. The City either (1) failed to hold the final hearing within sixty days; *or* (2) improperly set the Property before the Board for review and subjected Petitioners to historic designation proceedings without having made a preliminary determination of eligibility. Under either scenario, the City departed from the essential requirements of the law.

* * *

Counties—Code enforcement—Permits—Hearing officer departed from essential requirements of law where hearing officer found that owner of auto repair shop disposed of waste tires while his waste tire generator permit was expired but did not impose fine based on shop owner's personal hardship despite there being no exemption in county code for personal hardship

MIAMI-DADE COUNTY, Appellant, v. JOSE A. SIERRA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-18-AP-01. November 18, 2021. On Appeal from the Miami-Dade County Office of Code Enforcement. Counsel: Geraldine Bonzon-Keenan and Ryan Carlin, Office of the Miami-Dade County Attorney, for Appellant. Jose Sierra, pro se, Appellee.

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

OPINION

(PER CURIAM.) This matter comes before this Court on appeal from an order of an administrative hearing officer for the Miami-Dade County Office of Code Enforcement. The facts are uncontroverted. Appellee operated an auto repair and gas station in Miami Beach. As part of his business, Appellee performed tire repairs requiring the disposal of tire waste. Such a business required a Waste Tire Generator Permit from the Miami-Dade County Department of Solid Waste. While Appellee had been issued such a permit, he allowed it to expire without renewal on October 1, 2019. The business continued to operate without a permit, and as a result, a citation was issued on December 3, 2019.

Appellee appealed the citation to an administrative hearing officer. At the hearing, Appellee did not contest the fact that his permit had expired and that he continued to dispose of waste tires without a permit. Instead, Appellee's son testified that his father had operated the business for an extended period of time and that he had never had an expired permit until now. He also stated that his father had not received a "courtesy permit application" from the Department. As a result, Appellee's son asked for leniency. Appellee presented no other evidence and presented no legal authority which have required the Department to issue a "courtesy permit application" or which would allow the exercise of leniency by the hearing officer upon the establishment of a permit violation.

The hearing officer asked the Department representative whether there was a requirement for a courtesy application being mailed to Appellee. The Department representative responded that there was not, and that any such mailing of an application was merely a courtesy. The Department representative maintained that the burden for renewal of a permit was entirely on the applicant.

At the conclusion of the hearing the hearing officer announced his ruling, stating:

> I'm going to go the other way here, and I'm going to find you with a leniency that you (sic) . . . especially with all the other things that have been going on for the last year or so, all right? I hope the County is comfortable with that. Okay, I'm done.

In support of his ruling, the hearing officer reasoned:

> Well you know, I understand the County's responsibility and obligation to follow through with the violations and everything else, but here's a person that has been in business for 35 years, and he's always renewed his license and he was somehow waiting for this courtesy paper to come in. I have the discretion to go one way or the other, and I'm going to set this one aside. So I hope the County doesn't fight this. You know, it's been a rough year for some of the businesses. I'm not going to add anything to it, especially for someone that's been there for so many years, has been so consistent with his license and everything else.

In his written decision, the hearing office indicated that the Department "is . . . correct in its assessments of the subject violation."

Circuit court review of an administrative agency decision is governed by a three-prong standard of review: "(1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent, substantial evidence." *Bennett D. Fultz Co. v. City of Miami,* 2005 WL 5302110 (Fla. 11th Cir. June 7, 2005) [12 Fla. L. Weekly Supp. 832a] (citing *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]; *Board of County Commissioners of Brevard County v. Snyder,* 627 So. 2d 469 (Fla. 1993); *Metropolitan Dade County v. Blumenthal,* 675 So. 2d 598 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c], *rev. dismissed,* 680 So. 2d 421 (Fla. 1996) [21 Fla. L. Weekly D464a]).

Appellant here argues that the hearing officer disregarded the essential requirements of law by basing his decision not on the applicable law, but on the basis of the Appellee's personal hardship. We agree with the Appellant and must reverse the order of the hearing officer.

Section 15-17(3) of the Code of Miami-Dade County provides that:

> [I]t shall be unlawful for any person to sell, trade or otherwise transfer new, used, or waste tires within Miami-Dade County without a Waste Tire Generator Permit from the Department of Solid Waste Management.

Section 15-17(3(c) further states that this permit requirement "[a]pplies to any person that is either principally or partially engaged in the selling, trading or otherwise transferring of new, used or waste tires, whether such transactions are for cash, barter or without consideration."

Section 15-32(a) prescribes that

> Any person found guilty of a violation of any provisions of this chapter shall pay a fine in accordance with the minimum fee schedule indicated in paragraph (d) of this section. . . . At the discretion of the Director, violations of this chapter may be prosecuted pursuant to Chapter 8CC of the Code of Miami-Dade County.

The hearing officer clearly found that the Department had met its burden of proof and had established that Appellee had been disposing of waste tires without a permit. However, despite the mandatory language of Section 15-32(a), the hearing officer declined to find in favor of the Department and order that a fine be imposed. Instead, he indicated that he would exercise his discretion and show leniency by not requiring Appellee to pay a fine.

This Court is not unsympathetic with what the hearing officer was trying to do. Appellee was a long-time business owner who had always renewed his permit. It is entirely within the realm of possibility that the Appellee simply forgot to renew his permit, particularly since a courtesy reminder was not provided. It was certainly within the discretion of the Department to excuse Appellee's oversight, and in light of the suffering of business owners from the ruinous effects that the COVID-19 pandemic has wrought, foregoing a citation may have been appropriate. However, the hearing officer did not have the same discretion. No Miami-Dade County Code provision been cited which would support a hearing officer failing to impose a fine after a finding that a violation had been established under Section 15-17. Indeed, this Court, on similar facts, reversed the order of a hearing officer who, sympathetic to the plight of a dog owner, dismissed a citation for the failure of the owner to have the dog vaccinated for rabies. In *Miami-Dade County v. Gustavo Perez,* 27 Fla. L. Weekly Supp. 924(c) (Fla. 11th Cir. App. 2020), we said:

> The hearing officer's dismissal appears to be based on compassion for the owner's personal issues. There is no code exception for an owner's personal hardship. Therefore, in dismissing the violations for a reason that has no basis in the code or any other law, her decision constitutes a failure to observe the essential requirements of law. We must therefore reverse the order dismissing the citations and remand for an adjudication of the citations and imposition of fines and costs.

While it may be unfortunate, we must make the same finding here.

The hearing officer's order dismissing the citation is hereby **REVERSED** and we **REMAND** for an adjudication of the citation and the imposition of a fine and costs. (TRAWICK, WALSH and SANTOVENIA JJ., concur.)

* * *

Municipal corporations—Annexation—Petition for contraction—City commission departed from essential requirements of law by rejecting petition for contraction without specifically stating facts on which rejection of contraction as not being feasible was based—Further, commission's finding that contraction was not feasible departed from essential requirements of law and is not supported by competent substantial evidence where commission applied wrong feasibility standard—Correct feasability standard does not make judgment as to whether contraction should be done but, rather, considers whether contraction is capable of being done—Commission also erred in failing to state facts supporting determination that contraction area meets criteria for annexation and is therefore ineligible for contraction—Final order denying petition is quashed

WEST VILLAGERS FOR RESPONSIBLE GOVERNMENT, JOHN MEISEL, Plaintiffs, v. CITY OF NORTH PORT FLORIDA, Defendant. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2021 CA 002673 SC, Division H Circuit. November 15, 2021.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(HUNTER W. CARROLL, J.) BEFORE THE COURT is the Petition for Writ of Certiorari [DIN 2], the response in opposition [DIN 31], and the reply to the response [DIN 35]. The Court heard oral argument from the parties on October 8, 2021.

The North Port City Commission failed to "specifically stat[e] the facts upon which the rejection is based" and applied the wrong definition of feasible. This was a miscarriage of justice; the Commission departed from the essential requirements of law. Further, the Court cannot find there is competent, substantial evidence supporting the Commission's rejection of West Villagers' contraction petition.

The Court grants the writ of certiorari and quashes the Final Order under review.

1.
THE PARTIES AND THE PETITION

Petitioners are West Villagers for Responsible Government, Inc., ("West Villagers") and John Meisel ("Meisel"). Respondent is the

City of North Port, Florida ("City"). The City's governing board is the North Port City Commission ("Commission"). West Villagers is a political organization that organized and submitted petitions to the City for the contraction (or de-annexation) of certain property ("contraction area") currently within the City limits, as provided for under section 171.051(2), Florida Statutes. At the conclusion of a quasi-judicial hearing on April 29, 2021, the Commission voted to reject the petition. Through the present petition, West Villagers and Meisel seek a writ of certiorari quashing the Commission's decision and remanding the matter with directions to grant the petition and adopt the proposed contraction ordinance.

2.

THE FINAL ORDER UNDER REVIEW

On May 3, 2021, Amber L. Slayton, North Port's City Attorney, entered the following final order denying West Villagers' request for the Commission to initiate proceedings that could lead to the contraction of the municipal boundaries of the City ("Final Order").

The Court quotes the relevant portions of the Final Order.

ORDER DENYING PETITION FOR CONTRACTION

Petitioners' Representative:	West Villagers for Responsible Government
Petition Submission Date:	October 28, 2020
Signature Verification Date:	November 17, 2020
Petition Request:	Adopt an ordinance removing all lands west of the Myakka River from the City of North Port municipal boundary

PROCEEDINGS

On October 28, 2020, West Villagers for Responsible Government submitted a petition pursuant to Florida Statutes Section 171.051(2) asking the City Commission to redraw the City's municipal boundaries and exclude certain property that is currently within the City limits. On November 5, 2020, the City submitted all signatures on the petition to the Supervision of Elections for verification. On November 17, 2020, the Supervisor of Elections verified the sufficiency on the petition, confirming that, of the 1315 signatures on the petition, 1260 signatures were verified as valid under Chapter 171, Florida Statutes.

Pursuant to Florida Statutes Section 171.051(2), the City undertook a study of the feasibility of the proposal. On April 29, 2021, the City Commission conducted a full-day hearing to consider the eligibility of the area for contraction and the feasibility of contraction, including but not limited to, the feasibility study conducted by the City. The City Commission conducted the hearing in compliance with the City's procedures for quasi-judicial proceedings set forth in Chapter 2, Article III of the Code of the City of North Port, Florida. The following parties were given equal time and opportunity to present documentary and testimony evidence, as well as to conduct cross-examination and provide argument as to this subject:

1. Petitioner, West Villagers for Responsible Government;
2. Administrative staff of the City of North Port;
3. Wellen Park, LLLP;
4. Mattamy Sarasota/Tampa, LLC d/b/a Mattamy Homes;
5. Neal Communities, LLC; and
6. Sam Rogers Properties, Inc.

ACTION AND FINDINGS

Immediately after conducting the hearing on this matter and considering all evidence and testimony presented, the City Commission deliberated and took the following final action by a unanimous 5-0 vote:

Based upon the competent, substantial evidence presented in this hearing, to REJECT the municipal contraction petitioner submitted by West Villagers for Responsible Government on October 28, 2020 for the following reasons:

1. The area meets the criteria for Florida Statutes Section 171.043; therefore, this area is not appropriate for contraction;
2. Public health and safety are our primary responsibilities for all citizens of North Port;
3. Contraction is not feasible due to the existing urbanization;
4. Contraction is not in the best interest of the City's prior planning and future goals; and
5. Contraction is not fiscally neutral.

Pet. App. Ex. 31, Order Denying Petition for Contraction, signed May 3, 2021 [DIN 19].

On June 2, 2021, West Villagers and Meisel timely filed with the Court their Petition for Writ of Certiorari [DIN 2]. The Court directed a response and conducted oral argument.

3.

JURISDICTION AND STANDARD OF REVIEW

The Court has certiorari jurisdiction to review municipal action on annexation or contraction. Art. V, § 5(b), Fla. Const.; *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842-843 (Fla. 2001) [26 Fla. L. Weekly S463a]; Fla. R. App. P. 9.030(c)(3). In this "first-tier" certiorari review, the Court is limited to determining: (1) whether the City afforded procedural due process to the parties; (2) whether the City observed the essential requirements of the law; and (3) whether the City's decision is supported by competent substantial evidence. *Martin County v. City of Stuart*, 736 So. 2d 1264, 1266 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1660a]. The Court's review of the Final Order is limited to these considerations; it is not a plenary appeal.

The City agrees that the Court has common law certiorari jurisdiction; however, the City disagrees that that the Court has jurisdiction pursuant to section 171.081(1), Florida Statutes. In that the Court indisputably has common law certiorari jurisdiction, the Court need not address whether it separately has jurisdiction pursuant to section 171.081(1), which authorizes "any party affected who believes that he or she will suffer material injury by reason of the failure of the municipal government body to comply with the procedures set forth" in chapter 171 to "file a petition in the circuit court for the county in which the municipality . . . [is] located seeking review by certiorari."

Further, the Court need not determine whether Meisel separately has standing as West Villagers indisputably has standing.

Given the Court's limited review, West Villagers' request that the Court direct the Commission to adopt a contraction ordinance is legally improper.

4.

THE STATUTORY FRAMEWORK FOR CONTRACTION OF MUNICIPAL BOUNDARIES

"Florida law establishes a statutory process that could result in the contraction of a municipality's boundary. Section 171.051, Florida Statutes [(2021)], contains the present-day statutory requirements. Contraction—also known as deannexation—is not a new concept. More than 150 years ago, the Florida Legislature established a process to contract the boundaries of a municipality. *See* ch. 1688, §29, Laws of Fla. (1869), approved Feb. 4, 1869. Over the years, the Legislature has amended the deannexation process. While the details of the process have changed, the potential for deannexation has been a constant since at least 1869, if not prior." *Wellen Park, LLLP v. West Villagers for Responsible Government, Inc.*, 2021 WL 277433, at *4 (Fla. 12th Cir.Ct. Sarasota Jan. 25, 2021) [28 Fla. L. Weekly Supp. 1098a].

In 1974, the Legislature overhauled the entire contraction process. There are three separate statutes directly implicated by the pending

petition: section 171.051, the contraction statute; section 171.052, criteria for contraction; and section 171.043, the character of the area for annexation. The Court first addresses the contraction process established by section 171.051. The Court then addresses the criteria in sections 171.052 and 171.043 that determine whether any contraction may proceed.

4-A

The Contraction Process (§171.051, Fla. Stat.)

The Legislature rewrote section 171.051 in 1974, and it has remained unchanged since then except for one minor change in 1990 not relevant here. *See* ch. 90-279, §17, Laws of Fla. Section 171.051 establishes various steps that must occur—in sequence—prior to any contraction.

Present day section 171.051 contains 10 subsections. West Villagers filed their petition under subsection (2). The Court reproduces the first 5 subsections of that statute because statutory context is important in determining the proper meaning of subsection (2). The Court omits subsections 6-10, which address the mechanics of a referendum election not relevant here:

> **171.051 Contraction procedures.—**Any municipality may initiate the contraction of municipal boundaries in the following manner:
>
> (1) The governing body shall by ordinance propose the contraction of municipal boundaries, as described in the ordinance, and provide an effective date for the contraction.
>
> (2) A petition of 15 percent of the qualified voters in an area desiring to be excluded from the municipal boundaries, filed with the clerk of the municipal governing body, may propose such an ordinance. ***The municipality to which such petition is directed shall immediately undertake a study of the feasibility of such proposal and shall, within 6 months, either initiate proceedings under subsection (1) or reject the petition, specifically stating the facts upon which the rejection is based.***
>
> (3) After introduction, the contraction ordinance shall be noticed at least once per week for 2 consecutive weeks in a newspaper of general circulation in the municipality, such notice to describe the area to be excluded. Such description shall include a statement of findings to show that the area to be excluded fails to meet the criteria of s. 171.043, set the time and place of the meeting at which the ordinance will be considered, and advise that all parties affected may be heard.
>
> (4) If, at the meeting held for such purpose, a petition is filed and signed by at least 15 percent of the qualified voters resident in the area proposed for contraction requesting a referendum on the question, the governing body shall, upon verification, paid for by the municipality, of the sufficiency of the petition, and before passing such ordinance, submit the question of contraction to a vote of the qualified voters of the area proposed for contraction, or the governing body may vote not to contract the municipal boundaries.
>
> (5) The governing body may also call for a referendum on the question of contraction on its own volition and in the absence of a petition requesting a referendum.

(Emphasis added.)

Florida's Attorney General has expressed an opinion concerning the proper functioning of section 171.051, which in most respects is relatively straightforward. The Court agrees with most—but not all—of the General's assessment. The Court reproduces the General's relevant analysis, but the Court emphasizes that portion in which the Court disagrees.

> Before answering your questions, I would offer the following summary of the contraction procedure provided by s. 171.051, F. S., for exclusion of an area not meeting the requirements for annexation. There are two methods by which initiation of the contraction procedures may be accomplished, and there are two separate petition procedures.
>
> Under s. 171.051(1), F. S., a municipal governing body may, on its own initiative, "by ordinance propose the contraction of municipal boundaries, as described in the ordinance, and provide an effective date for the contraction." In the alternative, under s. 171.051(2), F. S., such a contraction ordinance may be proposed by a "petition of 15 percent of the qualified voters in an area desiring to be excluded from the municipal boundaries." If the latter course is taken—proposal of the contraction ordinance by petition—the governing body is required to undertake a feasibility study of the contraction proposed by the petition. Within 6 months from the time the required study is begun by the governing body, that body must do one of two things: It must either initiate contraction proceedings by ordinance pursuant to subsection (1), supra, or reject the petition (in which case the specific facts on which the rejection is based must be stated). Section 171.052(1) (criteria for contraction) clearly provides that "[o]nly those areas which do not meet the criteria for annexation in s. 171.043 may be proposed for exclusion by municipal governing bodies." (Emphasis supplied.) Thus, it would certainly seem that a finding of compliance with s. 171.043 would constitute sufficient grounds for rejecting a petition for initiation of contraction procedures. ***However, a municipal governing body would appear to have broad discretion under the statute to reject any such petition, so long as it specifically states its reasons therefor.***
>
> The second petition procedure is provided for in s. 171.051(4), F. S. It must be understood that this petition procedure would be available only after the governing body has introduced a contraction ordinance pursuant to subsection (1) of s. 171.051 [either on its own initiative or after conducting a feasibility study pursuant to a petition submitted under subsection (2)]. After introduction of the contraction ordinance and advertisement or public notice thereof pursuant to subsection (3) which, among other things, must include a statement of findings showing the area to be excluded fails to meet the criteria of s. 171.043, supra, the next step is consideration of the contraction ordinance at a meeting of the governing body held for that purpose. It is at this point—the holding of the meeting at which the ordinance is to be considered—that the second petition procedure comes into play. This second procedure, under subsection (4) of s. 171.051, concerns whether or not the contraction ordinance is to be the subject of a referendum submitted to the vote of the "qualified voters of the area proposed for contraction." Section 171.051(4). Such a referendum may be sought by submission at such meeting of a petition requesting a referendum on the question of contraction as prescribed in subsection (4), or, in the absence thereof, such a referendum may be proposed by the governing body on its own initiative under subsection (5).

Op. Att'y Gen. Fla. 76-221 (Nov. 15, 1976) (emphasis added to indicate disagreement).

As addressed in section 5-A of this Opinion, the Court disagrees with that portion of the General's opinion involving the General's gratuitous suggestion that a municipality has unfettered discretion in reviewing a section 171.051(2) petition, because such statement deviates from the statute's text. That discretion seems to be afforded at the later section 171.051(4) step in the contraction process.

4-B

Contraction Criteria (§§171.052(1) and 171.043, Fla. Stat.)

Regardless of whether contraction is initiated by a municipality under section 171.051(1), or, in this case, by petition under section 171.051(2), two related statutes describe required criteria that must be present for contraction to proceed. Section 171.051 provides:

> **171.052 Criteria for contraction of municipal boundaries.—**
>
> (1) Only those areas which do not meet the criteria for annexation in s. 171.043 may be proposed for exclusion by municipal governing bodies. If the area proposed to be excluded does not meet the criteria of s. 171.043, but such exclusion would result in a portion of the municipality becoming noncontiguous with the rest of the municipality, then such exclusion shall not be allowed.

By the express terms of the first sentence of this subsection, contraction is not permitted if the area for contraction does not meet the criteria for annexation in section 171.043. The first sentence of section 171.052(1) expressly references section 171.043, which sets forth criteria an area must possess to be eligible for ***annexation.*** Stating that first sentence more directly: If the area sought to be contracted qualifies for annexation under section 171.043, contraction is not permitted. This is a legislative command.

The second sentence of section 171.052(1) provides an additional prohibition to contraction not relevant here: contraction is not permitted if the result of the contraction would render a portion of the municipality being noncontiguous with the remainder of the municipality. Because there is no contention in the papers that the result of West Villagers' petition, if adopted, would render a portion of the City noncontiguous with the remainder, the Court will ignore the second prohibition for the remainder of this Opinion.

Returning to the first sentence of section 171.052(1), there is reference to section 171.043 discussing ***annexation.*** That statute provides:

> **171.043 Character of the area to be annexed.—**A municipal governing body may propose to annex an area only if it meets the general standards of subsection (1) and the requirements of either subsection (2) or subsection (3).
>
> (1) The total area to be annexed must be contiguous to the municipality's boundaries at the time the annexation proceeding is begun and reasonably compact, and no part of the area shall be included within the boundary of another incorporated municipality.
>
> (2) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> (a) It has a total resident population equal to at least two persons for each acre of land included within its boundaries;
>
> (b) It has a total resident population equal to at least one person for each acre of land included within its boundaries and is subdivided into lots and tracts so that at least 60 percent of the total number of lots and tracts are 1 acre or less in size; or
>
> (c) It is so developed that at least 60 percent of the total number of lots and tracts in the area at the time of annexation are used for urban purposes, and it is subdivided into lots and tracts so that at least 60 percent of the total acreage, not counting the acreage used at the time of annexation for nonresidential urban purposes, consists of lots and tracts 5 acres or less in size.
>
> (3) In addition to the area developed for urban purposes, a municipal governing body may include in the area to be annexed any area which does not meet the requirements of subsection (2) if such area either:
>
> (a) Lies between the municipal boundary and an area developed for urban purposes, so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services or water or sewer lines through such sparsely developed area; or
>
> (b) Is adjacent, on at least 60 percent of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (2).
>
> The purpose of this subsection is to permit municipal governing bodies to extend corporate limits to include all nearby areas developed for urban purposes and, where necessary, to include areas which at the time of annexation are not yet developed for urban purposes whose future probable use is urban and which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

§171.043, Fla. Stat.

The application of sections 171.052(1) and 171.043 results in only two scenarios that contraction may qualify to proceed, regardless if initiated by a municipal governing body or by petition. *First,* if the area for contraction does not qualify under 171.043(1) for annexation, then contraction may proceed. *Second,* if the area for contraction qualifies under 171.043(1) for annexation but does not qualify under both .043(2) and .043(3), then contraction may proceed. In all other circumstances, contraction cannot proceed by legislative command.

Having discussed these contraction statutes, the Court in Part 5 now applies those statutes to the current certiorari petition.

5.
ANALYSIS OF THE PETITION

The Commission identified five reasons to deny West Villagers' petition for contraction. They were:

> 1. The area meets the criteria for Florida Statutes Section 171.043; therefore, this area is not appropriate for contraction;
>
> 2. Public health and safety are our primary responsibilities for all citizens of North Port;
>
> 3. Contraction is not feasible due to the existing urbanization;
>
> 4. Contraction is not in the best interest of the City's prior planning and future goals; and
>
> 5. Contraction is not fiscally neutral.

Pet. App. Ex. 31, p. 2, Order Denying Petition for Contraction, signed May 3, 2021 [DIN 19].

Initially, the Court notes that each of these enumerated reasons falls well short of the statutory command that the Commission "specifically stat[e] the facts upon which the rejection" of the feasibility of West Villagers' petition is based. In large part, these are ultimate conclusions. The Legislature's direction to require a governing body to "specifically stat[e] the facts" is designed, in part, to allow a reviewing court to understand the decision and be able to determine if there exists competent substantial evidence supporting the facts. As the Court is quashing the Commission's rejection of the petition, the Court is confident that the Commission—should it again decide to reject the petition at the section 171.051(2) step—will apply the correct law, which includes the statutory command to "specifically stat[e] the facts upon which the rejection is based." §171.051(2), Fla. Stat.

In footnote 5 of their Response, the Commission with citation to *Board of County Commissioners of Brevard County v. Snyder,* 627 So. 2d 469, 476 (Fla. 1993), appears to reject the need for specificity. The Commission is mistaken. The Court in *Snyder* explained in the context of a rezoning application under the then existing Growth Management Act that the governing body did not have to make findings of fact, even if useful. *Id.* Of course, *Snyder* did not address a contraction petition where the Legislature directed the governing body to "specifically stat[e] the facts upon which the rejection" of feasibility is based.

Having addressed that fatal flaw in the Final Order, the Court continues its review to address other flaws also requiring the quashal of the Final Order.

The interplay of section 171.051(2) with sections 171.052(1) and 171.043, required the Commission to make two fundamental assessments: (1) whether contraction is feasible; and (2) whether the area proposed to be contracted meets the statutory criteria for annexation. The Court will address each seriatim.

5-A
Feasibility

"Many high-stakes cases turn on . . . narrow linguistic questions." *Dean Wish, LLC v. Lee County,* 2D19-4843, 2021 WL 4557060, at *1 (Fla. 2d DCA Oct. 6, 2021) [46 Fla. L. Weekly D2173a] (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 141 (1st ed. 2012)). Whether West Villagers' proposed

contraction is feasible turns on the definition of feasible. This is foundational, as section 171.051(2) required the Commission to determine "the feasibility of the West Villagers' proposal. Because Chapter 171 does not define "feasibility," the Court must give that term its plain and ordinary meaning.

The Florida Supreme Court recently reminded what a court should do in assessing the plain and ordinary meaning of a term:

> In interpreting the statute, we follow the "supremacy-of-text principle"—namely, the principle that the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. We also adhere to Justice Joseph Story's view that every word employed in a legal text is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.
>
> We thus recognize that the goal of interpretation is to arrive at a fair reading of the text by determining the application of the text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. This requires a methodical and consistent approach involving faithful reliance upon the natural or reasonable meanings of language and choosing always a meaning that the text will sensibly bear by the fair use of language.

Ham v. Portfolio Recovery Associates, LLC, 308 So. 3d 942, 946-47 (Fla. 2020) [46 Fla. L. Weekly S9a] (internal citations, quotations, and alternation omitted). In implementing this task, courts may resort to dictionaries, especially those from the time the Legislature first used the term. *See Debaun v. State,* 213 So. 3d 747, 751 (Fla. 2017) [42 Fla. L. Weekly S322a].

When the Legislature in 1974 rewrote section 171.051 and included the feasibility determination requirement for the first time, the Fourth Edition of *Black's Law Dictionary* was the then current edition. That dictionary defined feasible as "[c]apable of being done, executed, or affected." *Black's Law Dictionary* (4th ed. rev. 1968). ***None*** of the alternate definitions for feasible included a value judgment of whether something ***should be done.***

Resort to more current dictionaries confirm that feasible continues to exclude value judgments. The Sixth Edition of *Black's Law Dictionary*—from 1990—contains virtually the same primary definition: "Capable of being done, executed, affected or accomplished." It adds, "reasonable assurance of success." That dictionary lists "possible" as a synonym. A nonlegal dictionary from 1991—*Webster's Ninth New Collegiate Dictionary*—defines feasible as "capable of being done or carried out." The secondary definition provides "capable of being used or dealt with successfully." It, too, identifies "possible" as a synonym.

Online dictionaries from today contain the same definition. The Merriam-Webster's online dictionary primarily defines feasible as "capable of being done or carried out," with a secondary definition of "capable of being used or dealt with successfully." (www.merriam-webster.com/dictionary/feasible, last visited 11/9/2021). Dictionary.com similarly defines feasible as "capable of being done, effected, or accomplished." (www.dictionary.com/browse/feasible, last visited 11/9/2021). As with the Fourth Revised Edition of *Black's Law Dictionary,* the Sixth Edition of *Black's Law Dictionary,* and *Webster's Ninth New Collegiate Dictionary,* none of these online dictionaries include the value judgment of whether something should be done.

Interestingly, Respondents cited a1995 version of *Black's Law Dictionary* was consulted for a definition of "feasibility study." Respondents dropped footnote 7 in their Response, arguing:

> Black's has long contained a specific definition for 'feasibility study' which means 'analyzing to see if a project is technically doable, cost effective, and profitable. *Black's Law Dictionary* (2d ed. 1995). This definition was also provided to the City Commission during the Feasibility Hearing (Tr. 68:17-69:3).

Response, p.12, n.7 [DIN 31].

Of course, those words—"feasibility study"—were not used in order by the 1974 Legislature, which calls into question the resort to that phrase. The Fourth Revised Edition of *Black's Law Dictionary*—from 1968—does not include the phrase "feasibility study" as a defined phrase. Similarly, the Sixth Edition from 1990 does not include the phrase "feasibility study." The Court did not find the dictionary version identified by Respondents, and the Court could not find it in the appendix. Regardless, Respondents have made no contention that "feasible study" has achieved the level of being a term of art. In all events, the Supreme Court of Florida has directed that we view the meaning of the term at the time of its adoption, which here is 1974.

The structure of section 171.051 confirms that the term feasible in subsection (2) excludes any value judgment. A later step in the contraction process—section 171.051(4)—provides that at that later meeting "the governing body may vote not to contract the municipal boundaries." This subsection appears to grant the governing body discretion whether to proceed with contraction. Yet, in contrast, the subsection (2) step "direct[s]" the governing body to either initiate contraction proceedings or reject the petition as not feasible by "specifically stating the facts upon which the rejection is based."

Reading these two subsections together and in context with each other, the Court easily concludes the subsection (2) step is a limited, technical review, ***i.e., whether it can be done***; whereas the later subsection (4) step is a broader consideration, ***i.e., whether it should be done.*** This construction of section 171.051 is the basis of the Court's earlier partial disagreement with the Attorney General's construction of section 171.051. The discretion afforded to a municipal governing body is allowed at the subsection (4) step, not at the subsection (2) step.

In reliance on its consultant Munilytics, the Commission included value judgments in its reasoning instead of constraining itself to determining if the proposed contraction is feasible, i.e., whether contraction could be done. To be sure, Munilytics heavily asserted that feasible meant much more than whether something can be done. Instead, the consultant argued strongly that feasibility included the concept of whether something should be done. Munilytics began its presentation with this concept as its first foundational assertion. After providing her qualifications, Ms. Schoettle-Gumm from Munilytics testified:

> The City hired Munilytics, a group of consultants, to address the statutory requirement for a feasibility study. As the Petitioner mentioned, the statute does not define what a feasibility study is, but in looking at the Cambridge Dictionary, Black Law Dictionary and some other dictionaries, determined that a feasibility study examines the situation to see if the suggested plan is possible, cost effective, or reasonable. And it provides an overview of essential issues related the action being considered.
>
> ***So it is not simply a narrow analysis of whether or not something can be done. It also looks at whether it should be done.*** Here with me today is Chris Wallce, the owner of Munilytics of Underwood Management Services, who performed a lot of the fiscal analysis; and myself, I applied the statutory criteria to the proposed contraction area.

(Hearing transcript, pp. 68-69; Ex. 32 to petition, emphasis added [DIN 20]).

The bulk of Munilytics' report is built upon this improper, expansive definitive of feasible. Not only did Munilytics concede this in its testimony, but its report is replete with examples of applying the value judgment of whether West Villages' petition should be approved.

Munilytics's study of the feasibility of West Villagers' petition analyzed the fiscal impact of the proposed contraction, the impact on municipal services, and other anticipated effects on the City. The report found that reductions in City revenue and expenditures would create a net loss of approximately $21 million over five years, but this loss could be offset by the reduction of services and increased taxes. The report finds that the contraction area would see a reduction in fire, EMS, and law enforcement services, and to the extent the County would not be able to cover shortcomings in these services, the City may bear an inequitable burden under mutual aid agreements.

As for the transition of permitting, inspection, planning, and zoning from the City to Sarasota County, both levels of government would need to coordinate in handling plan reviews and permits already underway at the time of contraction, fee collection authority will change hands, and the contraction area will be subject to a different Comprehensive Plan. The report noted that the City may have legal exposure for development delays occasioned by the change of applicable rules.

The City would continue to own rights-of-way and easements in the contraction area that provide utilities services. The streets, roads, and drainage infrastructure in the contraction are largely owned and maintained by an independent special district whose existence would continue. However, the City and Sarasota County would need to negotiate responsibility for repayment of certain bonds for roadway improvements as they pertain to property within the contraction area.

The issues raised by Munilytics in the study of the West Villagers' petition are inherent in any transition of an area from city to county governance. Indeed, Chapter 171 explicitly contemplates the negotiation of certain debts, expenditures, and other responsibilities between a municipality and the receiving county, and the contraction area will be subject to the county's laws, ordinances, and regulations. §§ 171.061-.062, Fla. Stat. The report itself proposes various solutions for the issues raised, including partnerships or agreements with the county, that would mitigate many of the anticipated negative effects of the contraction. While the contraction at issue may be fiscally detrimental to the City and may require additional work to "unwind" fully the contraction area from the City, the report and its findings fall well short of establishing that the contraction is not "capable of being done." For that reason, the lengthy evidence and testimony on those matters fails to provide competent, substantial evidence that contraction is not feasible.

An appellate panel of the Nineteenth Judicial Circuit concluded that section 171.051(2) does not afford a governing body discretion. *Vonickx v. Town of St. Lucie Village,* 05-CA-832 (Fla. 19th Cir. Ct. St. Lucie Cnty Feb. 11, 2008) [15 Fla. L. Weekly Supp. 449a]. Although less clear in that decision, it appears the *Vonickx* court also rejected concern about fiscal loss from a section 171.051(2) determination. The Court understands that another Circuit Court in *Orlampa, Inc. v. City of Polk City,* 2010CA-7881 (Fla. 10th Cir. Ct. Polk Cnty Nov. 28, 2011), appeared to conclude that a municipality may consider the fiscal impact of a proposed contraction within its feasibility determination. That decision, though, is not binding on the Court, and that decision did not analyze the proper scope of a governing body's feasibility review.

Four of the five reasons given by the Commission in denying the contraction petition were based on the Commission's misapprehension of its review for feasibility. Specifically, reasons 2 (public health and safety are primary responsibilities for all citizens of North Port), 4 (contraction is not in the best interest of the City's prior planning and future goals, and 5 (contraction is not fiscally neutral) do not address whether contraction ***can be done***. Instead, these findings speak more to whether contraction ***should be done***. For the same reason, reason 3 (contraction is not feasible due to the existing urbanization) is not a valid consideration to the question of feasibility. As urbanization is referenced in section 171.043, the Court will further address reason 3 when reviewing that section's requirements.

Having determined the Commission legally erred, the Court must assess the seriousness of that error. *Williams v. Oken,* 62 So. 3d 1129, 1133 (Fla. 2011) [36 Fla. L. Weekly S202a]. Certainly, not every legal error qualifies as a departure of the essential requirements of the law. A fact-finding tribunal departs from the essential requirements of the law in applying the wrong legal standard. *Amalgamated Transit Union, Local 1579 v. City of Gainesville,* 264 So. 3d 375, 381 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D478b] (quashing trial court order vacating arbitration award). The existence of a controlling statute constitutes "clearly established law" to permit a court granting certiorari based on a departure of the essential requirements of the law. *Id*. at 380.

The Commission's error in this case is significant and constitutes a miscarriage of justice. The Commission fundamentally miscomprehended the nature of its fact-finding task, which is understandable given Munilytics' invitation into error. Applying an erroneous—and much too-broad definition of feasible—the Commission materially altered its statutory required role. This constitutes a departure of the essential requirements of the law.

The Commission's reasons 2, 3, 4, and 5 finding that the contraction is not feasible is both based on an absence of competent, substantial evidence as well as a departure from the essential requirements of the law.

The Court pauses here to note West Villagers' submission of the Sheriff's affidavit in this certiorari petition, which was not before the Commission during its proceedings. That affidavit suggests that Munilytics offered opinions and recommendations concerning law enforcement without even attempting to speak with the Sheriff, the lead law enforcement official in the County. Certainly, this affidavit is troubling because it suggests Munilytics failed to adequately or comprehensively address the assignment for which it was hired to do, which failure could potentially erode a fact-finder's view of Munilytics' work product.

The Court, however, is not serving in the role of fact-finder in this proceeding. And the Court is not tasked with evaluating credibility in this review. The Sheriff's affidavit was not before the fact-finder, so it is not proper to insert it here on review. As the Court is quashing the Commission's Final Order rejecting the petition, the Commission will be able to address the contents of the affidavit in the first instance in further proceedings before the Commission. Nothing in this Opinion precludes the Commission from reopening the evidence.

5-B

Criteria for annexation.

The Commission's other stated reason (reason 1) for denying the petition is that the contraction area meets the statutory criteria of section 171.043 and is therefore ineligible for contraction. Like the other reasons given by the City, this is an ultimate conclusion and falls short of the City's obligation to "specifically stat[e] the facts[.]" That failure is even more pronounced here, as a finding of ability to be annexed under section 171.043 can be accomplished by disparate methods. Without the City "specifically stating the facts" the Court simply cannot discern whether competent, substantial evidence exists that supports unstated facts the Commission may or may not have made. This failure constitutes a departure from the essential requirements of the law, and it is, by itself, sufficient for the Court to quash the decision under review.

For instance, under section 171.043(1), an area potentially qualifies for annexation if it is reasonably compact and contiguous to the municipality's boundary. Contiguity in this context requires that a substantial part of the area's boundary be coterminous with the

municipality's boundary. § 171.031(11), Fla. Stat. Division by a body of water, watercourse, or similar geographical feature does not disqualify an area under the statute unless the division practically prevents the two areas "from becoming a unified whole with respect to municipal services or prevent their inhabitants from fully associating and trading with each other, socially and economically." *Id.* Compactness means the property is concentrated in a single area and does not create enclaves, pockets, or finger areas in serpentine patterns. § 171.031(12), Fla. Stat.

At the hearing below, West Villagers presented a report and testimony from Max Forgey, a planning and land-use consultant and member of the American Institute of Certified Planners. Mr. Forgey opined that the contraction area does not meet the statutory criteria. Mr. Forgey noted that the City previously attempted to contract the same area in 1990. Ordinance 90-9 found that the Myakka River would, as a practical matter, prevent the area from becoming unified with the remainder of North Port and prevent the inhabitants from fully associating and trading. (A bankruptcy court would later void Ordinance 90-9.) These findings were echoed in the 1989 supporting opinion of then-City Attorney David Levin, which also opined that the area was not contiguous to the remainder of North Port and did not touch or adjoin the City's boundary in a reasonably substantial sense. Mr. Forgey opined that these deficiencies are still present today, noting that no bridge connects the contraction area to the remainder of North Port across the Myakka River and travel between the two areas consists of several miles outside City limits.

Mr. Forgey also found that the contraction area is separated from the boundary of the rest of North Port not only by the Myakka River but also by unincorporated Sarasota County neighborhoods on both the East and West shores of the river. Based on these separations, he opined that the contraction area was not contiguous with the City boundary and was not reasonably compact due to the presence of pockets or enclaves.

The City presented the testimony of Ms. Schoettle-Gumm, an attorney with 30 years' experience in land use and local government law. Ms. Schoettle-Gumm largely summarized the findings of Munilytics' report with respect to the contraction area's eligibility under section 171.043, Fla. Stat. The report described the contraction area as 8,730 acres comprising the West Villages Improvement District (WVID), 6,981 acres comprising the Myakka State Forest and Southwest Florida Water Management District Park/ Preserve lands (preserve lands), and 242.7 acres of other land. The report found that approximately 46 percent of the preserve lands boundary along the Myakka River was coterminous with the remainder of North Port. The citation for this figure is limited to unspecified "analysis of maps and data by Munilytics." The report also notes that Ordinance 90-9 was voided on August 31, 1990, and Munilytics argues that any related findings were apparently part of the City's legal and financial strategies related to the bankruptcy of the General Development Corporation. In other words, Munilytics argues that the City did not mean what it expressly said.

On the issue of compactness, the report concedes that the contraction area "could be viewed as containing a pocket area and an enclave area," which are prohibited. §§ 171.031(12), 171.043(1), Fla. Stat. The report dismisses this concern "in light of the purposes of [chapter 171] and the policy reasons for minimizing enclaves and pockets." However, the plain language of the statutes does not provide for any such purpose-based exception to the compactness requirement. The report also misapprehends the holding in *City of Sanford v. Seminole County,* 538 So. 2d 113 (Fla. 5th DCA 1989). The *Sanford* court did not hold that "some small pockets did not prevent a oneness of community and . . . invalidate an annexation." The trial court found the annexation did not create enclaves but did create pockets and finger areas in serpentine patterns; the Fifth District held that the annexation did not create enclaves and any finger patterns were not serpentine. *Id.* at 114-15.

The Commission's "finding" is based on unspecified facts from unspecified analysis of unspecified maps and data, and certainly is well short of the obligation to "specifically stat[e]" its findings. The Court cannot conclude there is competent substantial evidence in this record, or even if it were, whether this satisfies the statutory contiguity requirement for the contraction area as a whole. Further, the City's concession that the contraction area could contain enclaves and pockets undermines any finding of reasonable compactness. To the extent the Commission finds that such enclaves and pockets are permissible, such a conclusion is contrary to the plain language of the statutes and a departure from the essential requirements of the law.

That leaves only the need to further to readdress reason 3 provided by the Commission—the contraction is not feasible due to the existing urbanization—which the Court previously rejected. Section 171.043(2) and (3) contain specifics concerning urbanization that would qualify an area of land to be eligible for annexation. Reason 3, however, makes no findings to any of the multiple sub-elements of those statutes. This, again, constitutes a departure from the essential requirements of the law, and it makes it impossible for the Court to determine if competent substantial evidence exists to support the Commission's rejection of West Villagers' contraction petition.

5-C

Other issues raised by West Villagers

West Villagers also contended in their petition that two commissioners should not have participated in the hearing and that the Commission improperly allowed the impacted independent special district to make a presentation. West Villagers frame these issues as due process violations. The Court rejects these contentions as meritless without further comment.

CONCLUSION

The Commission did not comply with the express dictates of the contraction statute to "specifically stat[e] the facts upon which [its] rejection" of the feasibility of West Villagers' contraction petition was based. In reliance on its consultant, the Commission adopted a much broader definition of feasible than the ordinary meaning of that term. The Commission's "findings" underlying the Commission's denial of the contraction petition are not supported by competent substantial evidence and depart from the essential requirements of the law.

The petition for writ of certiorari is granted, and the Commission's Final Order denying the petition is quashed. As explained in this Opinion, nothing in this Opinion precludes the Commission from reopening its evidence.

* * *

Counties—Zoning—Rezoning—Denial—Lack of school capacity—Due process—Rezoning applicant's failure to object to county commission's disallowance of rebuttal at hearing on rezoning request waived issue for appellate review—To extent that commission's decision to deny rezoning application rests on lack of school capacity, decision departs from essential requirements of law because school capacity is not required to be shown at time rezoning is sought—Appellate court lacks capacity to review commission's determination that proposed development is inconsistent with comprehensive plan—All challenges to consistency with comprehensive plan must be brought in *de novo* proceedings

EISENHOWER PROPERTY GROUP, LLC, a limited liability company, Petitioner, v. HILLSBOROUGH COUNTY, a political subdivision of the State of Florida, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-204, Division C. October 21, 2021. Counsel: Darrin J. Quam and Jacob T. Cremer, Stearns Weaver Miller Weissler

Alhadeff & Sitterson, P.A., Tampa, for Petitioner. Carly J. Schrader, Gregory T. Stewart, and Elizabeth Desloge Ellis, Nabors, Giblin & Nickerson, P.A., Tallahassee; and Cameron S. Clark, Senior Assistant County Attorney, and Mary J. Dorman, Senior Assistant County Attorney, Hillsborough County Attorney's Office, Tampa, for Respondent.

Having considered Petitioner's motion for rehearing, the court grants the motion, withdraws its original opinion rendered August 23, 2021, and substitutes the opinion below. No further rehearing will be considered by the court.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(JAMES M. BARTON II, Senior Judge.) Petitioner, Eisenhower Property Group, LLC, seeks review in certiorari of Hillsborough County Board of County Commissioners' (the "Board") denial of its rezoning application. The application sought to change the property's current Agriculture Rural (AR) zoning to Planned Development within the Wimauma Village Residential-2 ("WVR-2") future land use category. The petition is timely, and this court has jurisdiction. Fla. R. App. P. 9.030(c)(3) and 9.190(a). Having reviewed the petition, response, reply, appendices, and applicable law, the court determines that to the extent that the Board's decision to deny rezoning rests on the lack of school capacity, it departs from the essential requirements of law because school capacity need not be shown at the time rezoning is sought. With regard to the Board's determination that the proposed development is inconsistent with the comprehensive plan, this court concludes on rehearing that it lacks subject matter jurisdiction to review it. Accordingly, the petition is granted, but only to the extent the decision rests on the school capacity issue.

Background:

Hillsborough County evaluates rezoning requests under the Future of Hillsborough Comprehensive Plan ("the Plan").[1] The Plan is required to contain "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of. . ." unincorporated portions of the County. § 163.3177(1), Fla. Stat. (2016). The Future Land Use Element ("FLUE") is a required element of the Plan. § 163.3177(6)(a), Fla. Stat. The FLUE is required to designate proposed *future* land uses and must include standards for the distribution of densities and intensities of development. *Id*. The Plan also provides for a Livable Communities Element as a Plan extension. The subject property is located in Wimauma. The Livable Communities Element[2] contains community and special area studies, including the the Wimauma Village Plan.[3] The Wimauma Village Plan establishes the vision statement and goals for the community, which are listed in order of priority to the community, including the establishment of the Wimauma Village Residential-2 ("WVR-2") land use classification within the boundaries of the Wimauma Village Plan. One of the specific goals of the Wimauma Village Plan is economic development, which emphasizes the desire of the community to "[p]rovide opportunities for business growth and jobs in the Wimauma community."

The goal of economic development is set forth in the Plan's Objective 48, which applies to property within WVR-2, and states:

> In order to avoid a pattern of development that could contribute to urban sprawl, it is the intent of this category to designate Wimauma Village Residential-2 areas inside the boundaries of the Wimauma Village Plan that are suited for agricultural development in the immediate horizon of the Plan, but may be suitable for the expansion of the Village as described in this Plan. (Pet. Appx. A at 237).

In addition, the Plan contains specified assumptions that are used "in determining compliance" with the WVR-2 employment and service requirements. The Plan assumes:

> 1. There are 2.7 persons per household
> 2. There are 1.5 job holders per household
> 3. One job is created for every 500 sq. ft. of commercial development
> 4. One job is created for every 240 sq. ft. of office development
> 5. One job is created for every 400 sq. ft. of light industrial development
> 6. One job is created for every 400 sq. ft. of government services (schools, parks, fire stations, etc.), and residential support uses (churches, day cares, nursing homes, etc.)
> 7. Neighborhood retail and community commercial demand is 10 sq. ft., respectively, per person
> 8. The Village shall provide 55% of the needed household jobs (no. of households X 1.5 X .55 = needed jobs)
> 9. The Village shall have available 75% of the needed household services (households X 2.7 X 10 = desired level of available commercial space in square feet).

To satisfy the employment requirements:

> [T]he proposed commercial square footage shall be contained in the Wimauma Village Downtown. Other employment square-footage requirements shall be contained in the Wimauma Light Industrial and Office District & the West End Commercial District.

In addition to requiring that commercial square footage be contained in the Wimauma Village Downtown, Objective 48 also provides that "[t]he WVR-2 zoning category's employment and shopping requirements shall be tracked *through each individual Planned Development district* and as part of the County's Annual Planned Development Review."

Plan objectives are implemented through more specific policies. Objective 48 of the Comprehensive Plan is implemented through Policy 48.1, which provides that developments within WVR-2 "shall achieve" the minimum clustering ratios, job opportunities, and shopping provisions required by the Plan, and reads in pertinent part:

> . . .In order to achieve densities in excess of 1 du/5 ga in the WVR-2 category, developments shall achieve the minimum clustering ratios, job opportunity provisions, and shopping provisions, required by this Plan, except as noted in the Zoning Exception found in the Implementation Section of the FLUE.

This objective formed the basis for the Board's decision on Petitioner's rezoning application.

Procedural History:

This matter arises from the Board's denial of Petitioner's application to rezone a site of approximately 194 acres in the rural Wimauma Community in the Rural Service Area of Hillsborough County from AR to WVR-2 with a maximum 387 single-family lots. The proposed development would contain 2.2 acres of residential support uses and approximately 83.42 acres of open space. The properties to the north and south are, like the subject property, within the WVR-2 classification; the properties to the east and west are designated as Residential-4.

When an application for rezoning is filed, the County coordinates reviews of other departments and governmental agencies, who then provide reports with comments and recommendations. Under this process, Hillsborough County City-County Planning Commission ("Planning Commission") staff reviewed the application for Plan consistency. Noting that Petitioner's own analysis indicated the need for 319 jobs to support the project, Planning Commission staff found the proposal to be *inconsistent* with the Plan because not enough jobs were available to render the development self-supporting as the Plan requires. The Planning Commission had previously determined that under Policy 48.1, jobs had to be available *before* project approval. Planning Commission staff also made reference to the School Capacity Report provided by the School District, noting that there is not current adequate capacity for the proposed development. The

County's Development Services also determined the project to be inconsistent with the Plan, citing the same deficiencies as had the Planning Commission.

Following review by county staff, a hearing was held before a land use hearing officer. Sec. 10.03.03, Land Development Code (LDC). This is the first part of a two-part review process and is evidentiary. *Id.* At this proceeding, a hearing officer receives sworn testimony and documentary evidence, including the parcel's zoning history, reports of reviewing agencies, and permitted uses for the property. The hearing officer is also required to consider applicable goals, objectives, and policies contained in the Plan, availability and capacity of public services, nature of any impacts on surrounding land use, environmental impact of the proposed use, and applicable development standards promulgated by the Board. Sec. 10.03.03(E), LDC. The second part of the two-part process is review by the Board of County Commissioners and consists only of a review of the record. Sec. 10.03.04(A), LDC. The record the Board considers contains the application and accompanying documents, staff reports and recommendations, exhibits and documentary evidence, the summary, findings, conclusions, and recommendation of the hearing officer, an audio recording of testimony at the hearing, and a verbatim transcript of the proceedings. Sec. 10.03.04(C), LDC. The Board may hear oral argument, but it does not take any new evidence in this second part of the process. Sec. 10.03.04(C)(1), LDC. The Board is also not required to agree with or accept the hearing officer's conclusion. Sec. 10.03.04(G)(1), LDC. The Board signifies its written approval—or disapproval—of an application by Resolution. *Id.*

The evidentiary hearing before the hearing officer in this case was held February 18, 2020. Although Petitioner disagreed with the interpretation by both the Planning Commission and Development Services that Policy 48.1 required jobs to be in place to support additional development in the area, it submitted an existing employment analysis for the project. The analysis demonstrated that the 319 jobs needed for the requested 387 residential units[4] could not be provided by the existing non-residential square footage within the Wimauma Community Plan boundary. Petitioner took the position that the number of jobs need not be present prior to any rezoning request. Petitioner's representative also discussed the school capacity issue.

Representatives of both the County's Development Services and the Planning Commission spoke on the jobs requirement. They explained that the employment and service requirement numbers were calculated using the square footage of existing nonresidential development from within the entire community plan boundary. This analysis included review of rezoning applications as far back as 2008-09, which looked at whether nonresidential development within the Wimauma community was sufficient to support the addition of the residential units proposed. Based on this analysis, research, and the Plan language, Planning Commission staff interpreted the Plan to require the existence of nonresidential entitlements to move forward with rezonings of a density of two dwelling units per gross acre, the maximum density allowed in the category.

Following Petitioner's and staff's presentations, a member of the public spoke in opposition to the project. In addition, there were a number of written objections to the project. Most cited the explosion of development without the necessary infrastructure to support it. Petitioner was afforded an opportunity to provide rebuttal, and it did so. At the conclusion of the evidentiary presentation, the hearing officer recommended approving the application, citing his disagreement with the Planning Commission's interpretation that Policy 48.1 requires jobs to be available *before* a rezoning is approved.

On August 11, 2020, the Board of County Commissioners reviewed the matter. This second part of the two-part process is not evidentiary. Sec. 10.03.04(A), LDC. The Board considers only the complete record of the hearing before the hearing officer. Sec. 10.03.04(C), LDC. Petitioner was permitted to present argument in favor of the project and in opposition to the Planning Commission's interpretation of Policy 48.1. Planning Commission staff summarized the positions taken in its staff report and evidence from the hearing below. In addition, a representative from the County Attorney's Office presented the hearing officer's recommendation to approve the planned development. Although Petitioner initially sought time for rebuttal in the Board proceeding, Petitioner was advised that no one from the public appeared for the hearing, and there were no amended staff recommendations. *See* Sec. 10.03.04(E)(5)(d)-(e), LDC. At the conclusion of the hearing, Petitioner did not renew its request to provide rebuttal.

After oral argument, a commissioner moved for denial. Board members discussed the job opportunities requirement contained in Policy 48.1. It was explained that the development request was for a 10-fold density increase *outside* the Urban Service Area[5] and that such requests must be self-sustaining. It was further noted that State Road 679 would remain substandard even after required improvements were made. Ultimately, the Board rejected the hearing officer's recommendation and voted to deny rezoning by a vote of 5 to 2.

On December 9, 2020, the County issued and filed with the Clerk its Resolution RR20-055 (the Resolution) denying the request. It sets forth the findings of the Board and, as required by law, identifies points of noncompliance with the Plan. Among other things, the Board found a failure to demonstrate consistency with Policy 48.1 because insufficient jobs were available to support the project. In addition, the Board also made the finding that the school system lacked adequate capacity to support the development. This timely petition followed the Board's denial of the rezoning request.

STANDARD OF REVIEW:

Certiorari is appropriate to review the quasi-judicial decisions of a Board. *Hirt v. Polk Cnty. Bd. of Cnty. Comm'rs*, 578 So. 2d 415, 416 (Fla. 2d DCA 1991) ("Certiorari is the proper method to review the quasi-judicial actions of a Board of [the] County. . . injunctive and declaratory suits are the proper way to attack a Board's legislative actions."). Certiorari review of a quasi-judicial zoning decision is akin to a plenary appeal in that it is "a matter of right." *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) [25 Fla. L. Weekly S461a]. In such proceedings, the circuit court reviews the agency's quasi-judicial decision to determine whether the local government provided due process, whether the local government followed the essential requirements of law, and whether competent substantial evidence in the record supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Courts are not permitted to reweigh evidence or substitute their findings for those of the administrative agency. *Haines City Com'ty Dev. v. Heggs*, 658 So.2d 523, 530 (Fla.1995) [20 Fla. L. Weekly S318a]. Moreover, courts are charged with reviewing the record for evidence that supports local government, not that which rebuts it. *Broward Cnty. v. G.B.V. Intern. Ltd.,* 787 So. 2d 838, 846 (Fla. 2001) [26 Fla. L. Weekly S389a]. In such proceedings, the landowner has the initial burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance before the burden shifts to the government to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose. *Martin Cnty. v. Yusem*, 690 So. 2d 1288, 1292-93 (Fla. 1997) [22 Fla. L. Weekly S156a].

Due Process:

The requirements of due process in an administrative proceeding are met if the parties are afforded notice and a meaningful opportunity

to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a] (internal citations omitted). Petitioner received notice, appeared, and participated in all aspects of the proceedings. Here, Petitioner asserts two bases for its claim that it was denied its right to due process: 1) Petitioner was not given an opportunity for rebuttal at the August 11, 2020 Board hearing; and 2) Petitioner was not given an opportunity to rebut justifications set forth within the Resolution itself.

The court is not persuaded that Petitioner was denied due process because it was not afforded the opportunity to provide rebuttal at the hearing before the Board. The LDC mandates that "[t]he content of testimony shall be the same as the content of testimony submitted verbally or in writing to the Land Use Hearing Officer." Sec. 10.03.04 (E), LDC. Petitioner was afforded the opportunity to provide rebuttal in the first hearing. In the second hearing the Board receives no new evidence. Sec. 10.03.04 (D)(1), LDC. Petitioner's entire presentation in the evidentiary hearing was in the record. Petitioner is correct that, *if* the Board permits oral argument, sec. 10.03.04 (E)(5)(f) allots five minutes for rebuttal, but it also provides a party that is not the applicant 10 minutes and an additional five minutes for any amended staff recommendations, neither of which occurred here. Moreover, the LDC also provides that "[a]ll irrelevant, immaterial or unduly repetitious evidence shall be excluded." *See* Sec. 10.03.03(D), LDC.

In addition to the rebuttal Petitioner provided in the record, Petitioner presented significant argument to the Board, addressing the Planning Commission's finding of inconsistency with the Plan, and the hearing officer's recommendation to approve it. Although Petitioner initially asked to reserve time for rebuttal, Petitioner was informed that, where no party of record had appeared in support of or to oppose the project, there was nothing to rebut. Petitioner did not thereafter object to the disallowance of rebuttal. The failure to object waived the issue for appellate review. *See Clear Channel Communs., Inc. v. City of North Bay Vill.*, 911 So. 2d 188, 190 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b].

Petitioner also claims it was not given an opportunity to rebut the justifications for the Resolution.[6] Though there are multiple bases given in the Resolution as to inconsistency with the Plan, Petitioner's argument relates to the finding regarding school capacity. Petitioner alleges that "[h]ad the Board discussed this issue or made [Petitioner] aware of it, [Petitioner] would have been able to explain that the Board could not deny rezoning applications based on school capacity." Because, for reasons explained below, this court agrees that the Board erred when it included school capacity as a basis for denying rezoning, it is unnecessary to discuss the issue on due process grounds.

Competent Substantial Evidence / Essential Requirements of Law:

Petitioner next argues that no competent, substantial evidence supports the Board's decision to deny rezoning. If competent substantial evidence supports the local government's decision, the decision is presumed to adhere to the essential requirements of law. *State v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D1894a] (*citing Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]). It is an applicant's burden to demonstrate consistency with the Plan. *Bd. of County Comm'rs. of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). The Board has no burden to show that Petitioner's application is inconsistent, *St. Johns Cnty. v. Smith*, 766 So. 2d 1097 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1887b], or that there is a legitimate public purpose in maintaining the current zoning, *Snyder*, 627 So. 2d at 475, unless Petitioner first demonstrates the Board's decision to deny the application is inconsistent with the Plan.

As noted in the facts, the Resolution denying the rezoning identifies two main bases for its conclusion that the project did not comply with the Plan. This Court agrees with Petitioner that the lack of school capacity at the time of the Board hearing is not an appropriate basis to deny rezoning. *After rezoning is completed*, a developer must submit a school concurrency application to receive a mandatory determination of school capacity at the time of permitting or preliminary plat or site development plan. *See* Interlocal Agreement §5.5.2 (a-b).[7] If capacity remains unavailable, the applicant may mitigate for the development's impacts. *Id.* §§ 5.5.2(e)(1-2), (g); and §163.3180(6)(h)(2), Fla. Stat. If adequate capacity does not exist and mitigation is not an acceptable alternative, the County may then deny the *development application*.[8] Interlocal Agreement § 5.5.2(f).The Interlocal Agreement does not even allow a property owner to submit either the mandatory determination of capacity or a mitigation proposal at the time of rezoning. *Id.* § 5.5.1(a). Thus, to the extent that the Board's decision rests on the lack of school capacity, the decision departs from the essential requirements of law.

The Court now turns its attention to the Resolution's finding that the project was inconsistent with the FLUE's Policy 48.1, requiring that sufficient jobs be available to support the development. Although this point of alleged Plan inconsistency was argued in the administrative proceeding below, the petition presented no argument as to the alleged error of the Board's determination that the requested rezoning did not meet policy requirements. Respondent contends that the issue is, therefore, abandoned. *City of Miami v. Steckloff,* 111 So. 2d 446, 447 (Fla. 1959) (points will not be considered by an appellate court unless they are properly raised and discussed in the briefs); *see also Parker-Cyrus v. Justice Admin. Com'n,* 160 So. 3d 926, 928 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D582a] (issue not raised in the initial petition deemed abandoned).

In response, Petitioner contends that consistency with FLUE's policy 48.1 was not eligible for review in this certiorari proceeding because section 163.3215(3) provides the *exclusive* method for challenging the consistency of a development order with a comprehensive plan under §163.3215(1).[9] That proceeding is a de novo one filed in circuit court. §163.3215(3), Fla. Stat. After considering the issue on rehearing, the court agrees. Before 2002, the legal remedy provided under section 163.3215 was not available to owner/applicants whose applications for development orders were denied. *See* §163.3215, Fla. Stat. (2001); *Parker v. Leon Cnty.,* 627 So. 2d 476, 479 (Fla. 1993) (owner whose application has been denied does not seek to prevent action on a development order). Before 2002, the right to mount a consistency challenge under the statute was limited to affected third parties. §163.3215(2), Fla. Stat. (2001) (defining "aggrieved or adversely affected party");[10] *Parker,* 627 So. 2d at 479 (section 163.3215 applicable only to actions by third-party intervenors). In addition, before 2002, the statute specifically limited consistency challenges to action related to development orders that altered the density, intensity, or use of property. §163.3215(1), Fla. Stat. (1989);[11] *Parker v. Leon Cnty*., 627 So. 2d at 479.[12]

The intent of section 163.3215, Florida Statutes, was to afford third parties the ability to challenge, in a de novo proceeding, development orders on grounds of Plan inconsistency. Ch. 85-55, §18, Laws of Florida. *See also Seminole Tribe of Fla. v. Hendry Cnty*., 106 So. 3d 19, 22 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D175a] (section 163.3215 precluded third-party petitioner from raising comprehensive plan consistency challenge in a petition for writ of certiorari; an adversely affected party may maintain a de novo action for declaratory or other relief to challenge a development order.)*; Stranahan House, Inc. v. City of Ft. Lauderdale,* 967 So. 2d 1121, 1125-26 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2702a]. The claimed applicability of the statute to *denials* of applications for development orders such as the one before this court changed in 2002, when section

163.3215(2) was amended to include owners, developers, and applicants for developers in the definition of "aggrieved party." Ch. 2002-296, § 10, Laws of Fla. In addition, subsection (3) was amended. Previously, it allowed aggrieved parties to seek relief "to prevent such local government from taking any action on a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part." As amended, subsection (3) now allows aggrieved parties like Petitioner to maintain a de novo action for relief to challenge "any decision. . .*denying an application for*. . .a development order, as defined in section 163.3164, which materially alters the use or density or intensity of use on a particular piece of property. . .which is not consistent with the. . .Plan." §163.3215(3), Fla. Stat. Thus, although the denial of the requested development order maintained the status quo, that is, it did not alter the use, density, or intensity of use of the property, the *application* sought approval (or a development order) to increase the density and intensity of use of the property.

The court must give effect to every word of a statute so that no word is construed as "mere surplusage." *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017) [42 Fla. L. Weekly S613a] (quoting *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) [32 Fla. L. Weekly S455a]). To decide otherwise would fail to give effect to the legislature's addition of the words "applications for" as they modify "development order." Moreover, if only development orders that alter the use, density, or intensity of use of property were actionable, rather than *applications* for development orders that would do so, the denial of an application would rarely, if ever, be actionable under the statute because a denial maintains the status quo. *Parker*, 627 So. 2d at 479 ("denial of an application does not alter the use or density of property. . .denial order simply preserves the status quo and no further action is possible.")[13] The court is aware of the newly decided case, *Imhof, et al. v. Walton Cnty., Fla.,* 46 Fla. L. Weekly D2048a (Fla. 1st DCA Sept. 15, 2021), wherein the court said that there would be no reason to apply the statutory limitation to an application for a development order that has been denied, citing *Parker* at 479, but *Imhof* does not reach the discrete issue before this court.

This court concludes that under the current version of section 163.3215(3), all Plan consistency challenges must be brought in a de novo proceeding. *Bush v. City of Mexico Beach,* 71 So. 3d 147, 150 (Fla. 1st DCA 2011) [36 Fla. L. Weekly D1930b]. Accordingly, the Board's finding that the rezoning is inconsistent with FLUE Policy 48.1 is not one that can be raised in certiorari. Issues unrelated to Plan consistency, such as the school capacity issue raised in the petition here, must still be raised by petition for writ of certiorari. *Id.* Because Petitioner is correct that the County departed from the essential requirements of law on the school capacity issue, the court grants the petition as to that issue.

It is therefore ORDERED that the petition for writ of certiorari is GRANTED only to the extent that the County's decision is based on insufficient school capacity. The Resolution remains in effect pending a determination by the trial court as to Petitioner's Plan consistency challenge.

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[1]The Comprehensive Plan is also known colloquially as the "comp plan."

[2]http://www.planhillsborough.org/wp-content/uploads/2012/10/LIVABLE-COMMUNITIES_09_15.pdf

[3]http://www.planhillsborough.org/wp-content/uploads/2012/10/LIVABLE-COMMUNITIES_09_15.pdf beginning at p. 115 (p. 118 on the online version).

[4]387 homes x 1.5 jobs per household x .55 (the required percentage of jobs to be met) = 319 jobs.

[5]Areas outside the Urban Service Area are within what is referred to as the Rural Service Area.

[6]The Resolution was issued several months after the hearing.

[7]Hillsborough County Interlocal Agreement for School Facilities Planning, Siting and Concurrency. *See also* the School Capacity Report in Petitioner's appendix at p. 96.

[8]School concurrency applies only to that phase of residential development requiring subdivision plat approval or site development plan approval, or its functional equivalent. Interlocal Agreement § 5.5.1(a). *See also* § 5.5.2(a).

[9]**§163.3215, Florida Statutes (2019) states**: (1) Subsections (3) and (4) provide the *exclusive* methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan adopted under this part. . . .
(2) As used in this section, the term "aggrieved or adversely affected party" means any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.
(3) Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part. The de novo action must be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

[10]**Section 163.3215 (2), Florida Statutes (2001) states**: "Aggrieved or adversely affected party" means any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, or environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons. *Cf.* §163.3215(2) (2019), which is the same as the 2001 version, except for the following added language: ". . .The term includes the owner, developer, or applicant for a development order."

[11]**Section 163.3215(1), Florida Statutes (2001)**: "Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part."

[12]In *Parker,* the court noted that the definition of "development order" in section 163.3164(6), Florida Statutes (1989) included applications for development permits. It is the same today except that it has been renumbered from subsection (6) to subsection (15). Although this definition was incorporated into the version of section 163.3215 the *Parker* court considered, its decision ultimately turned on the definition of "aggrieved party," which it determined did not include owners/applicants, as the amended statute now does.

[13]The term "application" was added to the statute after the *Parker* decision.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of detention—Where officer observed indicia of impairment immediately upon stopping licensee for driving without headlights, and licensee admitted to drinking enough that he had to try to sober up, thirteen-minute detention to summon DUI investigator was justified—Although hearing officer erred in admitting results of horizontal gaze nystagmus test without evidence of officer's qualification to administer test, record contains ample evidence other than HGN test to support upholding license suspension—Petition for writ of certiorari is denied

SHANE VOSHELL, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 20-CA-8114, Division D. October 14, 2021. Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Christie S. Utt, General Counsel, and Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(EMILY A. PEACOCK, J.) This case is before the court on Petition for Writ of Certiorari filed October 15, 2020, and perfected with an amended petition filed November 30, 2020. The petition 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 seeks review of a final order upholding the suspension of his driving privilege for refusing to submit to a breath test to determine the amount of alcohol in his blood. He contends that the hearing officer departed from the essential requirements of law on two matters. Petitioner contends the first departure arose when the hearing officer admitted the result of Petitioner's horizontal gaze nystagmus (HGN) test, and the second from the hearing officer's failure to determine that the allegedly prolonged detention was illegal. These errors rendered the request for a breath test unlawful. The court has reviewed the briefs, appendices, and applicable law. Having done so, the court determines that Petitioner is correct that the hearing officer erred in failing to exclude the results of the HGN test. But Petitioner's driving without headlights provided law enforcement with reasonable suspicion to initiate a traffic stop. From there, where Petitioner smelled of alcohol, had slurred speech, admitted to drinking and trying hard to "sober up," probable cause to summon a DUI investigator was developed. Therefore, the stop, detention, arrest, and resulting request that Petitioner submit to a breath test were lawful, such that the petition must be denied and the suspension upheld.

FACTS AND PROCEDURAL HISTORY

On July 31, 2020, at about 3:00 a.m., Officer Degarmo saw Petitioner's silver pickup truck driving north on Howard Avenue with its headlights off and effected a traffic stop. Five other passengers were inside Petitioner's vehicle. Officer Degarmo detected the odor of alcohol coming from the vehicle's interior. In addition, Officer Degarmo observed Petitioner to have glassy eyes and slow speech, and that he wore a bar bracelet. A case of beer lay at the front passenger's feet, but neither Officer Degarmo, nor his partner Officer Bishop, observed any open containers. Petitioner told the officer he was coming from the SOHO Saloon. Petitioner admitted to drinking. In response to questioning about Petitioner's address, the officer asked Petitioner how long ago he had moved. In response, Petitioner replied nonsensically "just tomorrow." Officer Degarmo summoned a DUI unit. Within 13 minutes Officer Baden responded to conduct the DUI investigation.

When Petitioner exited the vehicle, Officers Baden and Degarmo detected an odor of alcohol from Petitioner. Officer Baden also observed Petitioner wearing a bar bracelet. After being asked to perform field sobriety exercises, Petitioner, without being questioned, offered that he knew he was driving without headlights but was committed to getting his passengers home safely. He added that he had tried hard to sober up. Thereafter, Petitioner performed the exercises, and did so poorly. Petitioner was then arrested for DUI. Petitioner refused law enforcement's request that he submit to a breath test to determine his blood alcohol level; as a result, Petitioner's driving privilege was administratively suspended.

Petitioner requested a formal review of the administrative suspension. A hearing was held September 3, 2020. At the formal review a hearing officer is to determine whether the law enforcement had probable cause to believe Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, whether Petitioner refused to submit to a breath test after being requested to do so by a law enforcement officer, and whether Petitioner was told that if he refused to submit to a test his driving privilege would be suspended for a year, or, 18 months in the case of a second or subsequent refusal. The hearing officer determined that the fact that Petitioner was operating a motor vehicle without headlights at night provided justification for the stop. In addition, Petitioner's glassy eyes, slurred speech, odor of alcohol, along with his admission to drinking, efforts to sober up, and his performance on field sobriety exercises provided probable cause to arrest and for law enforcement to request a breath test. Because significant indicators of impairment were already present, the hearing officer concluded that the time between Officer Degarmo's request for a DUI unit and its arrival was not an unlawful detention. Moreover, the hearing officer admitted the results of the HGN test to the extent it provided additional evidence regarding the decision to arrest, not that it showed any particular degree of impairment. The hearing officer rendered a written order on September 15, 2020; this timely petition followed.

STANDARD OF REVIEW

This court reviews the administrative decision upholding the suspension to determine whether Petitioner received due process, whether competent, substantial evidence supports the decision, and whether the decision departs from the essential requirements of law. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).

DISCUSSION

Petitioner does not assert that he was denied due process. Rather, he contends the hearing officer departed from the essential requirements of law in concluding that the detention by law enforcement was reasonable and by failing to exclude the results of the HGN test. In light of these alleged departures, Petitioner contends there is no competent, substantial evidence to sustain the suspension. Petitioner first argues that an otherwise lawful traffic stop became unlawful when it was prolonged for 13 minutes while awaiting an officer to conduct the DUI investigation, in violation of *Underhill v. State,* 197 So. 3d 90 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1604b]. In *Underhill*, law enforcement pulled over the defendant for failing to wear a seatbelt. *Id.* at 90-91. Because the defendant seemed nervous, law enforcement asked for consent to search the car, which the defendant denied. *Id*. at 91. Law enforcement then called a dog to the stop to sniff around the car. The dog alerted law enforcement to the presence of contraband, and the defendant was arrested. *Id*. The *Underhill* court emphasized that the question is not what the objectively reasonable length is to complete a traffic stop, but whether the dog sniff in this particular stop adds time to the stop. *Id*. at 92. It found the original traffic stop for the seatbelt violation was prolonged by the dog sniff because law enforcement had all the information they needed to write the traffic citation and complete the stop. *Id*. As a result, the court reversed the defendant's conviction and sentence. *Id*. In this case, unlike in *Underhill,* law enforcement observed signs of impairment immediately upon effecting the traffic stop. *Underhill* determined that a mere display of nervousness did not provide law enforcement reasonable suspicion to conduct any other proceeding than writing a traffic ticket. Here, however, Petitioner emitted an odor of alcohol, had slurred speech, wore a bar bracelet, had just left an establishment that served alcohol, and admitted to drinking enough such that he had to *try to sober up.* These factors provided sufficient basis to justify summoning a DUI investigator.

Petitioner next argues that the hearing officer's refusal to exclude the results of the HGN test departed from the essential requirements of law in the absence of evidence that the law enforcement officer conducting the test is a certified drug recognition expert as required by law. The court agrees. *Department of Highway Safety and Motor Vehicles v. Rose*, 105 So.3d 22, 24 fn 1 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a], citing *State v. Meador*, 674 So.2d 826, 835 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a] (absence of evidence of law enforcement officer's qualification to administer the test merits against admission of HGN test result). The court notes that even excluding the HGN result, the record contains ample other evidence to support upholding the suspension.

Petition DENIED.

* * *

GUIDAN MEDINA JARAMILLO, Plaintiff, v. CITY OF MIRAMAR, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21008746, Division AP. October 12, 2021.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, sitting in its appellate capacity, on the failure of the Appellant to comply with this Court's "Order to Show Cause," filed on August 30, 2021. In the Order this Court gave the Appellant thirty days to file an Initial Brief and Appendix. The Order stated, "3. If the Appellant fails to timely file a response showing good cause or an appropriate Initial Brief and Appendix that comport with Florida Rules of Appellate Procedure 9.210 it shall result in the dismissal of the appeal." As of the filing of this order, the Appellant has failed to comply with the Order and has otherwise failed to file a document indicating an intent to proceed.

Accordingly, it is hereby **ORDERED** as follows:

1. This Appeal is **DISMISSED.**
2. **The Clerk of Court is DIRECTED to close this case**.

* * *

DAVID PENNELL, Plaintiff, v. CITY OF DEERFIELD BEACH, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21008731, Division AP. October 27, 2021.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, sitting in its appellate capacity, on the failure of the Appellant to comply with this Court's "Order to Show Cause," filed on September 17, 2021. In the Order this Court gave the Appellant thirty days to file an Initial Brief and Appendix. The Order stated, "4. Failure to comply with this Order shall result in the dismissal of this appeal." As of the filing of this order, the Appellant has failed to comply with the Order and has otherwise failed to file a document indicating an intent to proceed.

Accordingly, it is hereby **ORDERED** as follows:

1. This Appeal is **DISMISSED.**
2. **The Clerk of Court is DIRECTED to close this case**.

* * *

Municipal corporations — Ordinances— Zoning—Appeals—Certiorari— City commission's legislative actions of adopting ordinances amending zoning code and map are not reviewable by petition for writ of certiorari

USA EXPRESS, INC., Plaintiff, v. CITY OF HALLANDALE BEACH, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County (Appellate). Case No. CACE21007774, Division AW. October 21, 2021. John Bowman, Judge.

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court, in its appellate capacity, upon "Motion to Dismiss Petition for Writ of Certiorari," filed on August 17, 2021. After review of the motion, the response, the reply to the response, case maintenance records, and the applicable law, this Court finds as follows:

USA Express, Inc.'s ("Petitioner") Petition for Writ of Certiorari against the City of Hallandale Beach ("City") arises from the adoption of two ordinances by the City's Commission. The two ordinances are companion ordinances. The first ordinance, Ordinance No. 2021-003, amended the text of the zoning code to create the new Hallandale Beach Boulevard zoning district and two new subdistricts, Hallandale Beach Boulevard West, and Hallandale Beach Boulevard East, and to create new detailed form-based standards and new zoning regulations for the new zoning district and subdistricts. The second ordinance, Ordinance No. 0021-04, amended the Zoning Map to remove previous, conventional zoning designations and to update the Zoning Map to mark the boundaries of the new zoning district and new zoning subdistricts.

Zoning decisions are generally classified as either legislative or quasi-judicial. *See Hirt v. Polk Cnty. Bd. of Cnty. Comm'rs,* 578 So. 2d 415, 416 (Fla. 2d DCA 1991). Generally speaking, a legislative action, whereby a governmental body makes local policy decisions, results in the formulation of a general rule of policy, while a quasi-judicial action, which involves a determination of whether facts in the case being considered meet the criteria of a specific ordinance, results in the application of a general rule of policy. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993).; *Section 28 P'ship, Ltd. v. Martin Cnty.,* 642 So. 2d 609, 612 (Fla. 4th DCA 1994); *Hirt v. Polk Cnty. Bd. of Cnty. Comm'rs,* 578 So. 2d at 417.

Quasi-judicial actions are reviewable by petition for writ of certiorari. *City of Fort Pierce v. Dickerson,* 588 So. 2d 1080, 1081-82 (Fla. 4th DCA 1991) (*citing Walgreen Co. v. Polk Cnty.,* 524 So. 2d 1119, 1120 (Fla. 2d DCA 1984)). A city's legislative actions are subject to attack in circuit court through the filing of an original action. *Minnaugh v. Cnty. Comm'n of Broward Cnty.,* 752 So. 2d 1263, 1265 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D659a]; *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder,* 627 So. 2d at 474.

The the City's Commission meetings, where there was a first and second reading of the Ordinances, were conducted as legislative.

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

1. The "Motion to Dismiss Petition for Writ of Certiorari," filed on August 17, 2021, is **GRANTED**.
2. The Petition for Writ of Certiorari is **DISMISSED**.
3. The Petitioner's Motion to Strike is **DENIED** as moot.
4. **THE CLERK OF COURTS IS DIRECTED TO CLOSE THIS APPEAL**.

* * *

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CIRCUIT COURTS—ORIGINAL

Motor vehicles—Financial responsibility—Noncompliance with statutory requirements—Failure of licensee to satisfy judgment—Driver's license suspension—Reinstatement—Where installment payment plan for satisfaction of judgment against licensee is established by court order, restoration of judgment debtor's driver's license is mandated by statute

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. KENNETH JENKINS, Defendant. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2019 CA 821. November 9, 2021. Angela Dempsey, Judge. Counsel: Anthony Steele, Lotane & Associates, P.A., for Plaintiff. Robert G. Churchill, Jr., Churchill Law Group, PLLC, Tallahassee, for Defendant.

ORDER ESTABLISHING INSTALLMENT PAYMENT ON JUDGMENT PURUSANT TO FLORIDA STATUTE § 324.141

This action was heard on the Defendant's Motion for Installment Payment Plan pursuant to Florida Statute § 324.141. That statute establishes a procedure by which a court may permit a party whose driver's license has been suspended in relation to a judgment debt to pay the judgment debt back in installments. Upon such order and other demonstrations of financial responsibility, the affected party's driver's license must be restored by the Department of Highway Safety and Motor Vehicles. Fla Stat. §324.141(2). This Court having reviewed the motion, taken testimony at an evidentiary hearing, and being otherwise fully advised in the premises, ORDERS AND ADJUDGES:

1. The Defendant's motion is GRANTED. The judgment previously entered in this action on August 1, 2019, and recorded at Leon County Official Records Book 5343, Page 2320 may be paid by Defendant KENNETH JENKINS in installment payments, as follows: $150.00 per month, to be delivered to the attorney for the Plaintiff, on or before the 15th day of each successive month, starting December 15, 2021, until the judgment is satisfied. All such payments shall be made payable to "Lotane & Associates, P.A. Trust Account", and shall be delivered to 1980 Michigan Avenue, Cocoa, Florida 32922, (or other such address as Plaintiff's counsel may designate).

2. While establishing a payment framework for the entered judgment, this order is entered expressly for the purpose of permitting and facilitating the Defendant KENNETH JENKINS to gain relief from his present driver's license suspension by the Florida Department of Highway Safety and Motor Vehicles, and pursuant to Florida Statute 324.141(2), such license restoration is required upon the entry of this Order and other satisfactory proof of financial responsibility.

3. Pursuant to Florida Statute § 324.141(3), in the event the judgment debtor fails to pay any installment as specified by this order, then upon notice of such default, the Department of Highway Safety and Motor Vehicles shall forthwith suspend the license of the judgment debtor until such judgment is satisfied.

* * *

Torts—Personal injury—Expert witnesses—Bias—Motion to exclude testimony of defendant's compulsory medical examiner because of remarks evincing witness's bias against all personal injury plaintiffs, which remarks were made at trial over five years earlier, is denied—Impeachment evidence available to plaintiff is sufficient to provide her with due process

YATREKA A. BRYANT-SMITH, Plaintiff, v. CHRISTOPHER A. CASEY and JOHNNY'S ELECTRIC, INC., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2018-CA-004997-XXXX-MA, Division CV-A. July 30, 2021. Waddell A. Wallace, Judge. Counsel: Glenn E. Cohen and Andrew J. Paladino, for Plaintiff. Edward M. Booth, Jr. and Courtney M. Johnson, for Defendants.

ORDER DENYING MOTION TO EXCLUDE TESTIMONY OF DEFENDANT'S COMPULSORY MEDICAL EXAMINER

This case is before the Court for consideration of the Motion to Exclude the Testimony of Defendant's Compulsory Medical Examiner John Von Thron, MD, filed February 12, 2021, on behalf of plaintiff, Yatreka A. Bryant-Smith. In her motion, plaintiff argues that Dr. Von Thron's admitted bias renders his anticipated testimony unreliable and inadmissible under the standard in *Daubert v. Merrell Dow Pharmaceutical,* 509 U.S. (1993).

In support of her motion, plaintiff points to Dr. Von Thron's extensive history since 1999 in performing forensic medical examinations and testifying as an expert witness for the defense in personal injury litigation. Dr. Von Thron has performed over 1000 compulsory medical exams and almost 100 percent of his work has been on behalf of defendants. What distinguishes Dr. Von Thron from many other physicians who are paid, professional expert witnesses are comments made by the doctor while testifying in prior litigation. In a jury trial in 2015, in response to anticipated questioning regarding his charge for a pre-trial deposition, Dr. Von Thron stated in front of the jury, "Yes, that's kind of riduculous and why our insurance rates are so high." Plaintiff argues that such comments reflect a pervasive, admitted bias held by Dr. Von Thron against all personal injury claimants. Plaintiff further argues that she cannot protect against this bias because eliciting testimony from Von Thron that he has previously made such comments would itself be prejudicial to plaintiff's case. Because of this bias, and the lack of a remedy to rebut it at trial, plaintiff concludes that Dr. Von Thron's bias against all plaintiffs renders his opinions unreliable and inadmissible under *Daubert.*

The Court could not locate a reported decision by a United States court that disqualified an expert witness because of alleged bias reflected in that witness's prior testimony. In *McClellan v. I-Flow* Corp., 710 F.Supp 2d (D. Oregon 2010), the court excluded the anticipated testimony of an expert for "litigation bias" that rendered his testimony unreliable and admissible. This testimony, however, was to explain and present results of of a medical study in which attorneys for the defendant were found by the court to have participated and shaped the methodology and results of the study in order to support the defendant's position in the litigation.

In contrast, the allegedly disqualifying testimony fron Dr. Vaon Thron came from off-the-cuff remarks by him in a trial now over five years ago. Dr. Von Thron has continued to testify in several trials in the Fourth Judicial Circuit in the intervening years. Extensive evidence is available to plaintiff to show that Dr. Von Thron has litigation bias in favor of defendants. Plaintiff may offer evidence of the number of years in which a significant portion of his income was derived from expert witness engagements and that those engagements were almost invariably on behalf of defendants. Plaintiff could elicit from Dr. Von Thron that in most of his expert witness engagements, he has testified that the plaintiff either did not suffer a permanent injury or needed no further treatment. This type of evidence is often received with respect to a certain group of physicians who regularly testify in court and do so almost invariably for either plaintiffs or defendants. This evidence is effective to convey to the jury the bias that underlies these experts' testimony. Under Florida law, "exclusion of witness testimony. . . is a drastic remedy and should be invoked only under the most telling circumstances." *Rojas v. Rodriguez,* 185 So.3d 710 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D423a], *citing, Clair v. Perry,* 66 So.3d 1078, 1080 (Fla. 4th DCA 2011) [36 Fla. L.

Weekly D1767c]. Because plaintiff has adequate alternative means of demonstrating Dr. Von Thron's litigation bias, no such compelling circumstances exist here to justify the exclusion of his testimony in its entirety.

Plaintiff also argues that if a juror expressed the views stated by Dr. Von Thron, that juror would be dismissed from the jury venire for cause. Plaintiff notes as well that if a trial court judge expressed such views, that judge would be subject to disqualification. However, both the potential juror and trial judge are decisionmakers occupying a distinct, neutral role in the adversarial judicial system. Dr. Von Thron, in contrast, is a witness called by a party to present that party's adversarial perspective on the issues to be litigated. For the reasons stated, the Court concludes that the impeachment evidence available to plaintiff is sufficient to provide her with due process of law and it would be inappropriate to exclude Dr. Von Thron from testifying because of the comments made in a separate trial five years ago.

For these reasons, as well as the argument advanced in defendant's memorandum in opposition to the motion to exclude Dr. Von Thron's testimony, filed June 22, 2021, it is

ORDERED:

Plaintiff's Motion to Exclude the Testimony of Defendant's Compulsory Medical Examiner John Von Thron is DENIED.

* * *

Torts—Fraud—Real estate brokers and salespersons—Count of complaint alleging that real estate brokers fraudulently induced plaintiffs to enter into contract for purchase of residential real estate is sufficient to state cause of action whether plaintiffs are alleging implied private statutory cause of action under chapter 475 or cause of action grounded in common law fraud while avoiding effect of contract disclaimers by reason of chapter 475—Motion to dismiss is denied

HARRY GIFFORD and PAULA GIFFORD, Plaintiffs, v. ELIZABETH NETTLES, SETH NETTLES, JORDAN FERIA, and VANGUARD CENTRAL FL., INC., d/b/a COLDWELL BANKER, Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2020-CA-005296-XXXX-MA, Division CV-A. July 28, 2021. Waddell A. Wallace, Judge. Counsel: Kelly B. Mathis, for Plaintiffs. Arthur I. Jacobs, for Elizabeth Nettles and Seth Nettles, Defendants. James T. Bailey, for Jordan Feria and Vanguard Central Fl., Inc., Defendants.

ORDER DENYING MOTION TO DISMISS AND GRANTING MOTION TO STRIKE JURY TRIAL DEMAND

This case is before the Court for consideration of the Motion to Dismiss Plaintiffs' Amended Complaint and Motion to Strike Jury Trial Demand, filed May 10, 2021, by defendants, Jordan Feria and Vanguard Central Florida, Inc., doing business as Coldwell Banker Vanguard Realty ("Vanguard"). In the motion, Feria and Vanguard seek an order dismissing the Amended Complaint filed by plaintiffs, Harry Gifford and Paula Gifford, against them on or about April 20, 2021. Defendants Feria and Vanguard are named only in Count Four of the Amended Complaint in which plaintiffs allege that these defendants fraudulently induced them to enter into a contract for the purchase of residential real estate.

In an order entered April 8, 2021, the Court dismissed the claim plaintiffs alleged against Feria and Vanguard in the original complaint, holding that the claim for fraud in the inducement was barred by provisions in the listing agreement between the parties, which stated that plaintiffs were disclaiming any right to rely on any prior representations made by Feria or Vanguard that were not included in the written agreement. Such non-reliance provisions are typically enforceable in commercial transactions. See *Billington v. Ginn-La Pine Island, Ltd.,* 192 So. 3d 77 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D1204a]. However, Feria and Vanguard are alleged to have acted in the capacity of a real estate broker. As such, these defendants are bound by duties imposed on them in Chapter 475, Florida Statutes. Courts have held that Chapter 475 creates a private right of action for persons injured by the fraud of a real estate broker. See, for example, *Smith v. Rodriguez,* 269 So.3d 645 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1097b]. Other courts have held that contracts disclaiming or exculpating real estate brokers for fraudulent acts are void as against public policy. See *Kjellander v. Abbott,* 199 So. 3d 1129 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2155b].

It is not clear whether plaintiffs are alleging an implied private statutory cause of action under Chapter 475 or a cause of action grounded in common-law fraud while avoiding the effect of the contract disclaimers by reason of Chapter 475. In either event, the Court concludes that, as framed, Count Four of the Amended Complaint is sufficient to state a cause of action against the defendant real estate brokers, Feria and Vanguard.

Before the Court also is the Motion to Strike Jury Trial Demand filed by defendants Feria and Vanguard. The Court finds no reason why the contractual waiver of the right to a jury trial is not enforceable. The Court will therefore strike plaintiffs' demand for jury trial as to defendants Feria and Vandguard. However, the Court will consider at a later date, whether it would be appropriate to impanel an advisory jury.

Accordingly, for the reasons stated, it is

ORDERED:

1. The Motion to Dismiss Plaintiffs' Amended Complaint filed on behalf of of Defendants Jordan Feria and Vanguard Central Florida, Inc. is DENIED. These defendants shall serve their answers to the Amended Complaint within 14 days of the date of entry of this order.

2. The Motion to Strike Jury Trial Demand filed on behalf of defendants Jordan Feria and Vanguard Central Florida, Inc. is GRANTED. Plaintiffs' jury trial demand as to these defendants is STRICKEN from the Amended Complaint.

3. At the time of setting this action for trial, the Court will consider whether it would be appropriate to impanel an advisory jury to hear and report to the Court on plaintiffs claim against defendants

* * *

Torts—Negligence—Trip and fall—Even if visually-impaired plaintiff who was injured when he tripped on orange construction barrier at fast food restaurant that was closed for construction was invitee, rather than trespasser, restaurant owner and construction companies are entitled to summary judgment where evidence establishes that barrier was open and obvious to anyone whose eyesight was not impaired, and construction worker and restaurant manager informed plaintiff prior to his fall that restaurant was closed and that he could not enter—Claim of violation of Americans with Disabilities Act by failing to make reasonable accommodations to persons with disabilities does not create factual issue sufficient to avoid summary judgment where claim is made in general, conclusory manner without specific factual support

ANTONIO L. GARRETT, Plaintiff, v. JAX FOODS, LLC d/b/a KFC, KIRBY BROS. CONSTRUCTION, INC., and WHITE OAK INDUSTRIES, INC., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2019-CA-006530-XXXX-MA, Division CV-A. November 18, 2021. Waddell A. Wallace, Judge. Counsel: Neil L. Henrichsen, for Plaintiff. Jessica R. Creegan and Richard L. Russo, for White Oak Industries and Kirby Bros. Construction, Inc., Defendants. Justin T. Duff, for Jax Foods, LLC, Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case is before the Court for consideration of the Joint Motion for Final Summary Judgment filed August 5, 2021, on behalf of Defendants, Jax Foods, LLC, doing business as KFC ("KFC"), Kirby Bros. Construction, Inc. and White Oak Industries, Inc. The motion seeks a summary judgment against Plaintiff, Antonio Garrett, on his

claims for personal injury arising from alleged negligence on the part of Defendants in maintaining an unreasonably safe location and in failing to warn Plaintiff of potentially dangerous conditions.

Defendants' argue that the time of the alleged incident, Plaintiff occupied the status as a trespasser and thus Defendants' duty of care owed to Plaintiff was that outlined in section 768.075 (3)(a)(2), Florida Statutes. Plaintiff argues there are genuine issues of material fact as to whether Plaintiff occupied the status of a trespasser or instead was a licensee or invitee. Assuming Plaintiff was an invitee, Defendants had a duty to use reasonable care in maintaining the property in a recently safe condition and a duty to warn of dangers of which they were or should have been aware and which were unknown to the Plaintiff and could not have been discovered by him through the exercise of reasonable care. See *DiMarco v. Colee Court, Inc.,* 976 So.2d 650 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D751b]. Even applying this legal standard to the facts in the record presented for the summary judgment hearing, the Court concludes that there are no genuine issues of material fact to be presented to a jury and that Defendants are entitled to judgment as a matter of law.

As to the facts in the record and how they failed to establish a breach of any legal duty owing to Plaintiff, the Court accepts and relies upon much of the analysis contained in Defendants' Motion for Summary Judgment and supporting memoranda. Plaintiff claims he slipped and fell and suffered injury while attempting to enter a restaurant operated by KFC but was instead was tripped by or entangled with a temporary orange plastic barrier erected around the restaurant in order to prevent members of the public from entering. Photographs of the location of the fall and the barrier around the restaurant are in the record, as well as testimony of Plaintiff and several eyewitnesses. There is no competent evidence establishing that the plastic barrier presented an unreasonably safe condition. Moreover, the barrier was open and obvious to anyone with normal eyesight. There is record evidence that Plaintiff's vision was significantly impaired and that he could not see the barrier before he fell. At the time he fell, Plaintiff was apparently attempting to enter the restaurant as he had done at least several times in the recent past. In his deposition, Plaintiff testified to a conversation with a restaurant employee after he fell and that he did not recall talking to anyone else at the time and place of his fall. However, Plaintiff has pointed to no sworn statements or other evidence in the record that conflicts with statements made from witnesses who testified that an on-site construction worker and the KFC store manager both informed Plaintiff, prior to his fall, that the restaurant was closed and that he could not enter. Accordingly, to the extent that the plastic barrier represented a danger to Plaintiff, the unrebutted evidence is that Plaintiff was, in effect, warned of that danger by being told that he could not enter the KFC restaurant as he was accustomed because the restaurant was closed for construction.

Plaintiff's claim is founded on the assumption that because he was visually impaired and could not see the orange plastic barrier, that barrier presented an unreasonable risk of injury to him. In opposition to the motion, Plaintiff argues that each of the Defendants failed to comply with their duties under the Americans with Disabilities Act, Title II, 42 U.S.C. section 12182, by failing to make reasonable accommodations to persons with disabilities such as him. Plaintiff points to testimony of a White Oak Industries, Inc. laborer showing that employee was not aware of any ADA training. However, other testimony from White Oak's corporate representative stated that the company did take steps in training and otherwise to comply with the ADA. In any event, Plaintiff's assertion of a violation of the ADA is made in a general, conclusory manner without specific factual support and thus does not create a factual dispute sufficient to avoid summary judgment. See *Ramsey v. Home Depot USA. Inc.,* 124 So.3d 415, 418 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D2245a]; and *Heitmeyer v. Sasser,* 664 So.2d 358, 359-60 (Fla. 4th DCA 1995) [21 Fla. L. Weekly D39a].

ORDERED AND ADJUDGED:

1. Defendants' Joint Motion for Summary Judgment is GRANTED.

2. Plaintiff, Antonio Garrett, shall take nothing by this action and Defendants, Jax Foods, LLC, doing business as KFC, Kirby Bros. Construction, Inc., and White Oak Industries, Inc., shall go hence without day.

* * *

Insurance—Homeowners—Attorney's fees—Issues regarding application of confession of judgment doctrine preclude entry of summary judgment against insured that would foreclose her right to seek attorney's fees and costs under section 627.428

BARBARA HENDERSON, Plaintiff, v. HARTFORD INSURANCE COMPANY OF THE MIDWEST, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2021-CA-000137-XXXX-MA, Division CV-A. August 4, 2021. Waddell A. Wallace, Judge. Counsel: David R. Heil, for Plaintiff. Michael A. Packer and Corey K. Setterlund, for Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This case is before the Court for consideration of the Motion for Summary Judgment, filed April 19, 2021, on behalf of of defendant, Hartford Insurance Company of the Midwest ("Hartford"). In its motion, Hartford seeks a judgment against plaintiff, Barbara Henderson, on her first-party claim under a homeowners insurance policy issued by Hartford.

Hartford made an initial payment on plaintiff's claim in the amount of $1880.19. On or about November 20, 2020, plaintiff presented a claim to Hartford seeking an additional payment of $37,439.10. On or about January 8, 2021, Hartford declined to pay plaintiff any additional amount for her claim. On that same day, January 8, 2021, plaintiff filed suit. On January 15, 2021, plaintiff filed a notice of civil remedy, pursuant to section 624.155 Florida Statutes. On or about March 5, 2021, Hartford paid plaintiff the full remaining amount of her claim in the amount of $37,439.10.

Hartford argues that plaintiff is not entitled to a judgment or award of costs and attorney fees because it paid plaintiff the full amount of claim within the 60-day period provided by the notice of civil remedy in which Hartford had the right to cure any failure to pay plaintiff's claim. As stated in plaintiff's memorandum in opposition to Hartford's motion for summary judgment, plaintiff's notice of civil remedy is relevant only to a potential statutory claim by plaintiff under section 624.155, Florida Statutes. The notice of civil remedy is not required for and does not condition or restrict first-party contract claims under an insurance policy. From a review of the record, it appears that genuine issues exist as to the application of the confession of judgment doctrine and that such issues preclude the entry of a summary judgment against plaintiff that would preclude her right to seek attorney fees and costs under section 627.428, Florida Statutes. *See Johnson v. Omega Ins. Co.,* 200 So.3d 1207 (Fla. 2016) [41 Fla. L. Weekly S415a].

Accordingly, for the reasons stated, it is

ORDERED:

The Motion for Final Summary Judgment filed April 19, 2021, on behalf of defendant Hartford is DENIED.

* * *

Criminal law—Grand theft—Post conviction relief—Ineffective assistance of counsel—Trial counsel was ineffective for failing to request good faith jury instruction where facts presented at trial for grand theft supported theory of defendant's good faith belief in his right to possession—Defendant was entitled to receive good faith instruction even though standard jury instruction on good faith had not been released at time of trial—New trial required

STATE OF FLORIDA, Plaintiff, v. DALE CLARK, Defendant. Circuit Court, 9th Judicial Circuit in and for Osceola County. Case No. 2011-CF-1553, Division 10-A. October 7, 2021. Tom Young, Judge. Counsel: Jason T. Forman, Law Offices of Jason T. Forman, P.A., Fort Lauderdale, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

This matter came before the Court on Defendant's Motion for Postconviction Relief, filed on January 5, 2018, under Florida Rule of Criminal Procedure 3.850. Having reviewed the record and the testimony presented at the evidentiary hearing, the Court concludes that Defendant's Motion should be granted.

PROCEDURAL HISTORY

On June 20, 2011, the State charged Defendant with one count of first-degree grand theft ($100,000 or more), one count of stopping payment on a check of $150 or more with intent to defraud, and two counts of obtaining property by a worthless check of $150 or more.

On July 30, 2014, the jury found him guilty of the lesser-included offense of second-degree grand theft ($20,000 or more, but less than $100,000). The jury also found him not guilty of stopping payment with intent to defraud. The Court granted a judgment of acquittal on the two counts of obtaining property by a worthless check.

On September 29, 2014, the Court adjudicated him guilty of second-degree grand theft ($20,000 or more, but less than $100,000) and sentenced him to six months in the Osceola County jail, with credit for one day, followed by 14 years and six months of probation.

The Fifth District Court of Appeal affirmed the judgment and sentence and issued the appellate mandate on January 7, 2016. *Clark v. State,* 181 So. 3d 504 (Fla. 5th DCA 2016).

On April 29, 2016, the Court modified Defendant's sentence to 30 days in the Osceola County jail, followed by five years of probation. The Court granted Defendant's Motion for Early Termination of Probation on October 26, 2017.

Defendant then filed the instant motion on January 5, 2018. The Court granted an evidentiary hearing on October 7, 2019, and conducted the evidentiary hearing on August 19, 2021.

RULING

Defendant asserts in Ground One of his motion that trial counsel was ineffective for failing to request a jury instruction that "[i]t is a defense to the charge of theft if defendant had an honest, good faith belief that he had the right to possess the property." Defendant maintains that the defense theory at trial was that he had a good faith belief that he would receive funds from a third party to pay for the charter flights and, therefore, that he had no intent to deprive the victim, Mr. Loumankin. He also alleges that trial counsel presented his testimony regarding his good faith, and further argued a good faith defense to the jury in closing.

The Court finds that Defendant has established his burden on ground one. At the evidentiary hearing, trial counsel testified that he did not request the instruction because he was concerned about the veracity of Defendant's good faith to pay the victim. However, at trial, counsel presented Defendant's testimony that he acted in good faith. In addition, trial counsel presented a defense at trial of good faith—that Defendant sincerely believed he would receive payment from a third party for the flights and did not intend to defraud the victim.

While counsel's strategy at trial was understandable and commendably driven by concerns of ethics and professionalism, case law holds that the good faith instruction should have been requested. *See Capiro v. State,* 97 So. 3d 298, 300-01 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2181a] (reversing and remanding for a new trial on the grand theft over $100,000 conviction after counsel failed to request a good faith instruction, which was central to the defendant's case, and finding that the defendant was prejudiced because the jury was not instructed on the law applicable to the defendant's only defense); *see also Aversano v. State,* 966 So. 3d 493, 495-96 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2488a] (reversing and remanding for a new trial on the grand theft over $20,000 but less than $100,000 conviction, after trial counsel failed to request a jury instruction on either a good faith defense or advice of counsel defense which were supported by undisputed evidence at trial and central to the defendant's case).

In addition, although the standard jury instruction on good faith was not released until 2016,[1] because the facts presented at trial supported a theory of good faith, Defendant was still entitled to receive a good faith jury instruction. *See Capiro v. State,* 97 So. 3d at 300 (quoting *Alfaro v. State,* 837 So. 2d 429, 422 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2124a] ("Florida recognizes that 'a good faith belief in one's right to possession of property is a defense to the charge of theft.' "); *see also Cliff Berry, Inc. v. State,* 116 So. 3d 394, 400, 407-09 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D80c] (holding that the trial court committed reversible error when it refused to give the defendant's requested special instructions on a good faith defense to the charges of first-degree grand-theft when evidence at trial supported the defense).

In light of its ruling on Ground One, the Court need not address Grounds Two through Eight[2] of Defendant's motion.

ORDERED AND ADJUDGED:

1. Defendant's Motion for Postconviction Relief is GRANTED.

2. The Judgment and Sentence rendered in this case are VACATED AND SET ASIDE, and this matter shall be reset on the trial docket.

3. The State may file a notice of appeal in writing within 30 days of rendition of this Order.

4. The Clerk of Court is directed to serve a copy of this Order, along with an appropriate certificate of service, upon Defendant, addressed as follows: Dale Clark, [Editors note: address redacted], Mooresville, North Carolina, 28117. ***The Clerk shall also file a copy of the certificate of service in the court file.***

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[1]*In re Standard Jury Instructions in Crim. Cases—Rep. No. 2015-04,* 190 So. 3d 614, 623-24 (Fla. 2016) [41 Fla. L. Weekly S143a].

[2]The motion contains no ground numbered seven but two grounds numbered eight.

* * *

Torts—Florida Racketeer Influenced and Corrupt Organizations Act—Civil theft—Summary judgment is entered in favor of defendant on counts alleging RICO violation and civil theft in case characterized as routine business dispute where court concludes that no reasonable jury could find by clear and convincing evidence that defendant committed RICO violation or civil theft or that plaintiff was injured by reason of any RICO violation or civil theft—Transgressions relied upon by plaintiff are not predicate acts under RICO Act, any injury to plaintiff from alleged transgressions is speculative and indirect, and evidence does not establish continuity and relatedness of alleged misconduct—No reasonable person could conclude that defendant stole plaintiff's interest in business entities with felonious intent where evidence shows that plaintiff transferred his interests via written assignments and for consideration—Further, alleged failure to pay money owed cannot support claim for civil theft

CONSTANTINE SCURTIS, et al., Plaintiffs, v. ALEXANDER E. RODRIGUEZ, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Complex Business Litigation. Case No. 2014-31805 CA 01. November 4, 2021.

Michael A. Hanzman, Judge. Counsel: Katherine Eskovitz, Nathan Holcomb, and Colleen Smeryage, Santa Monica, California, for Plaintiffs. John Lukacs, Coral Cables; and Benjamin Brodsky and Alaina Fotiu-Wojtowicz, Miami, for Defendants.

FINAL SUMMARY JUDGMENT ON COUNT 7 (CIVIL THEFT) AND COUNT 9 (RICO) OF PLAINTIFFS' REVISED VERIFIED FOURTH AMENDED COMPLAINT

I. INTRODUCTION

On December 17, 2014, Plaintiff, Constantine Scurtis ("Plaintiff" or "Scurtis"), brought this action against his former brother-in-law, Alexander Rodriguez ("Rodriguez"), and five entities he and Rodriguez had formed to invest in real estate.[1] The complaint pled routine breach of contract claims. In 2015, Scurtis filed an "Amended Complaint" ("AC") adding, as an additional Plaintiff, ACREI, LLC, and joining additional Defendants, including Stuart Zook ("Zook") and other Rodriguez/Scurtis entities. In 2016, Scurtis and ACREI, LLC, together with two other ACREI entities (ACREI-II, LLC and ACREI-III, LLC), filed a "Verified Second Amended Complaint" ("SAC") which, for present purposes, did not materially alter the legal landscape. Nor was the legal landscape materially changed when, in 2019, Scurtis and all three ACREI entities filed their "Third Amended Complaint" ("TAC").

On January 8, 2021, Scurtis, represented by new counsel, escalated matters by filing a "Verified Fourth Amended Complaint" ("VFAC") which, in its opening salvo, described Rodriguez as a "serial cheater and liar" who, "[a]fter cheating on his wife . . ., and lying about his affairs, . . . then lied and cheated [Scurtis]," through an "illegal and fraudulent pattern of criminal activities—including embezzlement, obtaining property by fraud, insurance fraud, forgery, mail fraud, and wire fraud." VFAC, ¶ 1. Consistent with these new allegations of criminal conduct, Plaintiffs upped the ante, adding claims seeking treble damages for civil theft (count 7) and RICO (count 9), in a pleading containing 59 counts, spanning 722 paragraphs.[2]

On February 4, 2021, the Court struck all allegations of Rodriguez' alleged marital infidelities as "scandalous and wholly irrelevant," directing Plaintiffs "to re-file their pleadings absent those allegations." (D. E. 466). On February 9, 2021, Plaintiffs, in compliance with this Court's directive, filed their "Revised Verified Fourth Amended Complaint" ("RVFAC")—the now operative pleading.

On August 5, 2021, the Court entered its "Order Denying Plaintiffs' Renewed Motion for Leave to Amend to Seek Punitive Damages" concluding, in sum and substance, that: (a) this case was a routine business dispute; (b) Plaintiffs had no legal basis upon which to secure exemplary damages; (c) the vast majority of alleged wrongful conduct committed by Defendants resulted in no harm at all to Scurtis (as opposed to third parties and possibly the juridical entities formed by Rodriguez/Scurtis); and (d) the facts, even when viewed in a light most favorable to Plaintiffs, fell short of establishing the type of reprehensible conduct required by Section 768.72 (1) of the Florida Statutes and Rule 1.190 (f) of the Florida Rules of Civil Procedure. (D. E. 1063).

Defendants now seek summary judgment on Plaintiffs' RICO/civil theft claims, insisting that both are legally bankrupt. Defendants say that: (a) this is a garden variety business dispute; (b) Plaintiffs cannot satisfy any of the elements of a Florida RICO claim; (c) no reasonable jury could find, by clear and convincing evidence, that Scurtis was injured "by reason of" any RICO predicate acts; and (d) no reasonable jury could find, by clear and convincing evidence, that Scurtis has been injured by theft. (D. E. 957). Defendants also argue that these claims are time-barred, and that Scurtis' failure to serve the required statutory demand is fatal to his claim for civil theft. *See* Fla. Stat. § 772.11.

Upon consideration of the evidence presented, and the parties' outstanding written and oral presentations, the Court agrees with Defendants that: (a) this case is a nothing more than a routine business dispute; (b) no reasonable jury could find, by clear and convincing evidence, that Defendants committed a RICO violation or civil theft; and (c) no reasonable jury could find, by clear and convincing evidence, that Scurtis was injured by "reason of" a RICO violation or civil theft. The Court therefore grants Defendants' Motion for Summary Judgment on counts 7 and 9 of Plaintiffs' RVFAC.

II. RELEVANT FACTS

In 2003 Rodriguez and his then brother-in-law, Scurtis, decided to invest in real estate together.[3] Rodriguez would provide all 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.[4] Each written limited partnership agreement carefully defined the respective rights and obligations of the general and limited partners.[5]

In 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.[6] 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. ("NPAV") as the new "guarantor" entity.

To capitalize NPAV, thereby enabling it to serve as the guarantor for acquisition loans, Scurtis and Rodriguez assigned to NPAV all of their respective interests in twelve (12) limited partnerships that had previously acquired real estate. At that time the general partner of each of these twelve (12) limited partnerships was one of the ACREI entities controlled by Scurtis. Following this March 2005 transaction, and the assignments executed in connection therewith, all general and limited partnership interests in these entities previously owned by Rodriguez and Scurtis, including Scurtis' interest in the ACREI entities, were transferred to—and now owned by—NPAV.[7] NPAV, like the limited partnerships assigned to it, 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. ("NPAV, Inc.").[8] NPAV, Inc. was, in turn, wholly owned by Rodriguez.[9] This 2005 transaction therefore divested Scurtis of legal control over the twelve (12) limited partnerships that were now held by NPAV—transferring that legal control to Rodriguez, the 95% owner. 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. NPAV, Inc., which was wholly owned by Rodriguez, would typically serve as the general partner, and 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 party on behalf of the entities. *Id.*[10]

On September 18, 2008, Scurtis advised all senior employee "that effective immediately I will no longer be working at Newport," and that he had "decided to pursue other opportunities." He reported that "Stuart Zook will become the Chief Operating Officer 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 absolutely no involvement whatsoever in the affairs of NPAV or any related ventures. Rather, as Scurtis himself has acknowledged, "after his forced removal . . . [he] went to work with Lynd, a real estate development company, where he ultimately became the Managing Partner." AC, ¶ 160.

Shortly after his removal in 2008, Scurtis retained counsel and demanded payment for unpaid partnership distributions attributable to certain of the Rodriguez/Scurtis entities. He claimed to be the "former President of Newport Property Ventures, Ltd., and a limited partner in many single asset limited partnerships he formed and operated in collaboration with . . . his former brother-in-law, Alexander E. Rodriguez," and demanded payment of "$427,777.47, representing his 5% profit interest, plus past due compensation, including severance pay through October 2008." *See* Nov. 21, 2008 correspondence from Joy Spillis Lundeen, Esquire to Alan Kluger, Esquire. Scurtis never claimed, in this demand letter or anywhere else, that he still owned/controlled the general partner of any of the juridical entities he and Rodriguez had formed, or that he continued to own/control any ACREI entity. He instead only demanded what he believed he was owed in profits/salary/severance. Two months later he dropped that monetary demand.[11]

After making a demand for his 5% of profits/salary/severance, Scurtis became aware that Jeanette Crook ("Crook"), a Vice President of Finance for NPAV, had advised "of recent events" causing her "great concern." Crook first alleged that the company was attempting to defraud an insurance carrier in connection with a Hurricane Ike claim. Crook reported that NPAV maintained "two separate books"—one documenting "the actual or 'real' damages" incurred, and one reflecting "the inflated and embellished state of damage" sent to the "insurance company for processing and payment." Crook alleged that Defendants were intent "on making a substantial profit from the Hurricane Ike claim"—something she did not believe "to be proper."

Crook also claimed that upon review of "information and documentation related to three rental properties in Tampa, Florida," she had discovered "checks made payable" to employees for "consulting fees" or "consultation." Crook alleged that these checks represented reimbursement for rent these employees were paying (and the company was booking) in order to fraudulently inflate the rent roll, thereby creating an illusion of sufficient cash flow to meet debt-service coverage requirements. Put simply, Crook alleged that employees who did not live in Tampa were giving the company false rent checks, and that the company was then reimbursing those employees via "consultation fees." *See* November 19, 2008 correspondence from John D. Hoffman to Angelica Gonzalez.

After becoming aware of this alleged mortgage/insurance fraud, Scurtis reached out to his father, John Scurtis, commenting: "Dad do not share this with anyone—What a shame of what's going on after all the hard work to put things in place." *See* November 21, 2008 email. Two days later, his father responded:

> Taki has been keeping me posted on some issue regarding certain "impropriety's [sic] that Jeanette has advise Taki of. Taki then has seen fit to share that information with Cynthia and I of which I appreciate. Here is my understanding of the entire matter. . . .
>
> **A)** Employees moved in as tenants to certain Newport property with the intent to support rental income so the bank will renew mortgage. Jeanette has made copy's [sic] of check etc supporting this allegation. Subsequently Deme was asked to remove those persons form the rent roll. If the intent was fraud "so be it" that will be a DIFFICULT thing to prove as the bank was not (according to my source) shown any such "false" information this time ***so in my opinion no fraud.***
>
> B) There was an issue about Insurance Fraud only because someone was instructed to keep "two sets of books" But as you both have found out no fraud has been committed since money's [sic] have been paid . . . end of story. .
>
> Here is what this message is all about. If someone is going to get busted for whatever issues are "so be it." Taki you need to "let go" and disconnect from what is going on between Jeanette and Newport . . . . Let them do what they want and hang themselves you are out of there that is the "end of the story" . . .

Scurtis' response was that: "I agree this has nothing to do with me and I am not getting involved but fyi I think these allegations are much more serious than u think mortgage fraud and insurance fraud are very serious allegations and the intent appears obvious." *See* November 23, 2008 email. Because this had "nothing to do" with him, Scurtis made no effort to address these "very serious allegations," or remedy the fraud he believed was being committed.

While NPAV incurred expense investigating these claims, and settling Crook's whistleblower complaint, it was never accused (civilly or criminally) of either mortgage or insurance fraud, and neither the bank holding the mortgage, nor the insurance carrier, took any adverse action against the company or any of its owners.

III. SCURTIS' ESCALATING COMPLAINTS

The initial complaint, filed on December 17, 2014, alleged that Rodriguez, and five entities formed by Rodriguez/Scurtis (6th Ave. Buildings, Ltd., 455 Building Ltd., 750 Bayfront Ltd., 500 N.E. 24 St., Ltd., and 2328 NE 6 Ave. Ltd.), breached Limited Partnership Agreements by selling properties "without authority, without notifying Scurtis, and without compensating Scurtis." Complaint, ¶ 18. Scurtis did not allege that he still owned/controlled any ACREI entity, or plead any tort claims.

In his AC, filed on August 26, 2015, Scurtis beefed up his contract claims, alleging that he was owed "approximately $8,000,000.00 in acquisition fees and [that] he retained his five percent ownership . . . in all Partnership properties." AC, ¶ 7. He also continued to allege that properties had been sold without his consent and in violation of "Limited Partnership Agreements," and that Rodriguez had "failed to distribute at least $2,170,390.00 in realized gains . . . to Scurtis," as called for by the agreements. The AC went on to allege that Rodriguez nevertheless reported this income to the IRS, misrepresenting that Scurtis was paid and "creating a tax consequence for Scurtis on money that Scurtis never received." AC, ¶¶ 8, 9.

The AC also alleged, for the first time, that "in an attempt to strip

Scurtis of his ownership interest," Rodriguez "fraudulently transferred . . . Partnership properties to a newly created entity Scurtis had no interest in—"Monument Capital Management" ("MCM"). *Id.*, ¶ 14. The AC further alleged that the "Limited Partnership Agreements" for the Rodriguez/Scurtis entities (or most of them) contained a "Right of First Refusal" to "purchase each Partnership property" which Scurtis would have exercised had he been given the opportunity. AC, ¶¶ 176-179.[12]

Through his TAC, filed on April 25, 2019, Scurtis continued to allege that: (a) he was owed acquisition fees; (b) Rodriguez had failed to pay him his share of net profits; (c) Rodriguez falsely filed K-1s with the IRS reflecting income paid to Scurtis that he had not received; (d) Rodriguez breached the Limited Partnership Agreements by selling properties without Scurtis' consent; (e) Rodriguez, NPAV and Zook transferred partnership properties to new entities they created (*i.e.*, MCM); and (f) Scurtis was denied his right of first refusal to purchase properties. Scurtis also (for the first time) accused Defendants of causing NPAV to commit insurance and mortgage fraud. This pleading, like its predecessors, advanced only common law claims, save a statutory records inspection demand.

In his RVFAC Scurtis continues to pursue these same common law claims. But as the Court pointed out earlier, he now also alleges that Defendants (or some of them) committed civil theft (count 7) and racketeering (count 9), statutory causes of action that permit an award of treble damages.

Turning first to the civil theft claim, Scurtis alleges that the following properties have been "wrongfully stolen":

1. Scurtis' lawful interest in ACREI, ACREI-II and ACREI-III;
2. ACREI, ACREI-II and ACREI-III's interests in the partnerships;
3. Funds owed to Scurtis as Acquisition Fees; and
4. Scurtis' interest in the partnership.

See RVFAC, ¶¶ 269-274. As for the RICO claim, Scurtis alleges that Defendants committed the following criminal "predicate acts":

a. Theft of Plaintiff's interests in real property.

b. Filing false K-1s with the IRS by means of interstate wire and/or the U.S. mail.

c. Fabricating assignments of interests in ACREI, ACREI-II, and ACREI-III, either by forgery or by obtaining signatures through fraudulent deception.

d. False filings with the Florida Secretary of State.

e. Fraud against a mortgage lender by means of interstate wire and/or the U.S. mail.

f. Insurance fraud by means of interstate wire and/or the U.S. mail.

RFAC, ¶ 309 (a-f).

IV. FLORIDA'S NEW SUMMARY JUDGMENT STANDARD

Effective May 1, 2021, Florida adopted a new standard for summary judgment, aligning itself with the federal standard embedded in Rule 56 of the Federal Rules of Civil Procedure, as interpreted by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and its progeny. As explained by our Supreme Court in *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a], this sea-change recognizes "the fundamental similarity" between the summary judgment standard and the directed verdict standard, which both now focus on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 75 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).[13]

Under our new interpretation of Rule 1.510, trial courts "must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case." *Id.* A party can now prevail at summary judgment "in either of two ways: if the nonmoving party must prove *X* to prevail [at trial], the moving party at summary judgment can either produce evidence that *X* is not so or point out that the nonmoving party lacks the evidence to prove *X*." *Id.* at 7 (quoting *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018)). Once the movant does either, the burden shifts to the nonmoving party to "establish every element essential to that parties' case." *See, e.g., Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). Absent an evidentiary basis for each essential element of the nonmovant's case, "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." *Celotex,* 477 U.S. at 323.

Our new interpretation also permits trial courts to grant summary judgment when one side's version of events is simply implausible. So "[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." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d at 75-76 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]). Florida trial courts are no longer required to empanel a jury, and force parties to go through trial, simply because a nonmovant swears to facts belied by the record. Nor may a party avoid summary judgment by showing that "there is a metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), as summary disposition is now appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 587.[14]

In deciding a motion for summary judgment, the Court also must now apply the substantive standard of proof that would govern at a trial on the merits, just as it would at the directed verdict stage. *Anderson*, 477 U.S. at 252 ("we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits"). Scurtis bears the burden of proving his RICO/civil theft claims by "clear and convincing evidence." Fla. Stat. §§ 772,104(1) and 772.11. This requires that his evidence "be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). So in adjudicating this motion, the Court must assess whether a reasonable jury could find, by clear and convincing evidence, that Defendants committed racketeering and civil theft. *See, e.g., Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C810b] (affirming summary judgment on civil theft claims, as there was no clear and convincing evidence of felonious intent).

V. SUBSTANTIVE LAW/ANALYSIS

A. RICO

Passed by Congress in 1970, the Racketeering Influenced and Corrupt Organizations Act (RICO) provides a private cause of action to any person injured in his business or property by reason of a violation of 18 U.S.C. § 1962(c). Florida's civil RICO statute, codified in Florida Statute § 772 is patterned after the Federal Act, *see, e.g., Arthur v. JP Morgan Chase Bank, NA*, 569 Fed. Appx. 669, 679-80 (11th Cir. 2014), and courts confronted with Florida RICO claims

look to precedent interpreting the federal analogue. *See, e.g., Ferrell v. Durbin*, 311 Fed. Appx. 253 (11th Cir. 2009); *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.*, 881 So. 2d 565 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1251a].[15]

Generally speaking, a civil RICO plaintiff must prove: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.' " *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005); *Smart Sci. Labs., Inc. v. Promotional Mktg. Serv., Inc.*, 2008 WL 2790219, at *4 (M.D. Fla. July 18, 2008). Through his RVFAC, Scurtis again alleges that Defendants committed the following "predicate acts" which he says caused him injury:

A. the theft of his interest in the ACREI entities;
B. the filing of False K-1s with the IRS;
C. false filings with the Florida Secretary of State;
D. fraud committed against a mortgage lender; and
E. insurance fraud.

VFAC, ¶ 309. The Court will address each in *seriatim*.

1. The Predicate Acts

a. The Theft of Scurtis' Interests in ACREI

Scurtis does not deny executing a written "Assignment and Assumption of Membership Interest" transferring his interest in ACREI I, ACREI-II and ACREI-III to NPAV. Scurtis' Depo pp. 200-202. Nor is there a shred of record evidence supporting his allegation of "forgery". RVFAC, ¶ 306(c). And despite his self-serving claim that he "never knowingly signed" these documents, he had a duty to know their contents before putting his pen to paper. *Sabin*, 404 So. 2d at 773 ("[a] party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions"). Nor does Scurtis' professed lack of memory alter the analysis. *See, e.g., Larsen v. Citibank FSB*, 871 F.3d 1295, 1308 (11th Cir. 2017) [27 Fla. L. Weekly Fed. C201a] ("lack of memory is insufficient to create a genuine dispute of fact").[16]

Aside from the execution of these written assignments, Scurtis also executed a written consent acknowledging that Rodriguez was issued 1000 shares of, and named President of, NPAV, Inc., the controlling general partner of NPAV. That gave Rodriguez legal control over NPAV and, in turn, control over the ACREI entities. Scurtis also executed the share certificate memorializing Rodriguez' ownership, and testified that he (Scurtis) was not issued any ownership in NPAV, Inc. Scurtis Depo pp. 279-280. There is hardly anything surprising, or remotely remarkable, about a 95% owner assuming legal control over a business, and nothing in this record suggests that Scurtis, as a 5% owner, bargained for, or was otherwise entitled to, a perpetual right to control the affairs of an enterprise that Rodriguez wholly funded and owned a 95% stake in.

After the 2005 transaction assigning all of the ACREI interests (and ACREI controlled entities) to NPAV, Scurtis then repeatedly represented to lenders (and others) that NPAV had been assigned the ACREI controlled entities (and the limited partnerships the ACREI entities served as general partner of), confirming that those entities contributed to NPAV's net worth "of at least 17 million." *See, e.g.,* Guaranty Agreement, ¶ 4.1, dated April 13, 2005. He provided this covenant to lenders time and time again in order to secure financing. And the evidence is uncontroverted that the only assets NPAV had at the time these representations were made was the ACREI controlled Limited Partnerships that had been assigned to it.

Then there is Scurtis' years long course of conduct. After the 2005 assignments, he never once claimed to be in legal control of a single entity as its general partner, or because he still owned/controlled any ACREI entity. To the contrary, he acknowledged, in multiple emails, that Rodriguez had authority to make all decisions, including hiring and firing personnel. *See, e.g.,* August 27, 2008 email from Scurtis to Alan Kluger. ("I do not question Alex authority to reduce personnel, but I have not heard from Alex directly . . .").

After being unceremoniously removed in September of 2008, Scurtis then advised all senior employees that "effective immediately I will no longer be working for Newport . . . Stuart Zook will become the Chief Operating Officer . . . ." *See* September 18, 2008 email. The next day he sent an email to Alan Kluger, and others, advising that "I will no longer be involved with [Newport Property Ventures]". *See* September 19, 2008 email. He never again performed any work for NPAV, or any of the limited partnerships. Nor did he exercise (or even attempt to exercise) control over any ACREI entity or any related limited partnership. Instead, and as he readily admits, he "went [on] to" become the "Managing Partner" of another "real estate development company." AC, ¶ 160.

Finally, in November 2008, when Scurtis was alerted to possible fraudulent activity, his response was "this has nothing to do with me," and "I am not getting involved." Notwithstanding his newly professed "belief" that he always possessed legal control, after leaving in September 2008, and after becoming aware of these "very serious allegations," Scurtis never lifted a finger to protect the company. He instead carried on with his new venture because, as his father bluntly put it, he was "out of there."

While Scurtis now conveniently and disingenuously claims that throughout this entire period (2005-2014) he "believed that he was still in control of the general partner of the various partnership entities," and that he only learned of this "fraudulent change in ultimate control . . . through litigation in this matter," RVFAC, ¶ 135, the overwhelming evidence establishes that he was well aware of the assignments, and he acted accordingly. *See Fonseca v. Taverna Imports, Inc.*, 212 So. 3d 431, 441 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D634a] ("parties may be bound to the provisions of an unsigned contract if they acted as though the provisions of the contract were in force").

As the Court has said before, it was inclined to grant summary judgment on this "fraudulent change of ultimate control" claim altogether, as it finds Scurtis' position completely fanciful. The overwhelming evidence suggests that he voluntarily assigned his interests in the ACREI entities to NPAV, and the claim that he "believed that he was [always] in control," and found out otherwise only "through litigation in this matter," RVFAC, ¶ 135, reeks of afterthought and strains credulity. The Court nevertheless denied summary judgment, opting to give Scurtis the opportunity to present this anemic claim to a jury. This claim, however, raises nothing more than an ordinary business dispute. And no reasonable jury, applying a clear and convincing evidence metric, could conclude otherwise. *See, e.g., Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 501 (Fla. 3d DCA 1994) (Florida's RICO Act "simply cannot apply where there has been no criminal activity").

Scurtis also has yet to explain how he was directly injured "by reason of" this act of alleged racketeering. He has produced no evidence as to what his interest in the ACREI entities were worth at the time they were allegedly converted—the proper measure of compensatory damages. *See, e.g., In re Corbin's Estate*, 391 So. 2d 731, 733 (Fla. 3d DCA 1980) (the "proper measure of damages for conversion in Florida is the interest's reasonable market value, measured as of the time and place of conversion"); *Goodrich v. Malowney*, 157 So. 2d 829 (Fla. 2d DCA 1963). Rather, his damage theory is that had he remained in control, NPAV would have prospered under his leadership—leadership he never attempted to exercise. Putting aside the fact that this damage model emits an odor

of speculation, this alleged injury was suffered by NPAV, not Scurtis himself. Scurtis was injured, if at all, indirectly because his 5% interest became less valuable. He therefore lacks standing to bring a RICO claim premised upon this alleged "predicate act." *O'Malley v. St. Thomas Univ., Inc.,* 599 So. 2d 999 (Fla. 3d DCA 1992) (indirect injury is insufficient to confer standing under RICO)*; Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) ("a shareholder lacks [RICO] standing . . . where the alleged injury is diminution or destruction of the value of the stock . . . ," as in "these cases, the shareholder's injury is only indirect . . . ."); *Smithson v. Puckett,* 2020 WL 6151372, at *3 (W.D. Wash. Sept. 30, 2020) ("[t]o prove injury to business or property, plaintiffs must show proof of concrete financial loss, and not mere injury to a valuable intangible property interest").

b. The K-1s

As his next "predicate act," Scurtis says Defendants filed K-1s reporting income he did not receive. Specifically, Scurtis says that Defendants made fraudulent tax filings with the IRS, claiming that he was receiving hundreds of thousands of dollars of partnership distributions when, in reality, they were not paying Scurtis any distributions. RVFAC, ¶ 199. As the Court explained in a prior order, Scurtis strategically mischaracterizes this issue as one of "false reporting" to the IRS, when it involves nothing more than a legitimate (and benign) dispute over whether he owed money to certain of the limited partnership entities.

It is undisputed that some of the limited partnership entities carried significant debt on their books, classified as loans advanced to Scurtis. Scurtis was aware of the fact that these loans were on the books, and he admits he received the money. He nevertheless insists these loans were "fake", and were supposed to be forgiven, because the funds represented earned compensation booked as loans at the request of the partnerships' accountants.[17]

When distributions later became due to Scurtis, Defendants used the money he would have otherwise received to re-pay these loans and, as required by law, reported the amounts credited Scurtis as income, thereby resulting in his having a tax liability despite receiving no cash. This caused Scurtis a problem with the IRS, as he lacked liquidity and could not timely pay his taxes. But the issue this claim presents is not one of "false reporting." Scurtis earned this income, and Defendants were obligated to report it to the IRS, regardless of whether any cash changed hands. The disputed issue is whether the loans—admittedly on the partnerships' books—were "real" or "fake"—a routine commercial dust up over whether money was owed. And Defendants filing of K-1s, as they were legally obligated to do, are not RICO "predicate acts."

c. The Annual Reports Filed with Florida's Secretary of State

Plaintiff next claims that Defendants committed "predicate acts" by filing annual reports with the Florida Secretary of State on behalf of the three ACREI entities. These reports were fraudulent, according to Scurtis, because they were submitted without his authorization and signed by Zook as ACREI's manager and/or COO. First, as discussed earlier, the substantive dispute over whether Scurtis assigned his interest in the ACREI entities does not implicate a RICO "predicate act." It necessarily follows that subsequent filings with the Secretary of State—consistent with Defendants' position that the entities were assigned to NPAV—adds nothing to the legal analysis.

Moreover, there is no evidence that these annual reports contain any misrepresentation of material fact or were submitted for the purpose of perpetuating any fraud. There also is no evidence that anyone relied on these filings to their detriment or suffered economic injury "by reason of" these legally required submissions. Annual reports were filed for purposes of keeping ACREI, ACREI-II and ACREI-III administratively active with the State of Florida. These filings were "clearly required by state law," *Levitan v. Patti,* 2011 WL 1299947, at *11 (N.D. Fla. Feb. 8, 2011), and "[l]egally compelled mailings, such as those imposed by state law, are not 'steps in a plot to,' 'incident to,' or 'made for the purpose of' [a] scheme to defraud." *Id.* (dismissing with prejudice counts for wire fraud and mail fraud based on annual reports and renewals transmitted to the Florida Secretary of State).

d. The Mortgage/Insurance Fraud

Finally, Scurtis points to alleged mortgage and insurance fraud directed at third parties as additional "predicate acts." These frauds (or attempted frauds) were not directed at Scurtis, and caused him absolutely no injury whatsoever. Nor did this troubling conduct materially injure any of the entities, as no claims were ever asserted by either the lender or insurer that were the targets of these activities. The only arguable injury to the entities were the investigative costs, and the cost of settling Crook's whistleblower claim. That *de minimis* injury was suffered by NPAV, not Scurtis.

2. The Absence of a Pattern

Aside from the fact that the transgressions Plaintiff relies upon are not "predicate acts" at all, and that most of the conduct he complains of caused him no direct injury, the evidence also falls far short of establishing a pattern—an element requiring that a civil RICO plaintiff demonstrate both "continuity" and "relatedness," *see United States v. Indelicato*, 865 F.2d 1370, 1382 (2d Cir. 1989) (en banc), meaning predicate acts that amount to, or "threaten the likelihood of continuous criminal activity," carried out through acts that are related to each other. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989).

Continuity may either be closed-ended or open-ended. "Criminal activity that occurred over a long period of time in the past has closed-ended continuity, regardless of whether it may extend into the future." *Reich v. Lopez*, 858 F.3d 55, 60 (2d Cir. 2017). It is "primarily a temporal concept," *Spool v. World Child Intern. Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008), requiring predicate acts that extend "over a substantial period of time." *H.J. Inc.*, 492 U.S. at 230. Open-ended continuity refers to criminal activity "that by its nature projects into the future with a threat of repetition," involving crimes that, "by their very nature include a future threat"—an example being a "protection racket." *Reich,* 858 F. 3d at 60. Criminal activity also will be found to be continuous when "the predicate acts were the regular way of operating [the] business," even if the business itself is primarily lawful. *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 243 (2d Cir. 1999).

Even assuming "continuity" is present, "[b]ecause RICO does not apply to 'isolated or sporadic criminal acts,' it has [an additional] relatedness requirement. . ." *Reich*, 858 F.3d at 60. This means that the predicate acts "must be related both to each other (termed 'horizontal relatedness') and to the enterprise as a whole ('vertical relatedness')" *Id.* (citing *United States v. Cain*, 671 F.3d 271, 284 (2d Cir. 2012)). Vertical relatedness requires only "that the defendant was enabled to commit the offense solely because of his position in the enterprise or his involvement in or control over the enterprise's affairs, or because the offense related to the activities of the enterprise." *United States v. Burden*, 600 F.3d 204, 216 (2d Cir. 2010). To show horizontal relatedness, the predicate acts must "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not isolated events." *H.J., Inc.*, 492 U.S. at 240.

As the *Reich* court explained, "[w]hen dealing with 'an enterprise whose business is racketeering activity, such as an organized crime family, horizontal relatedness can be established simply by linking each act to the enterprise.' " *Reich*, 858 F.3d at 61. In cases like this,

however, involving an enterprise that is primarily a legitimate business, "courts must determine whether there is a relationship between the predicate crimes themselves; and that requires a look at, *inter alia*, whether the crimes share 'purposes, results, participants, victims, or methods of commission.' " *Id.* (citing *H.J., Inc.*, 492 U.S. at 240). This ensures that RICO does not ensnare "the perpetrators of 'isolated' or 'sporadic' criminal acts." *Id.* (citing *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016)). Florida's RICO statute is in accord. *See* Fla. Stat. § 895.02(7), (requiring at least "two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents"); *Castillo v. State*, 170 So. 3d 112, 116 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1538a].

Assuming for arguments sake that each alleged misdeed relied upon by Scurtis was a criminal "predicate act," and that Scurtis could demonstrate either open-ended or closed-ended continuity, these "predicate acts" are not horizontally related. First, the "participants" in the alleged crimes are completely different, albeit sometimes overlapping. The alleged theft of Scurtis' interests in the ACREI entities was accomplished by Rodriguez, presumably with the assistance of Levenson. No one else had any involvement in this claimed "fraudulent transfer of control" that took place in 2005.

As for the filings with the State of Florida, they were prepared and submitted by Zook between 2010 and 2020, years after the alleged theft of Scurtis' interests in the ACREI entities. *See* RVFAC, ¶ 170. The alleged false K-1s were filed between 2008-2016 by NPAV and its accountants. Finally, Zook—together with others—is alleged to have orchestrated the mortgage/insurance fraud. There is no record evidence of Rodriguez' participation.

Aside from a complete lack of common "participants", these "predicate acts" also had completely disparate purposes. Any deprivation of Scurtis' control would have been for the purpose of placing Rodriguez (a 95% owner in any event) in charge of the entities. The purpose of filing false K-1s (assuming they were false, and they were not) would be to either harm Scurtis economically by causing him to incur a nonexistent tax liability, secure a deduction for NPAV, or—as Scurtis alleges—"reduce Rodriguez' taxable losses" and "lower his audit risk." RVFAC, ¶ 201. The purpose for committing insurance fraud would be to secure a windfall for NPAV. And the purpose of committing mortgage fraud would be to prevent the lender from calling its debt. Put simply, each of these purported "predicate acts" had an entirely different purpose, weighing heavily against a finding of horizontal relatedness.

Each of the Plaintiff's alleged "predicate acts" also were directed at different victims. Scurtis was the victim of any fraudulent transfer of control and any false K-1 filings. The victim, had there been one, of any mortgage or insurance fraud would have been the targeted lender and insurer. And no one was victimized by the annual filings with Florida's Secretary of State.

The "methods of commission" of each "predicate act" also were completely different. There is no similarity whatsoever. *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1265 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C665a] ("[c]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events"). The truth is, as Plaintiff himself acknowledges, the only common denominator here is that "all the predicate acts related to the affairs of NPV . . ." Plaintiffs Opp. p. 43. That is not horizontal relatedness. *See, e.g., Vild v. Visconsi,* 956 F.2d 560 (6th Cir. 1992); *Hartz v. Friedman,* 919 F.2d 469 (7th Cir. 1990); *Howard v. Am. Online Inc.*, 208 F.3d 741 (9th Cir. 2000).

Plaintiff—in a misguided effort to transform this ordinary commercial dispute into a criminal racketeering case—has simply cobbled together sporadic and isolated acts of alleged misconduct, carried out by different participants, designed to accomplish different purposes, aimed at different victims, and executed using different methods of commission. As one court succinctly put it, he has tried "to fit a square peg in a round hole by squeezing garden-variety business disputes into civil RICO actions." *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992). *See also, Robert Suris Gen. Contractor Corp. v. New Metro. Fed. Sav. & Loan Ass'n*, 873 F.2d 1401 (11th Cir. 1989) (affirming summary judgment in defendant's favor when plaintiff took "a simple breach of contract or garden-variety fraud claim and attempted to boot-strap it into a 'federal case' by couching the allegations in [RICO] statutory language"); *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 181 (4th Cir. 2002) ("[w]e have cautioned against imposing civil RICO liability for garden-variety violations of the mail and wire fraud statutes 'because it will be the unusual fraud that does not enlist the mails and wires in its services at least twice' ").

B. CIVIL THEFT

Florida's civil theft statute, codified at Florida Statute Chapter 772, provides a remedy to persons "injured in any fashion by reason of any violation of § 812.012-812.037 or § 825.103(1)." Fla. Stat. § 772.11. Section 812.014 prohibits the wrongful obtaining or use of the "property of another," defined as "anything of value" including "[t]angible or intangible personal property, including rights, privileges, interests, and claims." *See* Fla. Stat. §§ 812.014 and 812.012(4). The statute therefore covers the theft of an intangible ownership interest in a juridical entity (*i.e.*, stock, LLC membership, etc.). *See, e.g., Donigan v. Nevins*, 785 So. 2d 573 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D920a]; *Goodrich v. Malowney*, 157 So. 2d 829 (Fla. 2d DCA 1963); *In re Corbin's Estate*, 391 So. 2d 731 (Fla. 3d DCA 1980).[18]

For the reasons discussed earlier, the Court concludes that no reasonable jury, applying a clear and convincing evidence standard, could find that Rodriguez (or anyone else) "stole" Scurtis' interests in the ACREI entities with felonious intent. The overwhelming evidence again shows that: (a) Scurtis, for consideration, transferred his interests to NPAV via written assignments; (b) Scurtis knew that those interests had been assigned to NPAV, and repeatedly told lenders that NPAV owned these assets in order to secure financing; and (c) Scurtis, through his actions over a period of years, was well aware that after 2005 he did not legally control the affairs of NPAV, or any affiliate. While the Court may permit him to present his common law conversion claim to a jury, it finds that no reasonable fact-finder could conclude that Rodriguez, acting with felonious intent, "stole" his interests in these entities.[19]

The other property Scurtis claims was converted are funds owed as acquisition fees. The Court has previously concluded that this alleged failure to pay money cannot, as a matter of law, support a claim for conversion/civil theft. *See, e.g., Gasparini v. Pordomingo,* 972 So. 2d 1053 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D295a]; *Futch v. Head*, 511 So. 2d 314 (Fla. 1st DCA 1987). The only exception to this rule—which has no application here—is when there exists an obligation to segregate specific funds, an example being "where a specific sum of money is to be held in constructive trust until the occurrence of a specified event." *Belford Trucking Co. v. Zagar*, 243 So. 2d 646, 648 (Fla. 4th DCA 1970).[20]

VI. CONCLUSION

Scurtis may (or may not) be owed substantial sums of money for acquisition fees, profits, salary, etc., and may have other direct damages he can recover through this action. That remains to be seen,

and he will be afforded an opportunity to present his claims for these compensatory damages to a trier of fact. But his newly minted RICO/civil theft claims were added for no purpose other than to embarrass Rodriguez, generate sensationalized press, and increase settlement leverage.

For the foregoing reasons, Defendants' Motion for Final Summary Judgment on counts 7 and 9 of Plaintiffs' Revised Verified Fourth Amended Complaint is **GRANTED,** and Final Summary Judgment is hereby entered in Defendants favor on these claims.[21]

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[1]6th Ave. Buildings, Ltd., 455 Building Ltd., 750 Bayfront Ltd., 500 N.E. 24 St., Ltd., and 2328 NE 6 Ave. Ltd.

[2]On that same day, Scurtis also filed thirteen (13) derivative actions on behalf of certain entities he and Rodriguez had formed to acquire real estate, with Scurtis serving as "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 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D939a]. On August 19, 2021, the Court entered "Final Summary Judgment" in each of these thirteen (13) actions, finding that they were irremediably time-barred. (D. E. 1106).

[3]Rodriguez was then a major league baseball player who was married to Scurtis' sister, Cynthia Rodriguez ("Cynthia").

[4]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."

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

[6]Levenson apparently represented all interested parties, and neither Rodriguez nor Scurtis were advised of any potential conflict, or of a need to retain (or consider retaining) separate counsel.

[7]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 NPAV, as "Assignee." But he alleges that he "never knowingly signed" these documents, and that this "fraudulent change in control" was done "behind [his] back." RVFAC, ¶¶ 135, 164. He is nevertheless bound by these contracts. *Sabin v. Lowe's of Florida, Inc.*, 404 So. 2d 772, 773 (Fla. 5th DCA 1981) ("[a] party has a duty to learn and know the contents of a proposed contract before he signs and delivers it and is presumed to know and understand its contents, terms and conditions").

[8]*See* April 5, 2005 Limited Partnership Agreement for NPAV.

[9]In a written consent executed by both Rodriguez and Scurtis, each acknowledged that Rodriguez was issued 1000 shares of, and named President of, NPAV, Inc. Scurtis was not issued any shares. *See* April 5, 2005 "Unanimous Written Consent . . . ," executed by Rodriguez and Scurtis. Scurtis also signed, as Secretary and Vice President, the NPAV, Inc. share certificate memorializing Rodriguez' sole ownership. *See* April 5, 2005 Share Certificate issuing Rodriguez 1000 shares of NPAV, Inc.

[10]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.

[11]In January 2009, Scurtis told NPVA, Ltd.'s accountant, Tony Argiz, that he had "advised [his] attorney to stop all legal action . . . I am grateful for the opportunities that Alex and Newport and everyone gave me. I apologize for any misunderstandings that have led to the current situation. I want you to know I always had Alex's best interest in mind and was always loyal to him." Jan. 8, 2009 email from Scurtis to T. Argiz. He then took no legal action until filing this case on December 17, 2014.

[12]Based on this "right of first refusal," Scurtis claims he was entitled 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 Avenue, 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].

[13]The new standard applies to all currently pending cases, and in *Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020) [46 Fla. L. Weekly S2a] the Florida Supreme Court invited the parties "to seek summary judgment under Florida's new summary judgment standard, once our rule amendment takes effect." *Id*.

[14]Like Fed. R. Civ. P. 56, Florida's new standard furthers "important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). As our Supreme Court emphasized, "our rules of civil procedure are meant 'to secure the just, speedy, and inexpensive determination of every action.' " *In re amendments to Fla. R. Civ. P. 1.510,* 309 So. 3d at 194. The "prior interpretation of our summary judgment rule . . . unnecessarily failed to contribute to that objective," as trial courts were forced to deny summary judgment so long as the nonmovant presented a "scintilla" of evidence, or raised the "slightest doubt" as to whether a genuine issue of material fact was present. *Id.* at 193. A "scintilla" of evidence, or the "slightest doubt," will no longer prevent summary disposition. *Id.* at 194.

[15]The federal RICO Act is codified at 18 U.S.C. Part I, Chapter 96, §§ 1961- 1968. Section 1961 provides the definitions of "racketeering activity" and lists the applicable crimes with their respective U.S. Code references. Section 1962 of the same Chapter lists the prohibited activities under RICO, including fraud by mail (Section 1341), fraud by wire (Section 1343), and financial institution fraud (Section 1344). Section 1963 states the criminal penalties, while Section 1964 provides the civil remedies.

Florida's substantive provisions are contained in Chapter 895 of the Florida Statutes, titled "offenses Concerning Racketeering and Illegal Debts." Section 895.02 provides the definitions as applied to the "Florida RICO Act" and identifies, *inter alia*, the statutory crimes that are chargeable under the Act. In 1986, the legislature separated the RICO Statute into a Civil RICO Act, codified in Chapter 772 ("Civil Remedies for Criminal Practices"), leaving the criminal RICO Act codified in Chapter 895. *Horance-Manasse v. Wells Fargo Bank, N.A.*, 526 Fed. Appx. 782, 784 (11th Cir. 2013). Both statutes are substantially similar. For example, both the Civil and Criminal RICO Acts list as predicate acts theft (Fla. Stat. 812), fraudulent practices (Fla. Stat. 817), and forgery (Fla. Stat. 831), which are the provisions under which Plaintiff has brought his RICO claim.

[16]When confronted with documents bearing his signature, Scurtis parroted the same "I don't recall"—"its very confusing"—"I just didn't know" refrain, insisting that despite executing these assignments "I never gave up any rights"—"I never gave up any ownership"—"I never gave up any of my powers." Scurtis Depo pp 191, 207, 212, 214, 215, 216, 218, 242, 256.

[17]According to Scurtis, the accountants wanted to book this compensation as loans because showing losses would assist Rodriguez' personal tax planning. If Scurtis is to be believed, these loans represented income that was required to be reported at the time—something that would have resulted in a tax obligation.

[18]As Plaintiffs point out in their memorandum addressing this issue, "[h]istorically, it was only tangible property that could be converted. Florida Courts now recognize, however, that '[a]ctions for conversion may properly be brought for a wrongful taking over of intangible interests in a business venture.' " *Taubenfeld v. Lasko*, 324 So. 3d 529 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1810a].

[19]In a "Notice of Supplemental Authority in Support of Summary Judgment" on Plaintiffs' claims for conversion and civil theft, Defendants say that Scurtis interests in ACREI, ACREI-II and ACREI-III were admittedly assigned to NPAV, and that only NPAV—which has not been sued for either conversion or civil theft—can be held liable for converting/stealing these interests. *See Transcapital Bank v. Shadowbrook at Vero, LLC*, 226 So. 3d 856 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1657b]. Because this issue has not been fully briefed, the Court does not, at this time, dispose of the conversion or civil theft claims on this basis.

[20]While Scurtis also alleges that Defendants converted his interest in some (or all) of the partnerships, *see* RVFAC, ¶¶ 269-274, there is no record evidence supporting this claim. Defendants in fact acknowledge that Scurtis has never been divested of, and still owns, his 5% interest in all the entities he and Rodriguez formed.

[21]Because the Court has disposed of these claims on other grounds, it need not decide whether they are time-barred, or whether the civil theft claim is subject to dismissal as a result of Plaintiff's failure to serve the requisite statutory demand.

* * *

Contracts—Venue—Forum selection clause—Non-signatories—Claims for fraudulent inducement, breach of fiduciary duty, and civil conspiracy alleging that defendant non-signatories misled plaintiff into entering a securities acquisition and contribution agreement, and diverted, dissipated, and unduly risked plaintiff's corporate assets before subsequently entering into a termination agreement—Defendants may enforce the mandatory forum selection clauses contained in the SACA and termination agreement because their enforcement of the mandatory forum clauses in the agreements was foreseeable by virtue of their close relationship to corporate signatory—Plaintiff is also equitably estopped from avoiding its contractual undertaking because it raises claims against affiliates of corporate signatory based upon substantially interdependent and concerted misconduct relating directly to the contracts sued upon—Court rejects argument that "no third-party beneficiaries" clause contained in SACA prevents defendants' enforcement of the forum selection clauses—While plaintiff has advanced claims based on both the SACA and the termination agreement, the termination agreement is the only contract still in force and it does not contain a "no third-party beneficiaries" clause—Additionally, defendants are more than just non-signatories to the agreements as they were defined as "affiliates" under both contracts, and conduct they allegedly engaged in was on behalf of corporate signatory—Plaintiff's tort claims are within scope of mandatory forum selection clause where clauses in both agreements are broad, and each claim arises out of and relates to subject agreements—Court rejects argument that forum selection provision is unenforceable because it was contained in a contract alleged to have been induced by fraud—To avoid forum selection provision, the fraud alleged must relate to the inclusion of the clause in the contract

MXY HOLDINGS LLC, Plaintiff, v. JAY SCHOTTENSTEIN, et al., Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case No. 2021-923 CA 01. September 21, 2021. Michael A. Hanzman, Judge. Counsel: Oliver D. Griffin, Denver, Colorado; Melissa A. Bozeman, Philadelphia, Pennsylvania; and William McCaughan, Jr., Miami, for Plaintiff. Angel A. Cortinas and Jonathan Kaskel, Miami; and Steven W. Tigges and Christopher J. Hogan, Columbus, Ohio, for Joseph Schottenstein, Jay Schottenstein and Jean Schottenstein, Defendants. Joshua Thaddeus Fordin, Miami, for Adam Arviv and Chiron Ventures Inc., Defendants.

ORDER OF DISMISSAL WITHOUT PREJUDICE

I. INTRODUCTION

Plaintiff, MXY Holdings LLC ("Moxie" or "Plaintiff"), brings this action against Defendants ALL JS Greenspace LLC, ("ALL J's"), Chiron Ventures Inc. ("Chiron"), Joseph Schottenstein, Jay Schottenstein and Jean Schottenstein (collectively "Schottensteins"), and Adam Arviv ("Arviv"). The Schottensteins, joined by Chiron and Arviv, move to dismiss (D.E. 31) on a number of grounds, including the presence of a forum selection clause in both contracts giving rise to this action, mandating that any disputes be litigated in Delaware.

The motion was fully briefed and argued to the Court on September 15, 2021. Because the Court finds that each claim pled here falls comfortably within the scope of controlling mandatory forum selection clauses, and that Defendants, though non-signatories, are entitled to enforce them, it dismisses this case without prejudice and goes no further. *See, e.g., Reyes v. Claria Life & Health Ins. Co.,* 190 So. 3d 154, 158-59 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D685b] ("[o]nce the trial court properly determined there was a valid and enforceable forum selection clause which provided for mandatory and exclusive jurisdiction in Delaware (and that the action could not be brought in Florida), the trial court. . . simply should have dismissed the action, leaving any [other] issues to be addressed in the agreed-upon forum of Delaware").

II. FACTS AS PLED[1]

Moxie is a "California-based multistate cannabis operator" which distributes "its award-winning and high-quality. . cannabis products through an established 250+ retail dispensary partner network." Compl. ¶ 1. By the spring of 2019, Moxie's "successful completion of two capital raises, totaling $43 million," placed it on "Defendants' radar as a particularly attractive and *well-capitalized* acquisition target for" Green Growth Brands, Inc.("GGB"), a Canadian corporation "initially formed by Defendants Joey Schottenstein and Arviv, in February 2018, . . under name 'Schottenstein Arviv Group Inc.' " Compl. ¶¶ 2, 24.[2]

In early 2019, Defendants approached Moxie about a potential acquisition, "rolling out a 'red carpet' sales pitch," aimed at Moxie's CEO and founder, Jordan Lams ("Lams"), who "recently gained recognition as an industry leader in cannabis and been named one of the Top 100 Most Influential People in Cannabis by High Times." Compl. ¶¶ 3, 30. After a number of preliminary discussions, "the parties engaged in three days of intense meetings in California to hammer out the deal transaction," and on July 8, 2019, Moxie and GGB entered into a Securities Acquisition and Contribution Agreement ("SACA"), "whereby Moxie agreed to be acquired by GGB in a proposed $310 million all equity transaction." Compl. ¶¶ 4, 50. Moxie also simultaneously loaned "$5 million at 6% interest to GGB to fund the acquisitions contemplated by the Moxie business combination." Compl. ¶ 58.

Moxie alleges that it entered into the SACA, and loaned the $5 million to GGB, because it was assured by the Schottensteins that their family was: (a) "behind the business 100%"; (b) "100% backing GGB"; (c) would not "let this fail"; (d) "were in to win"; and (e) the Schottensteins would use their relationships with major mall operators to assist GGB in securing kiosks in "Grade A" malls across the United States that would serve as a distribution network. Compl. ¶¶ 3, 33, 35, 38.[3] Lam (and Moxie's then chairman, David Rosenblatt) were repeatedly assured that the Schottensteins were fully committed to the success of GGB; that the board of GGB does "whatever they [the Schottenstein's] want" Compl. ¶ 38; and that the family would not allow GGB to fail, thereby causing it "reputational harm." Compl. ¶ 41. The basis of Moxie's fraudulent inducement claim can be summed up as:

> During dinner, Rosenblatt asked Jay Schottenstein: "Are you committed to GGB? Is GGB meaningful to you? Are you going to support it?" Jay Schottenstein indicated to Rosenblatt the answer to each of the foregoing questions was "YES."

Compl. ¶ 45.[4]

While Plaintiff immediately began working on integrating the two companies, "Defendants were taking no steps toward causing GGB to complete the Moxie acquisition." Compl. ¶ 5. They instead were exploring "business combinations with third parties," and enriching themselves by "syphoning off Moxie's labor, resources, and good will . . . ." Compl. ¶ 6. By "September 2019, GGB effectively stopped working on the deal." Compl. ¶ 65. In December 2019, GGB then "decided to terminate its pending business combination with Moxie ostensibly so GGB could finalize its deal with another suitor, Aurora Cannabis Inc." Compl. ¶ 68. GGB also advised Moxie that it "did not have the liquidity" to pay the $5 million loan, but "indicated it would have that liquidity if [it] closed its alternative deal with Aurora . . . ." Compl. ¶ 72.

Though Plaintiff alleges that but for the Aurora deal, GGB "had planned to hold Moxie hostage under the restrictive covenants in the SACA," it acknowledges that: (a) GGB asked "for an accommodation to allow GGB to terminate the SACA without immediately paying the $5M Note," and (b) the board "decided that it was in the best interests of Moxie and its shareholders to proceed with terminating the SACA . . . ." Compl. ¶¶ 73-75. Moxie and GGB, therefore, voluntarily entered into a December 18, 2019 "Termination Agreement" that

extinguished the SACA and "extended the payment obligation on the $5M Note until January 31, 2020 . . . ." Compl. ¶ 76. As "consideration for Moxie's agreement to extend the payment of the $5M Note by six weeks, and to compensate Moxie for its lost transaction costs, attorneys' fees, and lost opportunities," GGB agreed to pay Moxie an "extension fee" of approximately four million dollars ($4,000,000.00). Compl. ¶¶ 79, 80.

Section 2.2(b) of the Termination Agreement provided for a general release of GGB and all of the present Defendants, conditioned upon "the satisfaction by GGB of its obligations under the [$5M] Note and the [Extension Fee] Note . . . ." Compl. ¶ 85. As GGB defaulted on those obligations, Plaintiff says that this conditional release is "null and void ab initio." Compl. ¶ 86. Moxie thus claims that it may now "pursue the break fees contemplated by the SACA," an amount "of $10 million," which was to be satisfied through a delivery of "GGB shares." Compl. ¶¶ 87-88.

The bottom line is that Moxie alleges that it entered into the SACA (and agreed to make an unsecured $5 million loan to GGB) based upon assurances that the Schottenstein family would stand behind this venture and never let it fail. Then, when the deal appeared to crater, Moxie agreed to walk away if it was repaid the $5 million loan and received an approximate $4 million breakup fee. As GGB has allegedly defaulted on both of these obligations, thereby voiding the conditional release contained within the Termination Agreement, Moxie wants to go back and recover the termination fee provide for in the SACA, which entitles it to "78,817,766 shares of GGB Common Stock." Compl. ¶ 90.[5]

Finally, aside from alleging that it was fraudulently induced to enter in the SACA, related loan transaction, and Termination Agreement,[6] and that GGB defaulted on its monetary obligations, the Complaint also alleges that Defendants "breached their fiduciary and other tort duties owed to Plaintiff in its individual and/or creditor capacity" by "improperly diverting, dissipating, and unduly risking the company's corporate assets . . . that might otherwise have been used to pay its creditors . . . ." Compl. ¶ 94. Specifically, Moxie alleges that Defendants "orchestrated a wholesale shedding of GGB's value-producing assets in a prejudicial and unfair manner, upon information and belief, and then fast-tracked the entity for a Canadian insolvency proceeding . . . ."Compl. ¶ 96.[7]

III. THE CLAIMS

As its "First Cause of Action" Moxie brings a claim for "Fraudulent Inducement," alleging that it was misled into entering into the SACA and into making "multiple loans to GGB" when—at the time of signing—Defendants knew that "GGB would not or otherwise could not honor the obligations owing . . . to Moxie." Compl. ¶ 130. The representations regarding the Schottenstein family's commitment to GGB were false when made because the family "actually did not have or intend to provide/receive the type of organizational, financial, and reputational backing they represented and rather were content on letting the venture fail." Compl. ¶ 132.

Plaintiff next brings a claim for "Breach of Fiduciary Duty Upon Insolvency," premised upon "fiduciary obligations that Defendants owed to the corporation expanded to include GGB's creditors, ..." Compl. ¶ 138. Plaintiff, through its third cause of action, then brings a claim for "Aiding and Abetting [that] Fiduciary Breach" against Defendants ALL Js, Chiron, Joseph and Jay (but not Jean) Schottenstein, and Arviv. Plaintiff's fourth cause of action, titled "Fraudulent Misrepresentation," appears to repeat verbatim the same claim advanced in the first cause of action. The final (fifth) cause of action pled is a claim for "Civil Conspiracy" to commit the torts alleged in counts 1 and 2 (*i.e.,* fraud and breach of fiduciary duty).

IV. THE MOTION

The Schottenstein Defendants, joined by Defendants Chiron and Arviv, move for dismissal. They again advance a number of grounds, including the claim that this case is subject to mandatory forum selection clauses contained in both the SACA and the Termination Agreement, each of which require that this dispute be litigated in Delaware. That clause provides:

> Each of the Parties hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of the Delaware Court of Chancery and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement or the Transaction or for recognition or enforcement of any judgment relating thereto, and each of the Parties hereby irrevocably and unconditionally (a) agrees not to commence any such action or proceeding except in the Delaware Court of Chancery, (b) agrees that any claim in respect of any such action or proceeding may be heard and determined in the Delaware Court of Chancery and any appellate court from any thereof, (c) waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any such action or proceeding in the Delaware Court of Chancery, and (d) waives, to the fullest extent it may legally and effectively do so, the defense of an inconvenient forum to the maintenance of such action or proceeding in the Delaware Court of Chancery.

Motion 4-5 Defendants maintain that this case is an "action or proceeding arising out of or relating to" the SACA and Termination Agreement and that they, although non-signatories, have the right to enforce this bargain. The Court agrees.

V. ANALYSIS

"Parties [to a contract] have the right to control their litigation destinies by bargaining for the ability to litigate in a specific forum," *Reyes*, 190 So. 3d at 157 (internal citation omitted), and mandatory forum selection clauses are routinely embedded in commercial agreements because they "enhance contractual and economic predictability, while conserving judicial resources and benefitting commercial entities as well as consumers." *Am. Online, Inc. v. Booker,* 781 So. 2d 423, 424-25 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D386a]. These clauses are "presumptively valid," *Corsec, S.L. v. VMC Int'l Franchising, LLC,* 909 So. 2d 945, 947 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1942b], and must "be enforced in the absence of a showing that enforcement would be unreasonable or unjust." *Manrique v. Fabbri,* 493 So. 2d 437, 440 (Fla. 1986). Delaware law is in accord. *Ingres Corp. v. CA, Inc.,* 8 A.3d 1143, 1146 (Del. 2010).

To avoid enforcement of a mandatory forum selection clause, a resisting party must demonstrate that either: (1) the forum was chosen because of one party's overwhelming bargain power; *or* (2) enforcement would contravene public policy; *or* (3) the purpose of the agreement was to transfer a local dispute to a remote and alien forum in order to inconvenience one or both parties. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972); *Mar. Ltd. P'ship v. Greenman Adver. Assoc., Inc.,* 455 So. 2d 1121, 1123 (Fla. 4th DCA 1984).[8] In an attempt to avoid the mandatory forum selection clauses in both the SACA and Termination Agreement, Plaintiff claims that: "(1) the Schottenstein Defendants can neither enforce the SACA or the Termination Agreement nor enjoy the benefits of those contracts as non-parties to those contracts; (2) Moxie's claims do not relate to or arise out of the SACA or Termination Agreement; and (3) enforcement of those clauses would lead to unjust results." Plaintiff's Opp. 8.

A. Defendants, as Non-Signatories, May Enforce the Mandatory Forum Selection Clauses

The question of whether non-signatories to a contract may compel signatories to honor mandatory venue provisions (*i.e.,* arbitration clauses and forum selection clauses) has been addressed by appellate courts in both Florida and Delaware. Florida appellate courts have repeatedly held that "a non-signatory may invoke a signatory's forum selection clause where the non-signatory and signatory are related," *Citigroup Inc. v. Caputo,* 957 So. 2d 98, 102 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1272a] (internal citation omitted), because in such circumstances "there exists a close relationship between the non-signatory and signatory and the interests of the non-signatory are derivative of the interests of the signatory." *Deloitte & Touche v. Gencor Indus., Inc.,* 929 So. 2d 678, 683 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1401a]. *See also Reyes,* 190 So. 3d at 158-59 (enforcing agreement requiring that all disputes be resolved by arbitration in Delaware, and affirming dismissal of case brought against both signatories and non-signatories to the contract).

Similarly, "[u]nder Delaware law, which is consistent with the laws of many other jurisdictions, a non-signatory has standing to invoke and enforce a forum selection clause where it is 'closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound.' " *Mack v. Rev Worldwide, Inc.,* 2020 WL 7774604, at *17 n.135 (Del. Ch. Dec. 30, 2020); *Neurvana Med., LLC v. Balt USA, LLC,* CV 2019-0034-KSJM, 2019 WL 4464268, at *5 (Del. Ch. Sept. 18, 2019) (permitting related non-signatories to enforce mandatory venue agreements serves "to foreclose [an] . . . end-run around an otherwise enforceable [f]orum [s]election [p]rovision").

Another basis relied upon to permit non-signatories to enforce mandatory arbitration/forum selection clauses is the doctrine of equitable estoppel. Courts reason that a signatory who agrees to resolve a dispute in arbitration (or a selected judicial forum) is estopped from avoiding its contractual undertaking "if the signatory raises allegations of concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Greene v. Johnson,* 276 So. 3d 527, 531 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2014a] (enforcing arbitration clause because plaintiff's claims against the "non-signatory defendants 'are based on the same set of operative facts' " alleged against the signatory to the contract); *Kratos Inv. LLC v. ABS Healthcare Serv., LLC,* 319 So. 3d 97, 101 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D603a] (" . . . courts 'have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed' "); *Kolsky v. Jackson Square, LLC,* 28 So. 3d 965, 969 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D458a] (non-signatories to limited liability company (LLC) agreement could compel arbitration of signatory's claims when signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract"); *Armas v. Prudential Sec., Inc.,* 842 So. 2d 210, 212 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D850c] (where signatories claims against non-signatories "arise out of the same factual allegations of concerted conduct by both the non-signatory . . . and the signatories . . . equitable estoppel is warranted" and non-signatories "can also compel arbitration . . ."); *Beck Auto Sales, Inc. v. Asbury Jax Ford, LLC,* 249 So. 3d 765, 767 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1380a] (". . . principles of equitable estoppel sometimes allow a non-signatory to compel arbitration against someone who *had* signed an arbitration agreement" when: (1) the signatory to the contract containing the arbitration clause "alleges 'substantially interdependent and concerted misconduct' by both the non-signatory and one or more of the signatories" or (2) ". . . the claims relate directly to the contract and the signatory is relying on the contract to assert its claims against the non-signatory"); *Lash & Goldberg LLP v. Clarke,* 88 So. 3d 426, 427-28 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1173a] (same); *AP Atl., Inc. v. Silver Creek St. Augustine, LLLP,* 266 So. 3d 865, 866 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D722c] (same).

Plaintiff alleges that the Schottensteins are "controlling principal[s]" of GGB, and that Defendant ALL J's—which is "indirectly owned, managed, and/or controlled by Joey Schottenstein"—is GGB's "largest" shareholder. Compl. ¶¶ 14, 16-18. The Complaint also affirmatively alleges that Defendants were at all material times "Affiliates" who had complete control over GGB. For example, Moxie alleges that Joey Schottenstein is the "founding and organizing member, former director, indirect owner, former Chairman, and a non-publicized controlling principal of GGB"; that Jay Schottenstein is an "indirect owner and a non-publicized controlling principal of GGB"; that Jean Schottenstein is "an indirect owner, shareholder, director, and a non-publicized controlling principal of GGB"; and that ALL J's is "the largest shareholder, a financial advisor, and a former issuer promoter of GGB . . . ." Compl. ¶¶ 14-17. And the substantive allegations against the Defendants all relate to wrongful conduct they allegedly engaged in with respect to the contracts containing the forum selection clauses.

As these non-signatory Defendants are all "closely related" to GGB, a signatory to the contracts, their enforcement of the mandatory forum clauses in these agreements was "foreseeable by virtue of" their relationship to GGB. *See Mack,* 2020 WL 7774604, at *17 n.135. Plaintiff also is equitably estopped from avoiding its contractual undertaking because: (a) it raises claims against "Affiliates" of GGB based upon "substantially interdependent and concerted misconduct" relating "directly to" the contracts (SACA and Termination Agreement) sued upon. *Beck Auto Sales,* 249 So. 3d at 767. For both these reasons, precedent clearly permits Defendants to enforce these mandatory forum selection clauses.

Plaintiff, however, says not so fast—directing the Court to the Fourth District's opinion in *Crastvell Trading Ltd. v. Marengere,* 90 So. 3d 349 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1441b]. In *Marengere* the contract containing the mandatory forum selection clause also provided that "[n]one of [its] terms" are "enforceable by any person" other than "the named parties" and their assignees. *Id.* at 352. Because the agreement "specifically state[d] that a non-party derives no rights," the Fourth District concluded that the non-party "did not have standing to enforce the forum selection clause . . . ." *Id.* at 354. Plaintiff points out that the SACA contains a similar provision, titled "No Third-Party Beneficiaries," *see* Compl. Ex. A at § 13.8, and insists that like the movant in *Crastvell,* Defendants lack the ability to enforce the mandatory forum selection clauses contained in the SACA and Termination Agreement. The Court disagrees.

First, while the SACA contains a "No Third-Party Beneficiaries" clause, the Termination Agreement—which supersedes the SACA—does not. The only contract that remains extant is the Termination Agreement, and Plaintiff has not sought to rescind that contract and place the parties back into the SACA. While it is true that Plaintiff has advanced claims based on both agreements, the only contract still in force is the Termination Agreement, and that contract again does not contain a "No Third-Party Beneficiaries" clause.

Second, the Defendants are more than just non-signatories to the SACA and Termination Agreement. They are defined "Affiliates" under both contracts, and the conduct they allegedly engaged in was on behalf of GGB—a signatory to each agreement. *See* Compl. Ex. A at p. 2 § 1.; Ex. D at p. 1 § 1.1.

Third, the Third District opinions holding that, under the circumstances presented here, non-signatories may enforce mandatory venue clauses, are not based upon the non-signatories' "intended third party beneficiary" status. Put another way, our appellate court did not permit the non-signatories in these cases to enforce these clauses *because* they were "intended third party beneficiaries" of the contract. They were permitted to enforce the mandatory venue clause because they were closely related to the other signatory (here GGB), and were allegedly engaged in "concerted misconduct" with that signatory, *Greene,* 276 So. 3d at 531, *or* because the signatory plaintiff was equitably estopped from avoiding its contractual undertaking. The appellate court's focus in each of these cases was on the relationship the non-signatory seeking enforcement had with a signatory, the nature of the claims brought, and whether the signatory resisting enforcement should be estopped from avoiding its agreement. Whether the non-signatory was (or was not) an "intended third party beneficiary" of the contract (something the Court believes to be completely irrelevant to this issue), was never even mentioned, and nothing in any of these cases suggests that the party seeking enforcement was in fact an "intended third party beneficiary" of the contract containing the mandatory forum selection clause. *See, e.g., Venezia Lakes Homeowners Ass'n, Inc. v. CSX Transp. Inc.,* 43 So. 3d 93, 95 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1747a] ("[u]nder Florida law, a third party is considered a beneficiary of the contract only if the contracting parties intended to primarily and directly benefit the third party").

Finally, if this Court were to agree with Plaintiff, it would have to find that Defendants have the ability to enforce the mandatory forum selection clause in the Termination Agreement, but not the ability to enforce the identical mandatory selection clause in the SACA. Assuming the claims pled here fall within the scope of these clauses (which the Court will address next), Plaintiff's claims arising out of the Termination Agreement would then be sent to Delaware, while its claims arising out of the SACA would remain here—an obviously absurd result. Or the Court could avoid splitting the case by denying enforcement of the forum selection clauses for compelling practical reasons. *See, e.g., Deauville.* The Court believes that the more prudent course is to enforce the contracts and permit the case to be litigated in Delaware, as the parties stipulated.

The Court concludes that the Defendants—defined "Affiliates" of GGB—are entitled to enforce the mandatory forum selection clauses in the contracts that are at issue in this case because; (a) each Defendant is closely related GGB—a signatory; (b) Plaintiff raises allegation of interdependent and concerted misconduct by the Defendants and GGB—an entity Defendants were acting on behalf of and (c) Plaintiff is equitably estopped from avoiding enforcement of its own contractual undertaking. The next question, then, is whether this dispute falls within the scope of these clauses. *See, e.g., Beck Auto Sales,* 249 So. 3d at 768 (" . . . even when a non-signatory can rely on equitable estoppel 'to access [the arbitration] clause,' the non-signatory can compel arbitration only if the dispute at issue 'falls within the scope of the . . . arbitration clause' ") (internal citation omitted).

B. Plaintiff's Claims Are Within the Scope of the Mandatory Forum Selection Clause

Both Florida and Delaware appellate courts have settled the question of what claims fall within the scope of mandatory forum clauses that attach to any dispute "arising out of," "connected to" or "related to," a contract.[9] In *Seifert v. U.S. Home Corp.,* 750 So. 2d 633 (Fla. 1999) [24 Fla. L. Weekly S540a] our Supreme Court placed mandatory forum clauses into two general categories: narrow provisions which limit their scope to disputes "arising out of any agreement, and broad provisions that cover all disputes "arising out of or related to" an agreement. *Id.* at 637. The *Seifert* court held that the former (*i.e.*, narrow clause) attaches only to claims "relating to the interpretation of the contract and matter of performance," and that the latter (*i.e.,* broad clause) encompasses "virtually all disputes between the contracting parties, including related tort claims." *Id. See also, Jackson v. Shakespeare Found., Inc.,* 108 So. 3d 587, 593 (Fla. 2013) [38 Fla. L. Weekly S67a] (a claim arises "out of" a contract when it has "a direct relationship to a contract's terms and provisions," and a claim is "related to" a contract whenever it has a "significant relationship" to the agreement, regardless of whether the claim is "founded in tort or contract law"). Delaware's law is in accord. *See ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.,* 2011 WL 4552508, at *8 (Del. Ch. Sept. 14, 2011).

The mandatory forum clauses in the SACA and Termination Agreement are broad, covering "any action or proceeding arising out of or relating to this Agreement or the transaction . . . ." These clauses, therefore, attach to any dispute between the parties, whether in contract or tort. Plaintiff nevertheless insists that "[t]his case is about the independent torts committed by Defendants in inducing Moxie into entering into the SACA with GGB, and Defendants' breach of fiduciary duties to GGB's creditors (such as Moxie) upon GGB's impending insolvency. This case is *not* about GGB's breach of the SACA, the Termination Agreement, or any of the promissory notes to which Moxie and GGB are parties." Plaintiff's Opp. p. 9. For that reason, Plaintiff says out that these claims are not barred by the so-called "independent tort doctrine." *Id.* p. 9-10, citing *California Inst. of Arts & Tech., Inc. v. Campus Mgmt. Corp.,* 2020 WL 1692079, at *5 (S.D. Fla. Jan. 22, 2020).

Plaintiff misses the point. The issue here is not whether its tort claims are foreclosed by the independent tort doctrine. That common law rule precludes contracting parties from recovering in tort unless the alleged tortious conduct is "independent," *see Peebles v. Puig,* 223 So. 3d 1065, 1069 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1080a], and in this district a tort is not considered "independent" unless both; (a) the conduct claimed to be tortious is separate and distinct from conduct amounting to a breach of contract; *and* (b) the damages "stemming from" the alleged tort are "separate and distinct from the damages sustained from the contract's breach." *Island Travel & Tours, Ltd., Co. v. MYR Indep., Inc.,* 300 So. 3d 1236, 1239 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D704a] (plaintiff could not sue in tort where "[t]he only properly alleged misrepresentation simply [had] to do with Island's failure to perform under the contract"); *ESJ JI Operations, LLC v. Domeck,* 309 So. 3d 248, 250 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2513a] (tort claim could not be maintained where plaintiff had failed "to demonstrate that it had damages that were separate and distinct from those . . . which it stood to recover in its breach of contract claim"). The doctrine also forecloses fraud claims based upon alleged misrepresentations relating to matters that have been "adequately covered or expressly contradicted in a later written contract." *GVK Int'l Bus. Group, Inc. v. Levkovitz,* 307 So. 3d 144, 146 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1777a].

The independent tort doctrine reflects a judicial "unwillingness to introduce uncertainty and confusion into business transactions," recognizing that compensatory damages are "an adequate remedy for an aggrieved party to a breached contract." *Lewis v. Guthartz,* 428 So. 2d 222, 223 (Fla. 1982). So, absent proof of conduct "independent from the acts that breach[ed] the contract," *and* "non-duplicative damages," a plaintiff will be limited to their contractual remedies. *Aanonsen v. Suarez,* 306 So. 3d 294, 295 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1519b].

The question *sub judice* has absolutely nothing to do with whether Plaintiff's tort claims are barred by the independent tort doctrine. Maybe they are and maybe they are not. The issue here is whether Plaintiff's tort claims fall within the scope of the mandatory forum selection clauses contained in both the SACA and the Termination Agreement. They do because: (a) each claim pled arises out of and relates to the agreements that were alleged to have been fraudulently induced and then breached; and (b) absent the agreements Defendants "would not have been obligated by the duties allegedly violated." *JEA v. Zahn,* 2021 WL 3730702, at *3 (Fla. 1st DCA Aug. 24, 2021) [46 Fla. L. Weekly D1927e] (broad arbitration clause coveting "any dispute, controversy or claim arising out of, committed with and/or otherwise relating to this Agreement" covered tort claims even if duties allegedly breached arose under *both* the contract and common law).

Because each claim pled by Plaintiff arises out of, and is related to, the contracts entered into between Moxie and GGB, they all fall within the scope of the mandatory forum selection clauses contained in these agreements. *See, e.g., Gregory v. Electro-Mech. Corp.,* 83 F.3d 382, 385 (11th Cir. 1996) ("a claim of fraud that related to inducement of an agreement generally is covered by an 'arising out of or relating to this agreement' arbitration clause"); *Episcopal Diocese of Cent. Fla. v. Prudential Sec., Inc.,* 925 So. 2d 1112, 1115 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1004a] (tort claims are within the scope of a broad arbitration clause so long as they arise from, or bear a "significant relationship to," the contract between the parties).

C. **There is Nothing "Unjust" About Requiring Plaintiff to Litigate the Case in the Forum it Agreed Upon**.

Plaintiff next argues that it should be relieved from its contractual agreement to resolve this dispute in the Delaware Chancery Court because: (a) both agreements were procured by fraud and "[i]t is long-standing Florida law that where a contract is procured by fraud or misrepresentation, " 'every part of the [ ] contract' is vitiated . . . ." Plaintiff's Opp. p. 13, citing *Glob. Quest, LLC v. Horizon Yachts, Inc.,* 849 F.3d 1022, 1027 (11th Cir. 2017) [26 Fla. L. Weekly Fed. C1211a]; and (b) Plaintiff is ". . . aware of no factual basis upon which a Delaware court could exercise personal jurisdiction over the Schottenstein Defendant in relation to this dispute . . . ." Plaintiff's Opp. pp. 14-15.

Plaintiff is far from the first to argue that a mandatory venue provision contained within a contract alleged to have been induced by fraud is unenforceable. That argument has been made, and soundly rejected, for decades and is foreclosed by binding precedent holding that to avoid an arbitration/forum selection provision, the fraud alleged "must relate to the inclusion of the clause in the contract," not the contract as a whole. *First Pac. Corp. v. Sociedade de Empreendimentos e Construcoes, Ltda.,* 566 So. 2d 3, 4 (Fla. 3d DCA 1990); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04 (1967). Furthermore, all Defendants have agreed to submit to the jurisdiction of the Delaware Chancery Court and litigate this case in that forum.

VI. CONCLUSION

Plaintiff, a sophisticated entity represented by sophisticated counsel, entered into two agreements that plainly and unambiguously require that any dispute "arising out or relating to" them be litigated in the Delaware Chancery Court. The claims pled here clearly arise out of and relate to these contracts; Defendants have the right to insist that Plaintiff litigate this case in the stipulated forum; and there is nothing "unjust" about holding Plaintiff to its bargain. Nor are there any compelling practical reasons to deny enforcement of these mandatory venue clauses. *See Deauville, supra.* Accordingly, it is hereby **ORDERED**:

1. This case is dismissed without prejudice. All pending motions are **DENIED** as moot

2. The Court reserves jurisdiction to adjudicate any authorized and timely post-judgment motions including, but not limited: to, any motions for attorney's fees and/or costs.

3. The Clerk is directed to close this case.

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[1]The material facts pled must, at this stage of the case, be taken as true. *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.,* 842 So. 2d 204, 206 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D847a]

[2]After changing the company name to "Green Growth Brand Ltd.", this cannabis startup was later taken public and listed on the Canadian Stock Exchange. Compl. ¶26. GGB later became subject to a corporate insolvency proceeding pursuant to the "Companies' Creditors Arrangement Act." For that reason, Plaintiff was unable to bring claims against GGB in this case.

[3]The Schottensteins are alleged to be "one of America's wealthiest families," with "unlimited resources." Compl. ¶¶ 2, 35.

[4]Defendants argue that these types of representations are mere "puffery" that cannot, as a matter of law, be the basis of fraud claims. (Motion pp.17-19), citing *Carvelli v. Ocwen Fin. Corp.,* 934 F.3d 1307, 1319 (11th Cir. 2019) [28 Fla. L. Weekly Fed. C119a]; *Garwood Packaging Inc. v. Allen & Co.,* 378 F.3d 698, 701-03 (7th Cir. 2004); *Airborne Health, Inc. v. Squid Soap, LP,* 2010 WL 2836391, at *8 (Del. Ch. July 20, 2010). *See also MDVIP, Inc. v. Beber,* 222 So. 3d 555, 561 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1248a]. Because the Court finds that this case must be litigated in Delaware, it again does not address any other issues raised.

[5]This breakup fee was required to be paid if the SACA was terminated by Moxie due to GGB' s breach. *See* SACA, § 12.3(a)(i). The SACA was terminated by mutual agreement. Moreover, even if the *release* contained in the termination agreement is no longer valid, the Termination Agreement itself still is and the SACA remains extinguished. The Court therefore questions how Plaintiff can possibly seek any relief under the SACA. In any event, the issue of whether GGB's alleged failure to pay the Notes entitles Moxie to now seek the termination fee provided for under the SACA (as opposed to its remedies under the Termination Agreement) is not presently before the Court.

[6]While the Court did not see allegations of fraud directed towards the Termination Agreement, at oral argument counsel made clear that its client claims that both contracts (the SACA and Termination Agreement) were fraudulently indeed.

[7]During oral argument counsel acknowledged that its client never acquired any equity in GGB, and that Moxie's claim for breach of fiduciary duty is based solely upon duties that Defendants, as officers/directors of GGB, allegedly owed creditors.

[8]In *Deauville Hotel Property LLC v. Endurance American Specialty Insurance Company,* 28 Fla. L. Weekly Supp. 491a (Fla. 11th Cir. Ct. May 27, 2020), this Court addressed the issue of whether a party seeking to avoid enforcement of a mandatory forum selection clause must demonstrate that enforcement would be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court," *Manrique,* 493 So. 2d at 444, or if a court has greater flexibility and may deny enforcement for other "compelling reasons." This Court concluded that enforcement of these clauses may be denied for "compelling" practical reasons, such as when enforcement would "result in duplicative effort and expense, a risk of inconsistent results, and the taxing of resources in multiple jurisdictions, ..." *Id.* No such compelling practical concerns are raised here.

[9]While many decisions involve arbitration clauses, courts apply the same reasoning in interpreting forum selection clauses. *See, e.g., Fairbanks Contracting & Remodeling, Inc. v. Hopcroft,* 169 So. 3d 282 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1637a]; *Inspired Capital, LLC v. Conde Nast,* 225 So. 3d 980 (Fla. 3d DCA 2017)[42 Fla. L. Weekly D1966a]; *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.,* 2011 WL 4552508 (Del. Ch. Sept. 14, 2011).

* * *

Dissolution of marriage—Child custody—Timesharing—Modification of time-sharing plan to allow child to reside with mother and father equally but to attend private school is in best interest of child—Mother, who has been main caretaker, has repeatedly demonstrated incapacity to encourage relationship between child and father, an inability to consider best interest of child over her own wants and desires, and an inability to communicate with father regarding child—Mother's motions to modify child support and to require payment of medical co-pays, day care costs, and correct child support are denied—Attorney's fees—Attorney's fees awarded to wife in an amount determined to be reasonable after consideration of various factors, including claims made by former wife, results obtained, mother's violations of court orders, and denial of nearly all matters requested by wife

IN RE: THE MARRIAGE OF PATRICK TOMA, Petitioner/Former Husband/Father, and CAROLINE TOMA, n/k/a CAROLINE SESI, Respondent/Former Wife/Mother.

Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 09-4063 - 35. October 25, 2021. Susan F. Greenhawt, Senior Judge. Counsel: Harry Hipler, Dania Beach, for Former Husband, Patrick Toma. Alan Burton, Boca Raton, for Former Wife, Caroline Toma.

[See also 29 Fla. L. Weekly Supp. 124a]

FINAL JUDGMENT OF MODIFICATION OF TIME SHARING, PARENTING PLAN, AND PARENTAL RESPONSIBILITY, AND OTHER RELATED FINANCIAL AND NON-FINANCIAL MATTERS

THIS CAUSE CAME on to be heard before the Honorable Susan Greenhawt via Zoom on September 1, 2021 beginning at 8:30 am and ending at 5:00 pm for the trial of this cause, and after trial on September 21, 2021 from 11:30 am to 12:15 pm at a case management conference as concerns the following motions that were filed by the parties:

a. Former Husband's (Father) Supplemental Petition for Modification of Time Sharing and Parenting Plan and Parental Responsibility; Former Husband's (Father) Amended Motion to Allow Minor Child to Attend Private School and Other Relief; and Former Husband's (Father) Motion for Attorney Fees and Costs;

b. Former Wife/Mother's Amended Motion for Clarification and Payment for Child Care Costs; Former Wife's Motion for Attorney Fees and Costs as to Father's Supplemental Petition for Modification of Timesharing, etc.; Former Wife's Motion for Modification of Child Support; Former Wife's Amended Motion for Contempt and for Reimbursement of Medical Care Costs; Former Wife's Motion for Contempt for Former Husband Not Paying Full Amount of Court Ordered Child Support; Former Wife's Motion for Attorney Fees and Costs as to Relocation Petition; Former Wife's Emergency Motion to Allow Child to Attend OMNI Middle School.

After considering the testimony of the parties, evidence presented, the arguments of counsel, the Court file and its pleadings, the transcript of the prior hearing on Relocation, the Court finds and orders as follows:

FATHER'S SUPPLEMENTAL PETITION FOR MODIFICATION OF TIME SHARING, PARENTING PLAN, AND PARENTAL RESPONSIBILITY, AND MOTHER'S EMERGENCY MOTION FOR CHILD TO ATTEND OMNI MIDDLE SCHOOL

1. As concerns the Father's Supplemental Petition for Modification of Time Sharing, Parenting Plan, and Parental Responsibility, and the Former Wife's Emergency Motion to Allow Child to Attend OMNI Middle School, the Court **GRANTS** the Father's Supplemental Petition for Modification of Time Sharing, pursuant to Fla Stat. 61.13 (3) and the best interest of the child, and **DENIES** the Mother's Emergency Motion for Child to Attend Omni Middle School in light of this modification.

2. Former Husband/Father was represented by Harry Hipler, Esq. Former Wife/Mother was represented by Alan Burton, Esq. Both parties and their counsel were present at the hearings.

3. There was one child born of the marriage, FT, (herein after called "FT" or "child" who was born in December, 2008.

4. After considering the criteria provided in Section 61.13 (3) Florida Statutes, and the evidence presented, the Court finds that there has been a substantial, material, and unanticipated change in the circumstances from the date of the last modification proceeding on January 27, 2016 to the present, and therefore it is in the best interest of the child to grant the Former Husband's (Father) Supplemental Petition for Modification of Time Sharing. Therefore, the Court finds as follows:

A. This Court entered a Final Judgment Denying Relocation on March 23, 2021, pursuant to the Mothers Supplemental Petition for Relocation that was denied on a temporary relocation basis on September 25, 2020, and on a final relocation basis the Court denied Former Wife's Petition for Relocation on March 23, 2021. The Court reserved jurisdiction over requests for child support, attorneys' fees and costs, and Former Husband's Supplemental Petition for Modification of Time Sharing. In the Petition for Relocation that was denied by this Court, the undersigned Circuit Court Judge heard and considered evidence provided at that hearing, therefore, this Judge is well familiar with the facts and circumstances of this case in addition to listening to evidence that was provided at this hearing by these parties. Further, pertinent portions of the trial transcript were filed with the Court (Dock. 820, 821).

B. **Section 61.13 (3(a) Florida Statutes**. The Mother has repeatedly demonstrated a total incapacity to encourage a close and continuing parent/child relationship with the Father. Mother has failed to follow the existing Parenting Plan by virtue of her unilateral decision to move to Michigan with the child without advising the Father of her relocation, her use of self-help in doing so, and without a coherent plan for herself and the child before she left. She also failed to advise the Father where she lived after she moved to Michigan and upon her return to Florida in November, 2020 after she was directed to return the child and during the Relocation proceeding. She has also attempted to enroll the child into a Boca Raton public school in spite of the Final Judgment Denying Relocation by failing to follow paragraph C, where the Court specifically provided that the child shall reside in Broward County. In spite of the Final Judgment and a prior order, she failed to allow the Former Husband to enroll the child in a private school, which she stated would be acceptable to her in a prior hearing, and that was agreed to pursuant to a prior order entered on November 9, 2020 (Dock. 738).

C. **Section 61.13 (3)(c) Florida Statute**. The demonstrated capacity and disposition of the mother to determine, consider, and act upon the needs of the child, as opposed to the needs or desires of herself does not appear to be present in this case. Mother relocated to Michigan in violation of Section 61.13001 *et. seq.* She decided to move to Michigan for her own self-interest without considering the best interests of the child. After she moved to Michigan, she resided with relatives, at a variety of hotels that she could not afford, she worked for a brief period of time before she quit, and she did not maintain permanent employment in Michigan in order to maintain a stable residence with the child. During the entire Relocation proceeding she claimed that she would relocate to Michigan regardless of the Court's ruling, with or without the child, which was not in the best interest of the child based upon the Guardian Ad Litem's Report (Dock. 769) that this Court considered and adopted. She did not consider the needs of the child and still does not do so. She did what she wanted to do, not what was in the best interest of the child, and she has shown that she is incapable of maintaining a stable environment for the sake of her child and herself as she has moved many times rather than maintain a stable home for her and the child. While the Mother has relatives in Michigan, and so does the Father, the child was born and raised in Broward County, where he has numerous family members that he visits regularly, substantial time sharing with the Father, who is close with the child and sees him regularly. She has also hindered enrolling the child into a private school, which this Court finds is in the best interest of the child.

D. **Section 61.13 (3)(d) Florida Statute**. Mother has resided in numerous places since the last modification proceeding, including but not limited to Hollywood, Boca Raton, Fort Pierce, Delray Beach, and various suburbs in and around Detroit where she relocated during the summer, 2020. She has also resided in a variety of hotels while in Michigan and South Florida. After the entry of this Court's Final Judgment Denying Relocation, she returned to Boca Raton, and she

currently resides in an apartment where she receives public assistance rental help in what is a month to month tenancy. She has not resided in a stable, satisfactory environment with any desire of maintaining continuity for the child for some time. She also moved to Boca Raton for her own personal reasons in the past, and after she vacated her former residence in April, 2020, and when she relocated to Michigan on her own with the child. On the other hand, Father is stable, he has lived in a nice condominium for years and moved there years ago so he could be close to the child for time sharing purposes, he is a "hand's on" entrepreneur, he has had a quality, continuing, and loving relationship with the child from his birth to the present date. He time shares regularly and routinely, and he attempts to have the child more time than is permitted by the Parenting Plan.

E. **Section 61.13 (3)(j)(l).** The demonstrated capacity of the Mother to communicate with and keep the other parent informed of issues and activities regarding the minor child and the willingness of each parent to adopt a unified front on all major issues when dealing with the child, clearly and totally does not appear to be present by her. Moth does not have insight into how her behavior negatively impacts the child. Mother discusses the litigation with the minor child, she has used the child as an intermediary and messenger when communicating with the Father. Mother when she does communicate with Father only uses email. She refuses to speak with him by telephone or text and has blocked him from doing so. She has also unilaterally decided what school the child should attend contrary to court orders.

F. **Section 61.13 (3)(p).** Demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities. Father has aided the child in the child's schooling and homework. When the child was falling behind in virtual school, he took it upon himself to make certain that the child completed his school tasks for graduation and to stay ahead so that he could see his relatives during any holidays. When the child is with him, he cooks, he has a stable home in Broward County and has had one for many years. When the child physically attended school in the past, he also attended basketball games and believes that schooling and extracurricular activities are an important part of the life of the child. The Father has even made a down payment for a new home in Davie so that the child can attend a quality public middle school in the district if he cannot attend American Heritage due to admission and time constraints for the Fall, 2021 term. He works so that the child's best interests are met and he strives to give the child a quality life and education and upbringing. His main purpose is to make certain that the child has a stable environment and that he associates with friends and relatives. He has also not hindered time sharing between the Mother and the child. Not only has he been involved in the child's schooling, which is paramount to the Father, he has also emphasized that as part of his school he should have long term relationships with others rather than move from place to place.

G. **Section 61.13 (3)(s) Florida Statute**. Mother has been the main caretaker of the child during his early years, while Father has been intimately involved in the upbringing and schooling of the child. As the child got older and attends school, he has tried to make certain that the child takes any required tests and does his homework with the goal that as the child gets older, he can attend a quality public and/or private schools in person. On a recent occasion, Father left his employment to make certain that the child would attend a standardized test for graduation purposes that the Mother failed to comply with. Father had to contact the school for a makeup test date for the child to take standardized tests that required him to drive to Boca Raton for standardized, academic testing of the child at the last minute. While the Mother was supposed to take the child for those tests, she failed to attend. He has routinely driven to and from Boca Raton to maintain time sharing before Mother relocated to Michigan requiring him to drive hours to and from Boca Raton even for one overnight. The child is 12 years of age, he is bright and intelligent, and he has developed so that it is in his best interest to attend a private school if possible on account of his development, which the Mother has hindered. No doubt the child needs both the Mother and Father. At this time in his life, the child is age 12, he appears to have the ability to do well academically and is a gifted child with the encouragement and help of the Father. It would be in the best interest of the child if he could attend a private school where his education could be augmented.

H. **Section 61.13 (4)(c)6 Florida Statute**. In light of the denial of the Former Wife's Petition for Relocation and the Mother's violation of the Parenting Plan and orders of the Court, this Court has authority to grant a modification of time sharing if it is in the best interest of the child. Therefore, the Court has considered the facts and circumstances provided in the Petition for Relocation litigation, the testimony and evidence presented in that hearing, and has concluded that there is a substantial, material, and unanticipated change in the circumstances of the parties, and therefore, it is in the best interest of the child that a modification of time sharing be granted.

I. **When an impasse occurs as to which school a child should attend, the Court may decide via a pending Supplemental Petition for Modification.** An impasse has resulted as to where the child shall attend school, which constitutes a basis for a modification of time sharing. The existing Parenting Plan provides that the child shall follow Broward County Schools schedules (Dock. 645, page 7). Pursuant to the Final Judgment Denying Relocation, the Court specifically provided that the child shall reside in Broward County, whereas the Mother enrolled the child in Palm Beach County Schools in violation of the Final Judgment, paragraph C. Mother failed to follow this Court's order. Father has attempted to enroll the child in a Broward County School, preferably a private school at his own expense, and the Mother hindered enrollment in a private school and she failed to return the child to Broward County, even though she agreed that the child could attend a private school (Dock. 738). Due to this impasse, and the Supplemental Petition for Modification of Time Sharing, these facts and circumstances required this Court to determine which school the child should attend and what is in the best interest of the child. Based upon the evidence, the Court decides that the child shall reside in Broward County and that the parties shall follow the Broward County school calendar if he cannot attend a private school, and further in light of the fact that the Father has stated that he would like to enroll the child into a private school, that is American Heritage, the Court concludes that it is in the child's best interest if he resides in Broward County and that he attend a Broward County public school, unless he enters American Heritage, which the Court finds are both in the best interest of the child. See *Tucker v. Greenberg*, 674 So.2d 807, 809 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D1134a]; *Dickson v. Dickson*, 169 So.3d 287, 290 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1664b]; *Watt v. Watt*, 966 So.2d 455, 458 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2360c] (where parents cannot agree which school the minor child should attend is in and of itself subject to a modification of time sharing and PP and Parental Responsibility).

J. From the date of the entry of the Final Judgment of Dissolution of Marriage when an original Parenting Plan was created, there has not been a modification of the Parenting Plan, except that on January 27, 2016, the Court tweaked and increased time sharing for the Father from the time provided for in the original Parenting Plan. Therefore, in light of the fact that there has been a substantial, material, and unanticipated change in the circumstances of the parties, the Court reconfirms and decides that the child shall reside in Broward County. The Father shall use his best efforts so that the child may attend a private school, American Heritage, for the Fall, 2021 term. As offered by the Former Husband and accepted by this Court, the Former

Husband shall pay 100% of tuition costs, fees for field trips if recommended by the school and agreed to by the parents, books, lab fees, one I-pad and necessary items for that I-pad, and one set of five gym uniforms and five daily uniforms that shall be shared and laundered by the parents before the child is sent to the other parent. If the Mother desires any further clothing of this nature, she shall pay for her own clothing for the child. As to transportation of the child for attendance to and from the private and/or public school, each party shall transport and pick up the child and if necessary pay for their own transportation costs to transport the child to and from American Heritage (Transcript hearing, pages 29-30 of ruling). Alternatively, if that does not occur in the Fall, 2021 term, then the child shall attend Indian Ridge public school in Davie, Florida as the Father is under contract to purchase a home in the Davie school district that permits attendance at Indian Ridge public school, an excellent "A" school. Should Indian Ridge attendance be warranted now or in the future, each party shall transport and pick up the child and pay for their own transportation costs to transport the child to and from school. Father states that the purchase of a home in that district is presently pending (Dock. 829). In all events, in light of the 50/50 time sharing that the Court has ordered, the child shall reside the majority of the time with the Father (183/182 overnights per year) during even years as per Section X of the Parenting Plan, and during odd years, the child shall reside a majority of the time with the Mother (183/182 overnights) during odd years. The Court hereby amends and modifies the latest Parenting Plan with a new one that shall be filed and approved by the Court. As to School designation, for purposes of school boundary determination and registration, the Father's address shall be designated as per Section IV of the Parenting Plan, subject to the aforementioned criteria so that the Father shall have the child the majority of the time during even years, while the Mother shall the child the majority of the time during odd years which shall be stated in an Amended Parenting Plan. Both parties shall execute any and all IRS documents to support the time sharing status stated herein, so that each may receive a tax dependency deduction and exemption and tax credits in the year(s) each parent has the child a majority of the time, and so that the majority parent (Father in even years) shall be the head of a household or such other designation, while the parent (Mother in odd years) not having the child a majority of the time shall receive a single designation for tax purposes, and vice versa.

K. As and for time sharing, in light of this modification the time sharing of the child, he shall reside with the Father and Mother equally, that is 50% of the time with each parent, so that beginning Friday, September 3, 2021, after school, the child shall reside overnight for one week with the Mother, and beginning Friday after school, September 10, 2021 and for the next week, the child shall reside with the Father for one week. While the child is with the Mother, she shall be responsible to timely drop off and pick up the child to and from the Broward County school the child attends, and while the child resides with the Father, he shall timely drop off and pick up the child from the public or private school. If there is a holiday on Friday and no school, then pick up and drop off shall be at the other parent's residence.

L. While the child is with one parent, the other parent shall be entitled to contact and speak with the child at reasonable hours to include before school in the morning, after school, during school time if time permits, and on the weekends at any time. Neither party shall interfere with any communications between the child and the parent. Neither party shall interfere with school attendance by the child wherever he shall go, including but not limited to contacting the school authorities for any disputes either may have with the other parent or Court proceeding. Mother shall not communicate with the private school about costs and expenses as the Father is solely liable for those expenses. At all times, both parties shall act reasonably and peaceably toward each other and school officials if any communications are necessary with the goal of making certain that the child does satisfactorily and progresses, whichever school the child shall attend.

FORMER WIFE'S MOTION TO MODIFY CHILD SUPPORT AND TO DETERMINE CURRENT CHILD SUPPORT GOING FORWARD

4. A. Mother has filed a Motion to Modify Child Support on March 29, 2021 (Dock. 786), where she asserts that there has been a substantial, material, and unanticipated change in the circumstances of the parties as to child support. Based upon the evidence presented, the parties Financial Affidavits stating their current incomes, the 50/50 time sharing determined, and the testimony and evidence presented by the Former Husband's CPA and Former Wife, the Court finds that the parties' current incomes are listed on their respective Financial Affidavits which shall be followed. See *Rudnick v. Harman*, 162 So.3d 116 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D291a]; *Woodard v. Woodard*, 634 So.2d 782 (Fla. 5th DCA 1994). This Court DENIES the Former Wife's Motion to Modify Child Support.

B. The evidence presented by the parties Financial Affidavits shows their current incomes, after the payment of income taxes thereto, and therefore, attached hereto is s Child Support Worksheet reflecting the current child support to be paid by the Former Husband to the Former Wife. Beginning September 3, 2021 when the 50/50 time sharing shall begin, and when the child shall be with the Father and Mother on a 50/50 basis—the Father has the child for one week and the Mother has the child the next week, so that they alternate every other week—the new child support shall be $1,500.00 per month beginning September 3, 2021, which the parties agreed to in open Court at a post-trial hearing case management conference that this Court held on September 21, 2021 at 11:30 am, among other things.

FORMER WIFE'S MOTIONS FOR PAYMENT OF MEDICAL CO-PAYS AND DAY CARE AND MOTION TO PAY CORRECT CHILD SUPPORT

5. Former Wife has filed a Motion for Payment of Medical Co-Pays and Day Care Expenses and Reimbursements, and a Motion to Pay Corrected Child Support on March 29, 2021 seeking to hold the Former Husband in contempt for not paying these items dating back to 2009 (Docks. 783, 784). Based upon the evidence presented, the Court finds these Motions to be without merit and DENIES these Motions for the reasons stated as follows:

A. Time sharing was tweaked under the latest Parenting Plan entered in January, 2016, where the Father increased his time sharing to the new time sharing of Friday to Monday morning every other week, and Tuesday to Wednesday including the overnight with the child. The evidence shows that the parties agreed that the corrected and amended child support was $2,088.60 per month by virtue of the change in time sharing. Further, the reconstructed child support worksheets with updated time sharing shows that the Father has correctly paid $2,088.60 per month (FH's Exh.7). Former Husband stated he was told to pay the new amount by the parties counsel and CPAs. Former Wife has not objected to this payment for greater than four years, as she has accepted those payments for in excess of four years (FH's Exh.5, 6), and she has failed to pursue a hearing for unpaid child support and unpaid medical co-pays and day care at a hearing, except for her attempt at this hearing at this time. Counsel for the Mother acknowledged in an email that child support was $2,088.60 per month (FH's Exh.5). Mother acknowledged to the Guardian Ad Litem that the Father was current in all child support payments including the $2,088.60 per month (GAL Report, Paragraph (h), page 8 of the GAL Report (Dock. 769). This Court also found in the Final Judgment Denying Relocation that Father was current in all child support matters which has not been timely appealed (Final Judgment Denying Relocation, paragraph 18 (h)) (Dock. 781).

Former Husband has paid the amount of $2,088.60 each and every month from 2016 with the agreement of the Former Wife to the present date (Exh.5, 6). The Father is current in his child support obligations, including child support, day care, medical co-pays, and any other legal obligation for child support obligations. Therefore, pursuant to collateral estoppel and/or res judicata—where there are identical parties and claims and factual findings in a legal proceeding—these matters were already considered and decided in favor of the Father. See *Pearce v. Sandler*, 219 So. 3d 961 (Fla. 3DCA 2017) [42 Fla. L. Weekly D1214b]; *Jasser v. Saadeh*, 103 So. 3d 982 (Fla. 4DCA 2012) [38 Fla. L. Weekly D16a]. The Court has also considered the Father's claims of estoppel, equitable estoppel, and laches, and concludes that based upon the evidence presented, the time that elapsed between the Mother's claims that were heard were in excess of four years before a hearing was held before a General Magistrate or Circuit Court Judge, were excessive, and he has in good faith relied on what he was supposed to pay, therefore, no further child support obligations are due and owing by the Father. See *Dean v. Dean*, 665 So.2d 244, 248 (Fla. 3DCA 1995) [20 Fla. L. Weekly D1353d]; *Robinson v. State*, 473 So.2d 228 (Fla. 5th DCA 1985); *Garcia v. Guerra*, 738 So.2d 459, 461 (Fla. 3DCA 1999) [24 Fla. L. Weekly D1755a]. Accordingly, this Court concludes that there is no child support arrearage as to child support, medical co-pays, child care, and any other claims made by the Mother as to past due child support obligations.

B. There was one medical co-pay bill that the Former Wife claims she incurred while she was in Michigan during the summer, 2020, where she took the child to the emergency room for a covid test in lieu of a clinic for covid 19 testing, which amounted to a balance of $394.54 that remains unpaid. At that time, the co-pays were set at 87% paid by the Former Husband and 13% paid by the Former Wife. As such, both parties shall pay their respective shares directly to Henry Ford Health System, PO Box 553920, Detroit, MI. 48255-3920.

FORMER WIFE'S MOTION FOR ATTORNEY FEES AND COSTS AND FORMER HUSBAND'S MOTION FOR ATTORNEY FEES AND COSTS

5. Both parties' attorneys timely filed a Motion for Attorney Fees and Costs (Dock. 785, 787). Counsel for the Former Wife, ALAN BURTON, Esq., and Counsel for the Former Husband, HARRY HIPLER, Esq., agreed to charge their respective clients $350.00 per hour, which the Court finds as a reasonable hourly attorney fee to be charged by both counsel. Both have provided their respective time records that were admitted into evidence, subject to cross-examination and argument of counsel (FW Exh.2; FW Exh.10). Former Wife claims that Section 61.16 Florida Statute—financial circumstances of the parties—controls the Petition for Relocation as well as the defense of the Former Husband's Supplemental Petition for Modification of Time Sharing. Former Husband argues that while financial circumstances of the parties as per Section 61.16 Florida Statutes is a factor in Family law cases, see *Hallac v. Hallac*, 88 So.3d 253 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D517a], any determination of entitlement to attorney fees is a defense to a Petition for Relocation is controlled by Section 61.13001(3)(e)(5) Florida Statute, Section 61.13 (4)(c)2 Florida Statute, and Section 61.16 Florida Statute has to be read together, and in fact the latter statute authorizes a Court to deny attorney fees to a party where that party violates court orders and presents unmeritorious claims, even if that party may have a financial need based upon the financial circumstances of the parties. Financial position is the starting point in family law matters, and after that is considered, the court can eliminate, deny, grant, partially grant, or offset each party's claim for attorney fees based upon the claims made and the conduct of the parties and their counsel and the results obtained. *Rosen v. Rosen*, 88 So. 3d 253, 256 (Fla. 4th DCA 2012) [Editor's note: see 696 So.2d 697 (Fla. 1997); 22 Fla. L. Weekly S210a] (Court may consider results obtained and whether the refusal to accept settlement offers as an element of whether attorney fees may be granted or denied or mitigated); *Diaz v. Diaz*, 727 So.2d 954 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2452b] (approving denial of award of fees to husband who rejected a very generous settlement offer from the wife, made no counterproposal, and embarked on a wasteful litigation strategy), *quashed in part on other grounds*, 826 So.2d 229 (Fla. 2002) [27 Fla. L. Weekly S178a]; *Rosaler v. Rosaler*, 226 So.3d 911, 914 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1904a]; *Hallac v. Hallac*, 88 So.3d 253 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D517a].

The Court concludes that the time spent by ALAN BURTON, Esq., for the time he spent, and the time spent by HARRY HIPLER, Esq.,are both reasonable, and that based upon the claims made by the Former Wife, the results she obtained, Mother's violations of court orders, the denial of nearly all matters requested by the Former Wife in her Motions and the Petition for Relocation, and other factors provided in these statutes and case law, as well as after considering the time spent by Counsel for the Former Husband in defense of the Petition for Relocation and the Supplemental Petition for Modification of Time Sharing, and after considering the results obtained by Counsel for the Former Husband, HARRY HIPLER, Esq, the Court concludes that ALAN BURTON, Esq., shall receive the amount of $5,000.00 based on the reasonable time he has spent in this case, which is 14.25 hours as to the Petition for Relocation litigation from beginning to end, which shall be paid within 15 days of the date of this hearing. This Court has taken into account the time spent, results obtained, the case of *Hallac v. Hallac*, 88 So.3d 253 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D517a] and its progeny, and the statutes cited to herein by both attorneys in determining the entitlement and award of attorney fees and costs in favor of Counsel for the Former Wife as to the Petition for Relocation and the time spent and results obtained by County for the Husband in determining the attorney fee award. Further, for the time spent by ALAN BURTON, Esq., Counsel for the Former Wife, in defense of the Former Husband's Supplemental Petition for Modification of Time Sharing, and the Former Wife's Emergency Motion to Allow Child to Attend OMNI School, the Court concludes that 7.50 hours is a reasonable time spent on that matter, and therefore he shall receive $2,625.00 that shall be paid within 15 days of the date of this hearing. Therefore, the Former Husband shall pay ALAN BURTON, Esq., as Counsel for the Former Wife, the total sum of $7,650.00 within 15 days of the date of hearing. Upon receipt and clearance of this sum, Counsel for the Former Wife shall prepare and file a Satisfaction of Attorney Fee Award and sign and file same with the Clerk of the Circuit Court. Any further amount of attorney fees and costs due and owing shall be the sole and exclusive responsibility of the Former Wife.

CO-PARENTING CLASSES TO BE ATTENDED

5. The parties have agreed to co-parenting classes that the Court believes is necessary and proper. This Court hereby orders co-parenting training to be attended by both parties, who shall contact Bougainvillea House for a course on co-parenting so that each party appears in person or via zoom as ordered by that agency. Both are required to attend and appear as directed by Bougainvillea House for a course on co-parenting. Payment shall be made on a sliding scale as determined by Bougainvillea House.

IT IS, THEREUPON, ORDERED AND ADJUDGED AS FOLLOWS:

A. The Court has jurisdiction of the parties hereto and of the subject matter hereof.

B. Former Husband's Supplemental Petition for Modification of Parenting Plan and Time Sharing is hereby GRANTED;

C. Former Husband's Amended Motion to Allow Minor Child to Attend Private School and Other relief is hereby GRANTED;

D. Former Husband's Motion for Attorney Fees and Costs is partially DENIED; however, in considering the Former Wife's Motion for Attorney Fees and Costs, the Court offset time spent by the Former Husband's counsel as applied to the Former Wife's counsel in order to obtain a net attorney fee for the reasons stated here;

E. Former Wife's Motion to Modify Child Support, Amended Motion for Clarification and Payment for Child Care Costs, Former Wife's Amended Motion for Contempt and for Reimbursement of Medical Care Costs, Former Wife's Motion for Contempt for Former Husband Not Paying Full Amount of Court Ordered Child Support are all hereby DENIED;

F. Wife's Emergency Motion to Allow Child to Attend OMNI Middle School is hereby DENIED;

G. Former Wife's Motion for Attorney Fees and Costs as to Relocation Petition is hereby partially GRANTED for the reasons stated above;

H. Former Wife's Motion for Temporary Attorney Fees, which is treated as a Motion for Attorney Fees and Costs as to the Former Husband's Supplemental Petition for Modification of Parenting Plan and Time Sharing, is hereby partially GRANTED, as stated above;

I. The Court reserves jurisdiction of the parties hereto, the subject matter hereof, and in order to enforce and/or modify this Final Judgment.

J. Any and all claims that were made, or that could have been made in this proceeding, are hereby DENIED.

* * *

Civil procedure—Default—Vacation—Defendant's failure to respond to complaint because of erroneous assumption that it was being handled by third-party payroll/workers' compensation manager was excusable neglect—Because defendant also alleged meritorious defense and acted expeditiously to vacate default, "order of final judgment" is set aside

WILLIAM CABRERA, Plaintiff, v. R.L.H. CONSULTING & MANAGEMENT, INC., Defendant. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2019 CA 718-11J-L. November 11, 2021. Jessica Recksiedler, Judge. Counsel: Anthony Fusco, Fasig Brooks, Tallahassee, for Plaintiff. Jimmy Allen Davis, Hallisky & Davis, Deltona, for Defendant.

ORDER SETTING ASIDE DEFAULT FINAL JUDGMENT WITH ADDITIONAL INSTRUCTIONS

THIS MATTER came before the Court upon DEFENDANT'S VERIFIED MOTION TO SET ASIDE/VACATE DEFAULT FINAL JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW and Plaintiff's RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE FINAL JUDGMENT and having heard the arguments of counsel, carefully reviewed the filings, and otherwise being fully apprised of the premises; the Court

FINDS, ORDERS, and **ADJUDGES** as follows:

1. The Court notes there is not a Final Judgment entered in the above stated cause of action. The record demonstrates an "Order of Final Judgment" entered on February 10, 2020. This is not a final judgment as defined by Fla. R. Civ. P. 1.540(b). *S.L.T. Warehouse Co. v. Webb*, 304 So.2d 97, 99 (Fla. 1974); *Mills v. Martinez*, 909 So.2d 340, 342 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1672b]; *Fabing v. Eaton*, 941 So.2d 415, 417-18 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2458a]; *Fla. Organic Aquaculture, LLC v. Advent Env't Sys., LLC*, 268 So.3d 910, 912-3 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D883a].

2. Therefore, the time limitations outlined in Fla. R. Civ. P. 1.540(b) does not apply to Defendant's motion.

3. The three-part test to set aside or vacate a default order is as follows: (1) excusable neglect in not responding to the complaint; (2) a meritorious defense to the suit; and (3) that it had acted with due diligence in moving to set aside the judgment. *Specialty Solutions, Inc. v. Baxter Gypsum & Concrete, LLC,* 5D19-1559 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1439b].

4. The Court finds as stated in Defendant's verified Motion, it was operating under the erroneous assumption the lawsuit was being handled by its third-party payroll / worker's compensation manager (SPLI) once the matter was transferred over to the third party. Further, there is no record the Plaintiff was ever employed by the Defendant and produced payroll forms from the relevant time-period. The Defendant stated there is another entity with a similar name to itself as well. Finally, when the Defendant determined the lawsuit was moving forward to a damages only trial it hired counsel who brought the motion from which this Order issues.

5. "As a general rule, Florida courts prefer to decide cases on the merits of the claims rather than on a technicality. *J.J.K. Int'l, Inc. v. Shivbaran,* 985 So. 2d 66, 69 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1648a]. Consequently, there is a "principle of liberality in setting aside defaults so that lawsuits may be decided on their merits." *Lindell Motors, Inc. v. Morgan,* 727 So. 2d 1112, 1113 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D667a] (citing *Bland v. Viking Fire Prot., Inc. of the S.E.,* 454 So. 2d 763 (Fla. 2d DCA 1984)). There is an issue of fact as to whether the Plaintiff may be suing the wrong entity and thereby the Court would be holding the wrong entity liable for the damages claimed by the Plaintiff.

6. Thus, for the aforementioned reasons, the Defendant's motion is **GRANTED**.

7. The ORDER OF FINAL JUDGMENT entered by the Court on February 10, 2020, is hereby set aside.

8. The Defendant has 10 days to file its answer.

9. The Defendant has 20 days to respond to Doc. Nos. 4 & 5 and file its notices of having responded to the Court.

10. The Non-Jury Trial scheduled for October 28, 202, is continued until January 6, 2021, and a pre-trial date of December 14, 2021 is scheduled at 1:30PM via teams. See the attached Virtual Courtroom Email Notice.

11. All deadlines previously set forth shall be extended and continued, with everything remaining in full force and effect. The parties and their attorneys are encouraged to review the local rules[1].

[1]https://flcourts18.org/docs/sem/Judge_Recksiedlers_Civil_Family_Policies_and_Procedures.pdf

* * *

Criminal law—First degree murder—Post conviction counsel—Withdrawal—Denial—Capital collateral regional counsel's motion to withdraw as counsel is denied—Defendant's volitional refusal to participate in defense or communicate with any counsel cannot be deemed to be waiver of postconviction counsel or proceedings—Disagreement between defendant's wish to be executed and counsel's professional judgment that all possible claims and rights must be preserved does not equate to ethical or legal conflict of interest warranting withdrawal of counsel, as counsel is able to pursue postconviction claims without defendant's cooperation—Counsel's concern that additional legal claims could be presented if defendant would cooperate is speculative and not basis for withdrawal

STATE OF FLORIDA, Plaintiff, v. MESAC DAMAS, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County, Criminal Action. Case No. 09-CF-2298. November 3, 2021. Ramiro Mañalich, Judge.

ORDER DENYING MOTION TO WITHDRAW

THIS CAUSE comes before the Court on Capital Collateral Regional Counsel's (CCRC) "Notice Of Conflict Of Interest And Motion To Withdraw As Counsel," filed August 16, 2021 and the State's response filed August 23, 2021. Having reviewed the motion,

the response, the record, the applicable law, and having heard the motion on September 2, 2021, the Court finds as follows.

Essential Background

1. The Defendant, Mesac Damas, is before the Court having been found guilty of six counts of first degree murder and sentenced to death for killing his family by slashing the throats of his five minor children and his wife, as set forth in the Sentencing Order entered by Collier County Circuit Judge Christine Greider on October 27, 2017. The Florida Supreme Court affirmed the conviction and sentence by mandate dated December 28, 2018.

2. This Court found Defendant competent to proceed by order filed April 19, 2021.

3. In an "Order On Durocher Hearing" filed June 18, 2021, the Court found that Defendant's refusal to communicate with defense counsel could not be deemed a waiver of postconviction counsel or proceedings. The Court specifically found that "Defendant is deliberately and intentionally frustrating these proceedings. Defendant has the ability and volition to cooperate and answer questions when he chooses to do so . . . it would be highly unlikely that Defendant would cooperate with any defense attorney, and Defendant's obstruction will not be allowed to further delay these proceedings" (Order para. 11).

4. In the motion to withdraw, CCRC argued that Defendant had, throughout these postconviction proceedings, refused to communicate in any way with counsel or staff. Due to this lack of communication and the Court's requirement that the proceedings continue, it "will undoubtedly cause potentially meritorious constitutional claims for relief to be waived without [Defendant's] consent" (Motion p. 4). CCRC argued that Defendant's refusal to communicate has created a complete lack of an attorney-client relationship, and that counsel is unable to litigate the postconviction claims.

5. The State argued that lack of communication caused by an uncooperative client does not create an actual conflict of interest in postconviction proceedings. The State noted that there is no right to effective counsel in collateral proceedings, *Mann v. State,* 112 So.3d 1158 (Fla. 2013) [38 Fla. L. Weekly S209a], and that Defendant's rights in these postconviction proceedings are limited to a right to access to the courts. The State argued that defense counsel is able to identify and litigate several postconviction claims, such that counsel's performance is not substantially impaired despite the lack of communication with Defendant.

Defendant's Pretrial Behavior

6. During pretrial proceedings, Defendant would either sit uncommunicative with his head on the table, or would disrupt the proceedings by shouting religious statements.

7. During a competency hearing on June 16, 2010, the hearing notes indicate that Defendant had to be removed from the courtroom briefly when he became disruptive.

8. The order finding Defendant competent filed June 23, 2010 specifically noted that Defendant was choosing not to cooperate with counsel or manifest appropriate courtroom behavior.

9. During the July 8, 2011 hearing, transcript filed September 27, 2013, defense counsel stated "we're progressing without—what we can do without the assistance of Mr. Damas. . ." (T. 7). During that hearing, Defendant requested to represent himself, saying he did not want any lawyers (T. 12-17, 20-23).

10. The order finding Defendant competent, filed October 21, 2014, noted that the experts determined that Defendant used religious speech as a tactic to avoid answering questions he did not wish to answer, that Defendant could be manipulative and deceitful, and that Defendant would cooperate when necessary to get what he wanted. The experts found that Defendant's refusal to cooperate was a volitional choice, not an indication of mental illness.

11. The case management conference order filed June 19, 2015 noted that Defendant had the day before finally been willing to meet with newly appointed counsel, approximately three months after counsel was appointed.

12. A case management conference order filed June 27, 2017 noted that Defendant again requested to represent himself so he could plea and be sentenced. See transcript of June 23, 2017 motion hearing, filed July 10, 2017, pages 73-82.

13. A *Faretta* hearing was held on July 21, 2017, at which time Defendant refused to respond fully to the questions, and the Court was unable to find that Defendant was making a knowing and voluntary waiver of counsel (T. 3-21).

14. At the competency and pretrial conference held on August 18, 2017, the Court found that Defendant could respond appropriately to the Court's questions, or cooperate with counsel, although he often chose to disengage or focus on his own wishes, and counsel represented that Defendant refused to meet with them during or prior to the hearing to discuss entering a plea (T. 5-6, 8, 38, 52-53).

15. At a hearing on August 25, 2017, the Court noted that jail personnel stated that Defendant speaks freely outside of court, while Defendant refused to respond to questions in court (T. 71-72).

16. During the plea proceedings on September 5, 2017, Defendant cooperated in order to enter a plea (T. 6-7, 16-21, 23-24, 28, 31-36, 38-46, 48-57, 59-65, 67-71, 80-84).

17. During the October 23-27, 2017 *Spencer* hearing, Defendant refused to respond to the Court's questions, and counsel indicated Defendant had refused to meet with him to discuss mitigation (T. 93, 229, 247, 249, 251, 262, 270, 272, 273, 274, 277, 278, 284-286, 289, 292-294, 352).

Defendant's Behavior at Durocher Hearing

18. At the March 25, 2021 hearing, upon inquiry as to his wishes by the Court, Defendant initially remained silent, with his head on the table (T. p. 23-24). Then Defendant began speaking about the facts of the case (T. 24-26). When the Court expressed concerns about his right to remain silent, Defendant stated "I don't need no legal right . . . Now, right now, if you give —I'll fire everybody, you know what I'm saying? I thank them for what they're doing okay?" (T. p. 26). Defendant requested respect for the victims, stating "It's like you digging—you're digging a wound trying to be healed" (T. p. 26). Defendant continued "I don't want people to show pictures of my wife's cold body, my children. That's disrespectful" (T. p. 28). He stated "I choose death, right now. Right now. You can even schedule me next month" (T. p. 28). Regarding his defense team, Defendant stated "These three guys right here, they're ultimate liars" (T. p. 30). When asked if he wanted counsel to continue with any defenses in his case, Defendant stated "My case? What case? You guys already sent me to death already. I don't have a case. It's over. That's it" (T. p. 31). Defendant continued "So I'd rather just stay where I'm at right there, and then let it be whatever—however long they take before they kill me" (T. p. 33). After the Court took a recess to give defense counsel an opportunity to speak to Defendant, Defendant refused to talk to counsel, and refused to communicate further with the Court (T. pp. 38-41). The Court then asked Defendant a series of questions, including whether he understood that if he wished to waive counsel and defenses that he would be subject to the issuance of a death warrant, would not get the benefit of any changes in the law, and would give up any rights as to the manner of execution, and Defendant refused to answer those questions (T. pp. 50-54).

19. Following the hearing, in response to CCRC's concern about a possible conflict of interest due to inability to consult with Defendant regarding possible claims for the 3.851 motion, the Court permitted defense counsel an opportunity to attempt to communicate

with Defendant and to amend the 3.851 motion to add what claims counsel could allege in good faith.

20. Counsel filed the amended motion on August 16, 2021.

Expert Opinions on Defendant's Behavior

21. Dr. Donald, McMurray, Ph.D., in a report filed October 25, 2020, found that Defendant's refusal to participate or communicate is a volitional choice (p. 7). He found that Defendant uses religious references in order to avoid responding to questions when Defendant perceived it would be of benefit to him (p.8).

22. Dr. Julie Harper, Psy.D., in her supplemental report, dated March 18, 2021, notes that Defendant was initially cooperative, but refused to continue cooperating when Dr. Harper stopped her listening posture and shifted to direct inquiry (p.10). **She noted that Defendant's insistence on staying mute in court has affected different proceedings for more than a decade** (emphasis added) (p. 11). Dr. Harper believed that Defendant's refusal to conform his behavior in court by answering questions is deliberate when the proceeding does not align with his wishes (p. 11). Dr. Harper stated that Defendant's refusal to communicate with his attorneys was goal-directed, based on his decision that the case is "done," and that **Defendant was likely to continue to resist any efforts to discuss or change the case status** (emphasis added) (pp.11-12).

23. Previous expert reports corroborate the recent expert opinions.

24. Dr. Michael Herkov, Ph.D., ABPP, noted in his report filed January 5, 2011 that jail staff indicated that Defendant's lack of cooperation was volitional and dependent on the ability to obtain what he wanted, such as phone privileges (p. 5). Dr. Herkov found that Defendant's refusal to cooperate in the evaluation was volitional, as Defendant would speak freely when allowed to control the topic and speak as he wished of religious topics (p. 9).

25. Dr. Frederick Schaerf, M.D., Ph.D., P.A., found in his report filed March 9, 2011 that Defendant was malingering and choosing not to cooperate. He found that "It is clear that [Defendant] can 'turn on and off his hyper-religious preaching' like a light switch, and responds to external parameters of his particular daily schedule with behaviors that are entirely under his control" (p. 9) Dr. Schaerf opined that Defendant "chooses not to cooperate or participate in demonstrating his understanding. . ." (p. 10).

26. After Defendant was found incompetent, Dr. Ali Mandelblatt, Psy.D., within a month of Defendant being at the State hospital, submitted a report, filed May 19, 2014, finding that Defendant was "non-responsive towards staff and only engaged when he chooses to do so" (p. 8). The report stated that Defendant is manipulative, uses religion to avoid classes or questions he does not want to answer, and chooses to cooperate when it benefitted him. Dr. Mandelblatt noted that Defendant "presents as drastically different around nonclinical staff. In fact, he sits quietly, engages in routine conversation with specific staff, and is not overly focused on his religious ideals" (p. 9). Defendant's unwillingness to cooperate and utilization of religious discourse "is a direct attempt to thwart the evaluation process and under his volitional control" (p. 13). The report found:

> Overall, Mr. Damas' behavior is indicative of an individual who suffers from significant characteristics of Narcissistic Personality Disorder, along with Antisocial Personality Disorder Traits. He is grandiose, preoccupied with his own self-worth, is entitled and wants to be admired by others, lacks empathy, and is arrogant. Mr. Damas is also aggressive and deceitful. He also does not abide by facility rules and regulations. Nevertheless, Mr. Damas' symptoms do not directly interfere with his competency to proceed and are under his volitional control, as these symptoms subside when he perceives it would be optimal for him

(p.9).

27. In a report filed October 26, 2017, Dr. Schaerf found "There is good evidence that he can interact in a way in which individuals would be seen as being 'normal' . . . At other times when he chooses to, he is hyper-religious, refuses to focus on specific questions given to him and is unwilling to provide specific answers. . . . All parties should appreciate that his presentation could change at any time; however, any change is a product of his personality, manipulations, and not an acute psychiatric disorder" (pp. 4-5).

28. In a report filed October 26, 2017, Dr. Herkov found that Defendant was more cooperative as a result of his desire to plead guilty and end the legal process, such that **"it is unlikely that Mr. Damas will purposefully interact with his defense team in the development of a new . . . legal defense"** (emphasis added) (p. 13).

Analysis

29. Florida Statute § 27.703(1) provides that:

> If, at any time during the representation of a person, the capital collateral regional counsel alleges that the continued representation of that person creates an actual conflict of interest, the sentencing court shall, upon determining that an actual conflict exists, designate another regional counsel . . . An actual conflict of interest exists when an attorney actively represents conflicting interests. A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists.

30. "[A] disagreement between counsel and client that arises when the attorney's professional judgment dictates an action or strategy different from that desired by his or her client does not constitute a legal or ethical conflict of interest requiring the appointment of new counsel." *Gonzales v. State,* 993 So.2d 55, 57 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2072a]. A defendant may not create a conflict. See *Miller v. State,* 921 So. 2d 816, 819 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D682b]. Here, Defendant is creating a conflict by intentionally refusing to communicate with counsel, as he has done throughout the case. Defendant's wish to be executed conflicts with defense counsel's professional judgment, which dictates that all possible claims and rights be preserved. This disagreement between Defendant and counsel does not equate to an ethical or legal conflict of interest on the part of CCRC, under the particular circumstances of this case.

31. In the motion to withdraw, CCRC argued that a complete breakdown in communication is a reasonable ground for termination of the attorney-client relationship, citing to *United States v. Garey,* 540 F.3d 1253, 1263 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C1223a]; *Harrell v. United States,* 2011 WL 3814455 (M.D. Ga. August 26, 2011); *Abrams v. CIBA Specialty Chemicals Corp.,* 2010 WL 2712241 (S.D. Ala. July 6, 2010). (Motion pp. 5-7). The State argued that these cases are distinguishable because this case involves a failure by the Defendant to communicate and because the cited cases involve pre-trial proceedings as opposed to postconviction motions, where there is no right to effective counsel. *See, Coleman v. Thompson,* 501 U.S. 722, 755 (1991); *Braddy v. State,* 219 So.3d 803 (Fla. 2017) [42 Fla. L. Weekly S671a]; and *Schoenwetter v. State,* 931 So. 2d 857, 870 (Fla. 2006) [31 Fla. L. Weekly S261a]. (State's response to Defendant's Motion To Withdraw as Counsel at pp. 2-4). The State's response also points out that the United States Supreme Court has cautioned against "constitutionalizing" state bar rules of ethics as a basis for finding ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). *Nix v. Whiteside,* 475 U.S. 157, 165 (1986). State's Response at pp. 5-6). The Court finds that the State's argument on this issue is more persuasive.

32. "The relevant consideration for the trial court here was whether there was an actual conflict and whether that conflict would have an adverse effect on the public defender's representation. . . *See State v. Alexis,* 180 So.3d 929, 937 (Fla. 2015) [40 Fla. L. Weekly S423a] ("Some adverse or detrimental effect on the representation, however, is required in order to establish an actual conflict of interest.")" *Leake v. State,* 207 So.3d 343, 345 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2657b]. There is no actual conflict merely because Defendant refused to communicate with counsel regarding preparation of the 3.851 motion.

33. "Without a factual showing that the defendant's interests are impaired or compromised, conflict is merely possible or speculative," and there is no basis to allow withdrawal. *State v. Bowens,* 39 So.3d 479, 482 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1475a], *affirmed in part, quashed in part by Public Defender, Eleventh Judicial Circuit of Fla. v. State,* 115 So.3d 261 (Fla. 2013) [38 Fla. L. Weekly S339a]. Here, CCRC is preserving Defendant's rights by presenting what legal claims may be made without Defendant's cooperation, in the absence of an explicit waiver of postconviction proceedings by Defendant. Counsel's concern that additional legal claims could possibly be presented if Defendant would cooperate is speculation, and not a basis for withdrawal. Defendant's interests are not impaired or compromised by the actions of CCRC in presenting what claims may be made in the 3.851 motion without Defendant's assistance. Rather, Defendant's rights and possible legal claims are being preserved by defense counsel. Allowing CCRC to withdraw would prejudice Defendant's rights far more than not allowing CCRC to withdraw based on a speculative ethical conflict.

34. The Court understands that "death is different"[1] and that super due process is often involved. However, given Defendant's targeted lack of cooperation throughout the many years of these proceedings, there is no reasonable probability that Defendant would communicate or cooperate with new defense counsel, whether another CCRC office or private appointed counsel. As detailed above, Defendant has expressed his desire that the legal proceedings be completed, and will not cooperate in the extension of collateral proceedings by assisting in developing claims for a 3.851 motion. The Court cannot and will not allow Defendant's whims to indefinitely stay these proceedings, preventing the Court from concluding this case in a timely and fair manner.

35. The State and the victims' next of kin have an interest in finality, which also has to be taken into account in this proceeding. FL. Const. Art. I §16(b)(10).

Accordingly, it is

ORDERED AND ADJUDGED that CCRC's motion to withdraw is DENIED.

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[1]*Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988).

* * *

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COUNTY COURTS

Insurance—Automobile—Windshield repair—Declaratory actions—Dismissal—Request for broad, across-the-board declarations that insurers have violated insurance policy, statutes, and public policy by using unauthorized internal claims handling process to determine reimbursement amounts for windshield claims is not appropriate use of declaratory judgment proceedings

APEX AUTO GLASS, LLC, a/a/o Shellys Rosario, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2020 16347 CODL, Division 73 (MILLER). November 10, 2021. A. Christian Miller, Judge. Counsel: Donald James Masten, Orlando, for Plaintiff. Geoffrey Schuessler and Kimberly Lambros, Jacksonville, for Defendant.

ORDER OF DISMISSAL

This cause came before the court upon the Defendant's Motion to Dismiss. The court has reviewed the Motion, the Plaintiff's responses and the court file. The court also conducted a consolidated hearing on the Motion on August 26, 2021. After consideration of the arguments and authorities cited by the parties, the court hereby dismisses this case for the reasons set forth below.

This action is one of hundreds of similar cases filed in Volusia County by Plaintiffs[1] seeking declaratory relief against Defendants on similar grounds. Although the requested declarations vary slightly in some cases, they are largely the same overall. In sum, Plaintiffs allege that Defendants are using a secret, extra-contractual pricing program designed to systematically underpay windshield glass repair/replacement claims ("the Glass Plan"), which they further allege violates the insurance policy, Florida statutes and public policy. Plaintiffs ask the court to issue several dozen related declarations confirming their allegations. Plaintiffs also ask the court to declare that Defendants cannot avail themselves of the contractual appraisal process due to their use of the Glass Plan, which they contend is a preliminary breach of the policy, and alternatively, that the dispute between the parties is not appraisable.

Among other reasons, Defendants move to dismiss Plaintiffs' complaints because they argue Plaintiffs are seeking "across the board" declarations as to Defendants' internal claims adjustment practices, rather than seeking relief on a case-by-case basis. Defendants cite *State Farm v. Sestile,* 821 So.2d 1244 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1757a]. In *Sestile,* two insureds obtained a declaratory judgment against their insurer which found that State Farm's use of a computer-generated database to determine the reasonableness of medical bills violated the PIP statute and the insurance contract. *Id.* at 1245. On appeal, the Second District Court of Appeal held ". . .it is not the court's function to determine, across the board, that an insurer's internal method of gauging reasonableness does or does not comply with the statute." *Id.* at 1246. The Court reversed the declaratory judgment, further finding that such determinations must be made on a case-by-case basis. *Id.*

In this action, Plaintiffs very similarly are asking this court to issue broad, across the board declarations that Defendants have violated the insurance policy, various Florida statutes, and public policy by using a secretive, unauthorized internal claims handling process to determine the reimbursement amounts on windshield claims. This is not an appropriate use of the declaratory judgment proceedings, as these determinations must be made on a case-by case basis. *Sestile, supra.*

WHEREFORE it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss is GRANTED. Plaintiff's Amended Complaint is hereby DISMISSED without prejudice[2].

[1]Although this specific case only involves a single Plaintiff and a single Defendant, many similar cases were consolidated for hearing of motions to dismiss on August 26, 2021. Each of the motions to dismiss make the same arguments, and as detailed in this Order, all of the complaints made substantially similar allegations. The majority of the cases are filed by either Apex Auto Glass LLC, Accusafe Auto Glass LLC, Allied Auto Glass LLC, or Adonis Auto Glass LLC ("Plaintiffs"). All of the Plaintiffs are represented by the same counsel. The Defendants are various Progressive entities ("Defendants").

[2]The court makes no ruling upon the Plaintiffs' challenges to the enforceability of the appraisal provisions of Defendants' policies.

* * *

Insurance—Personal injury protection—Venue—Motion to transfer venue from county where PIP benefits were due to county where insured allegedly resided at time of loss is denied

EMERGENCY PHYSICIANS, INC., d/b/a EMERGENCY RESOURCES GROUP, a/a/o Lauryn Frazier, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 36932 COCI. October 20, 2021. Belle B. Schumann, Judge. Counsel: Robert Bartels, Bradford Cederberg, Orlando, for Plaintiff. William Pratt, for Defendant.

ORDER

THIS MATTER having come before this Honorable Court on October 15, 2021 on Defendant's Motion to Transfer Venue and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, hereby finds as follows:

1. The complaint was filed in small claims court and governed by the Small Claims Rules of Civil Procedure. The parties stipulated to waive their appearance at pre-trial and this Court entered an Order on December 9, 2019 invoking the Florida Rules of Civil Procedure. On December 13, 2019, Defendant filed its Motion to Transfer Venue.

2. Defendant relies upon the residence information of the named insured and the venue provision contained in its policy as the basis to transfer venue to Duval County. The venue provision states:

> Unless we agree otherwise, any legal action against us must be brought in a court of competent jurisdiction in the county and state where the covered person lived at the time of the accident.

3. There is no dispute that Lauren Frazier was a covered person under the policy of insurance.

4. Defendant asserts that venue provision is mandatory and this Court is required to transfer venue, in this case, to Duval County. *See Allstate Fire & Cas. Ins. Co. v. Hradecky,* 208 So. 3d 184 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2413a].

5. Conversely, Plaintiff asserts that language unless we agree otherwise, renders the venue provision permissive because it does not contain the exclusivity language of shall or must. *See Travel Express Investment, Inc. v. AT&T Corp.,* 14 So. 3d 1224 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D1304a]; *Texas Auto Mart, Inc. v. Thrifty Rent-A-Car System, Inc.,* 979 So. 2d 360 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1007d], *Shoppes Limited Partnership, Etc. et. al. v. Steve Conn and Akemi Y. Yabu,* 829 So. 2d 356 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2378a], *Regal Kitchens, Inc. v. O'Conner & Taylor Condominium Construction, Inc.,* 894 So. 2d 288 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D405a] and *Grandos v. Swiss Bank Corporation,* 509 So. 2d 273 (Fla. 1987).

Additionally, Plaintiff alleged that venue was proper in Volusia County since the PIP benefits at issue were due in Volusia County.

Plaintiff alleged that Defendant waived its right to challenge venue pursuant to Florida Small Claims Rule 7.060 by not timely challenging venue.

Plaintiff alleged that there was no record evidence before the Court as to where Lauren Frazier lived at the time of the loss.

Plaintiff alleged that the insurance contract was an adhesion contract and therefore rendered the venue provision not enforceable. *See Pasteur Health Plan, Inc. v. Salazar,* 658 So. 2d 543 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1083a].

Finally, Plaintiff alleged that this matter presents a pure legal issue which precluded transfer of venue. *See Safety Nat. Cas. Corp. v. Florida Mun. Ins. Trust,* 818 So. 2d 612 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1172c].

6. This Court is persuaded by Plaintiff's arguments and not persuaded by Defendant's argument.

It is hereby, **ORDERED AND ADJUDGED that:**

1. Defendant's Motion to Transfer Venue is denied.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Dismissal—Matters outside four corners of complaint—Amended motion to dismiss medical provider's action for PIP benefits based on default final judgment in separate case is denied

UNIVERSITY COMMUNITY HOSPITAL, INC., d/b/a ADVENTHEALTH TAMPA, a/a/o Devene Jones, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-CC-003722-O. October 25, 2021. Elizabeth Starr, Judge. Counsel: Robert D. Bartels, Bradford Cederberg, P.A., Orlando, for Plaintiff. Stephanie Balcazar, Savage Villoch Law, PLLC, for Defendant.

ORDER

THIS MATTER having come before this Honorable Court on October 13, 2021, on Defendant's Amended Motion to Dismiss, Plaintiff's Motion to Compel Deposition of Defendant's Corporate Representative, Plaintiff's Motion to Compel Responses to Plaintiff's First Request to Produce to Defendant, Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant and Plaintiff's Motion to Strike Defendant's Amended Motion to Dismiss, and this Honorable Court having heard arguments of counsel and being otherwise fully advised in the premises, finds as follows:

1. This is a breach of contract action arising out of a motor vehicle collision that occurred on August 22, 2019.

2. The Plaintiff in this matter is University Community Hospital, Inc. d/b/a Adventhealth Tampa a/a/o Devene Jones.

3. The Plaintiff provided emergency medical services and care to Devene Jones on August 25, 2019. Pursuant to the assignment of benefits executed by Devene Jones in favor of Plaintiff, Plaintiff submitted its emergency medical services and care bill to the Defendant for payment. Defendant received Plaintiff's medical bill on or about September 24, 2019. The Defendant refused to pay Plaintiff's medical bill. Subsequently, Plaintiff sent Defendant a Notice of Intent to Initiate Litigation. Again, Defendant refused to pay Plaintiff's medical bill. Thereafter, on March 26, 2020, Plaintiff filed Plaintiff's Complaint in the instant action seeking damages.

4. On February 26, 2021, Defendant filed its Amended Motion to Dismiss.

5. It is Defendant's position that Plaintiff's Complaint in the instant action should be dismissed based upon a default final judgment, executed on July 7, 2020, in the declaratory action of *Direct General Ins. Co. v. Samantha G. Walker*, Second Jud. Cir. Ct., in and for Leon County, Case No. 2019-CA-002995. Said default final judgment in part states that "[t]he Insurance Contract, as specifically described in the Complaint, is hereby declared void ab initio, and 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 claimants under the Insurance Contract." *Id.*

6. It is Plaintiff's position that Plaintiff's Complaint in the instant action cannot be dismissed and this matter must proceed forward to conclusion on its merits. This Court finds Defendant's arguments unpersuasive and agrees entirely with Plaintiff's position.

7. When considering a motion to dismiss the Court is not permitted to entertain matters outside the four corners of the Complaint at issue. "The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal." *See Fox v. Professional Wrecker Operators of Florida, Inc.,* 801 So. 2d 175 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2824a]; *see also Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]. "In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations." *Id.* "The question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *See Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859, 860-861 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]. "A motion to dismiss is designed to test the legal sufficiency of a complaint, and not to determine issues of fact." *Bolz v. State Farm Mutual Auto. Ins. Co.,* 679 So. 2d 836, 837 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2010c].

It is hereby **ORDERED AND ADJUDGED** that:

1. Defendant's Amended Motion to Dismiss is denied.

2. Defendant and Plaintiff's Motion to Strike Defendant's Amended Motion to Dismiss is denied as moot.

3. Plaintiff's Motion to Compel Deposition of Defendant's Corporate Representative is granted. Within thirty (30) days from entry of this Order, Defendant shall coordinate the deposition of its Corporate Representative to occur within ninety (90) days from entry of this Order.

4. Plaintiff's Motion to Compel Responses to Plaintiff's First Request to Produce to Defendant is granted. Defendant shall respond to the discovery request within thirty (30) days from entry of this Order.

5. Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories is granted. Defendant shall serve verified answers within thirty (30) days from entry of this Order.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Motion to dismiss medical provider's action for PIP benefits based on pending declaratory action seeking declaration that policy was void *ab initio* is denied where complaint states cause of action for breach of contract—Abatement is not appropriate where provider who is assignee of PIP benefits was not party in declaratory action

TARPON SPRINGS HOSPITAL FOUNDATION, INC. d/b/a ADVENTHEALTH NORTH PINELLAS, a/a/o Ricardo Ruiz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-SC-026538-O. October 15, 2021. Brian F. Duckworth, Judge. Counsel: Steven Dell, Bradford Cederberg, P.A., Orlando, for Plaintiff. Jay C. Hamilton, Savage Villoch Law, PLLC, for Defendant.

ORDER

THIS MATTER having come before this Honorable Court on Defendant's Motion to Dismiss or, Alternatively, to Abate and Incorporated Memorandum of Law; Defendant's Motion for Extension of Time to Respond to Plaintiff's Discovery; Defendant's Motion for Relief from 60-Day Abandonment of Motions to Dismiss and For Extension of Time; Plaintiff's Motion to Compel Deposition; Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant; and Plaintiff's Motion to Compel Response to Plaintiff's First Request to Produce to Defendant and this Honorable Court having heard arguments of counsel, review of the

pleading and supporting hearing binders, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that:

1. This is a breach of contract matter filed in Orange County, FL for Defendant's failure to issue insurance benefits, including but not limited to, Personal Injury Protection (PIP), for an accident which occurred 11/17/2020.

2. Plaintiff in this matter is TARPON SPRINGS HOSPITAL FOUNDATION, INC. d/b/a ADVENTHEALTH NORTH PINELLAS, as assignee of Ricardo Ruiz.

3. Defendant sought dismissal (or abatement) of the current action as Defendant previously filed a declaratory action in Pasco County against the named insured only. Defendant's position is that the Pasco County case will control any subsequent decision or litigation since the named insured is the named defendant in the declaratory action. Defendant argues that should the policy in Pasco County be declared *void ab initio,* then the ruling trickles down to the remaining medical providers and cuts off their potential claim for benefits. Plaintiff's position is the current cause of action cannot be dismissed and must proceed on its merits including the right to conduct discovery regarding any potential affirmative defenses the Defendant, insurer, may raise in the litigation.

4. Plaintiff in this matter was not named in the declaratory action in Pasco County.

5. Defendant's Motion to Dismiss is hereby **DENIED.** As this Court has ruled in other matters, the four corners of Plaintiff's Complaint are sufficient to allege a cause of action. *See, Adventist Health System/Sunbelt, Inc., d/b/a AdventHealth Winter Garden, a/a/o Yure Desir v. Direct General Ins. Co.,* 29 Fla. L. Weekly Supp. 205a (Fla. Orange Co. May 17, 2021) citing to *Fox v. Professional Wrecker Operators of Florida, Inc.,* 801 So. 2d 175 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2824a].

6. Defendant's Motion to Abate is hereby **DENIED**. Considering Plaintiff in the instant matter was not a party in the matter in Pasco County; *Fla. Stat.* §*86.091* declares "[n]o declaration shall prejudice the rights of persons not parties to the proceedings."

7. Defendant's Motion for Relief from 60-Day Abandonment of Motions to Dismiss and For Extension of Time is hereby **MOOT** as the Court heard arguments and ruled on Defendant's Motion to Dismiss.

8. Defendant's Motion for Extension of Time to Respond to Plaintiff's Discovery is hereby **GRANTED** for purposes of compliance with the remainder of this Order.

9. Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant is hereby **GRANTED**. Defendant shall have thirty-five (35) days from the date of this Order to respond to Plaintiff's Interrogatories.

10. Plaintiff's Motion to Compel Response to Plaintiff's First Request to Produce to Defendant is hereby **GRANTED**. Defendant shall have thirty-five (35) days from the date of this Order to respond and provide responsive documents to Plaintiff's First Request to Produce.

11. Plaintiff's Motion to Compel Deposition is hereby **GRANTED**. The parties shall coordinate within thirty (30) days of this Order a date not to exceed one hundred twenty (120) days from the date of this Order for Defendant's Corporate Representative's deposition to occur.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Protective order for deposition of claimant clarifies that insurer that raises a defense of failure to attend examination under oath need not prove absence of, and claimant may not plead presence of, reasonable circumstances leading to failure to attend EUO

HEALTHY BODY MEDICAL CENTER, a/a/o Yassan U. Hernandez, Plaintiff, v. PROGRESSIVE EXPRESS INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-017572-SP-26, Section SD05. November 15, 2021. Michaelle Gonzalez-Paulson, Judge. Counsel: Yankell Benavides and Vanessa Banni, Law Offices of Corredor & Husseini, P.A., Doral, for Plaintiff. Alberto J. Sabates, Progressive PIP House Counsel, Miami, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER REGARDING THE CLAIMANTS (YASSAN U. HERNANDEZ) DEPOSITION

THIS CAUSE having come before the Court for consideration, and the Court being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. In granting Defendant's Motion for Protective Order, the Court relies on sub-section Fla. Stat. § 627.736(6)(g). Fla. Stat. § 627.736(6)(g) does not include any mitigating factors for the Court's consideration. *Red Diamond Medical Group, LLC. v. Progressive American Ins. Co.*, 29 Fla. L. Weekly Supp. 466a; *Savin Medical Group, LLC a/a/o Teresita Machado* [*v. State Farm Mutual Automobile Insurance Co.*], 23 Fla. L. Weekly Supp. 762b; *Palmetto Physical Therapy a/a/o Alan Mancia* [*v. Progressive Select Insurance Co.*], Case No. 3D19-2334 [46 Fla. L. Weekly D332a] affirming *Palmetto Physical Therapy a/a/o Alan Mancia* [*v. Progressive Direct Ins. Co.*], Case No. 16-588-CC-26 (holding that "[r]egardless of any reason the claimant may have had for failing to attend the EUOs, Fla. Stat. § 627.736(6)(g) does not include any mitigating factors for this court to consider). For comparison purposes, the next section of the No-Fault Statute, Fla. Stat. § 627.736(7)(b), states in pertinent part as follows:

> If requested by the person examined, a party causing an examination to be made
>
> shall deliver to him or her a copy of every written report concerning the examination rendered by an examining physician, at least one of which reports must set out the examining physician's findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled, upon request, to receive from the person examined every written report available to him or her or his or her representative concerning any examination, previously or thereafter made, of the same mental or physical condition. By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the person examined waives any privilege he or she may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined, or may thereafter examine, him or her in respect to the same mental or physical condition. **If a person unreasonably refuses to submit to or fails to appear at an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits. An insured's refusal to submit to or failure to appear at two examinations raises a rebuttable presumption that the insured's refusal or failure was unreasonable.**

Fla. Stat. § 627.736(7)(b) (2019) (Emphasis Added).

In sub-section Fla. Stat. § 627.736(7)(b), the Legislature expressly mentions and therefore creates an *unreasonable refusal standard*, or mitigating factors, with respect to Independent Medical Examinations. The Legislature did not include such a provision or create such a standard in sub-section Fla. Stat. § 627.736(6)(g). This Court finds that an insurer need not prove the absence of, and the claimant may not plead the presence of, reasonable circumstances leading to the failure to attend.

The hearing on Defendant's Motion for Summary Judgment scheduled for December 16, 2021, shall take place as scheduled.

* * *

Insurance—Personal injury protection—Coverage—Out-of-state policy—Where provision in Maryland policy providing coverage for out-of-state accident equal to compulsory insurance coverage of state in which accident occurs is positioned in section of policy applicable to liability coverages against claims from others, provision only applies to liability coverage, not PIP coverage—Where uncontroverted evidence shows that policy limits have been exhausted, summary judgment is entered in favor of insurer

PREMIER ORTHOPEDICS, P.A., a/a/o Henry Thomas, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-002274-SP-21, Section HI01. August 11, 2021. Milena Abreu, Judge. Counsel: David S. Kuzenski, for Plaintiff. Michelle Mejia, Law Office of George L. Cimballa, III, Plantation, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Court, after hearing on Defendant's Motion for Final Summary Judgment, and after a review of the pleadings, docket history, relevant case law, statutory authority and arguments of both parties, the Court hereby rules as follows:

FACTUAL BACKGROUND:

1. This case stems from a July 26 2014 motor vehicle accident.
2. Plaintiff sues Defendant for unpaid PIP benefits arising from said car accident.
3. The insured, Henry Thomas was a Maryland resident who was injured in a car accident in Florida.
4. Mr. Thomas was covered by a Maryland auto insurance policy with Geico.
5. Mr. Thomas sought treatment for the injuries from the car accident with Plaintiff.
6. Defendant claims an exhaustion of benefits defense to the full $ 2,500.00 PIP policy limit allowable under the Maryland policy.
7. Plaintiff claims the Defendant agreed to extend coverage to the minimum amounts under Florida's No-Fault law through their own policy and therefore, benefits are not exhausted.

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 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (together, the 'federal summary judgment standard')."). Furthermore, 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 court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.
>
> * * *
>
> **(c) Procedures.**
>
> (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

In the instant case, on June 30, 2021, Defendant, Geico Indemnity Company ("Geico"), filed its motion for final summary judgment. Geico has argued that: (1) the available PIP Benefits were "exhausted in this claim pursuant to the Maryland policy and Maryland law" and (2) "as benefits under the policy have exhausted, Plaintiff's Complaint must be dismissed, and Defendant is entitled to Final Summary Judgment as a matter of law." Defendant also filed the subject insurance policy in support of its Motion for Summary Judgment.

The policy for PIP benefits to the insured provides:

> LIMITS OF LIABILITY
>
> Regardless of the number of policies available, claims made, insured autos or persons to which this coverage applies, our total limit of liability for all personal injury protection benefits paid to or for any one person injured in any one motor vehicle accident is the amount shown in the policy Declarations as applicable to "each person" for the insured auto involved in the accident. If an insured is eligible to claim benefits as the result of an accident in which the insured auto is not involved, this coverage shall be limited to the amount shown in the Declarations for any one insured auto. Except for you or any relative, if the injured person is a pedestrian struck by the insured auto, the limit of liability is the minimum personal injury protection coverage required by Maryland law.

The policy further contains the following provision, positioned under "SECTION I—LIABILITY COVERAGES—Bodily Injury Liability and Property Damage Liability Your Protection Against Claims From Others,":

> **OUT OF STATE INSURANCE**
>
> When the policy applies to the operation of a motor vehicle outside of your state, we agree to increase your coverages to the extent required of out-of-state motorists by local law. This additional coverage will be reduced to the extent that you are protected by another automobile insurance policy. No person can be paid more than once for any item of loss.

It is under this specific provision, Plaintiff claims Florida benefit amounts are extended to the insured in this case. Plaintiff also relies on *Meyer v. Hutchinson*, 861 So.2d 1185, 1186 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2802c] in support of this position. In *Meyer*, an out-of-state driver with Michigan automobile insurance was involved in an accident while in Florida. The driver's policy contained a provision for out-of-state coverage that provided her with coverage equal to the compulsory insurance, financial responsibility, or similar laws of whatever state she was driving in. *Id.* at 1186-87. Specifically, the *Meyer* policy contained the following language:

> It is agreed that Part I—Liability is amended by the addition of the following language:
>
> **Out-of-State Coverage**
>
> If an insured is in another state or Canada and, as a non-resident, becomes subject to its motor vehicle compulsory insurance, financial responsibility, or similar law:
>
> (a) this policy will be interpreted to give the coverage required by the law and
>
> (b) the coverage given replaces any coverage in this policy to the extent required by the law for the insured's operation, maintenance, or use of an owned automobile, a temporary substitute automobile, or a non-owned automobile.

> Any coverage so extended shall be reduced to the extent other coverage applies to the accident. In no event shall anyone collect more than once.

The *Meyer* court found:

> The broad language employed by Michigan Farm Bureau incorporates by reference those laws of foreign jurisdictions and eliminates a voluminous inclusion of the details of laws of all of the other jurisdictions. The endorsement simply provides that whatever Florida requires as compulsory insurance or financial responsibility when Meyer operates, maintains or uses her automobile in Florida, that coverage is provided by the policy. *Id.* at 1188.

Moreover, in *Meyer* the District Court of Appeal, Peterson, J., held that: (1) the defendant's automobile insurance policy provided personal injury protection (PIP) coverage as required under Florida's no-fault statute, for purposes of determining whether defendant was entitled to threshold injury instruction, and (2) plaintiffs' settlement proposals were void, for purposes of determining whether they were entitled to attorney fees and costs under offer-of-judgment statute, as the proposals did not apportion the proposal amount between them.

Similarly, in *Jiminez v. Faccone*, 98 So. 3d 621, 626 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1918a], a driver with Illinois automobile insurance sought to evoke the protections of Florida's No-Fault Threshold through an out-of-state coverage provision in her policy. The operative provision provided the driver with out-of-state coverage commensurate with the compulsory insurance, financial responsibility, and similar laws of the state she was driving in. *Id.* at 625-26. Specifically, the policy provided, in pertinent part:

> 1. Out-of-State Coverage.
>
> If an insured under the liability coverage is in another state or Canada and, as a non-resident, becomes subject to its motor vehicle compulsory insurance, financial responsibility or similar law:
>
> a. the policy will be interpreted to give the coverage required by law; and
>
> b. the coverage so given replaces any coverage in this policy to the extent required by the law for the insured's operation, maintenance or use of a car insured under this policy.
>
> Any coverage so extended shall be reduced to the extent other coverage applies to the accident. In no event shall a person collect more than once.

The *Jiminez* court found the *Jiminez* policy "virtually identical to the policy provision at issue in the *Meyer* case. *Jiminez* at 626. Relying on the decision in *Meyer*, the court in *Jiminez* found that the Illinois automobile insurance policy held by a nonresident driver incorporated by reference Florida's compulsory insurance and financial responsibility laws and therefore provided adequate coverage for purposes of Florida's No-Fault Threshold. *Id.* at 626.

Plaintiff relies on these cases for the proposition that the *Meyer* policy had a liability section of the policy the court held was applicable to ***both*** the bodily injury and the personal injury protection (PIP) coverage and it was of no consequence that the coverage was in the liability section of the policy. In addition, Plaintiff relies on the notion that the *Meyer* court still held the provision contained in the liability section to be applicable to all coverages under the policy.

Here, the text of the "OUT OF STATE INSURANCE," positioned under "SECTION I—LIABILITY COVERAGES—Bodily Injury Liability and Property Damage Liability Your Protection Against Claims from Others," is dissimilar from both the *Meyer* and *Jimenez* provisions. More importantly, the placement of the conformity clause is clearly listed in the policy index under the "SECTION I—LIABILITIY COVERAGES." Also, the placement of the clause under the separately detailed section heading of "SECTION I—LIABILITY" supports this Court's conclusion that it only applies to *liability* (i.e., fault-based) *coverage*. "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a] (citing *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 785 (Fla. 2004) [29 Fla. L. Weekly S774a]). "The mere fact that an insurance policy is a complex document which requires a thorough analysis does not translate to ambiguity." *Grife v. Allstate Floridian Ins. Co.*, 493 F. Supp. 2d 1249, 1252 (S.D. Fla. 2007) [20 Fla. L. Weekly Fed. D899a], aff'd, 512 F. 3d 1302 (11th Cir. 2008) [21 Fla. L. Weekly Fed. C299a] (citing *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1379 (S.D.Fla. 2001). As a result, the Court finds the clear unambiguous language and context of the policy provisions at issue demonstrate the Defendant was not contractually obligated to provide out-of state no-fault coverage.

Defendant also argued as a defense the exhaustion of benefits under its policy language. Several Florida cases have held that the exhaustion of PIP benefits precluded provider's recovery of bills. *See Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] (exhaustion of PIP benefits precluded provider's recovery of remainder of bill); *see also Sheldon v. United Services Auto. Ass'n,* 55 So. 3d 593 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a] (chiropractor could not seek interest on disputed underlying PIP benefits that could not be paid to chiropractor due to exhaustion of benefits). The uncontroverted evidence of payments filed in this case demonstrates Defendant exhausted the $ 2500.00 policy limit.

ACCORDINGLY, it is **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment is ***granted.***

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Motion to dismiss medical provider's action for PIP benefits based on county court orders entered in declaratory action brought by insurer against insureds is denied—Complaint states cause of action for breach of contract—Neither abatement nor stay of action is available or appropriate where provider who was assignee of PIP benefits was not party in declaratory action

PHYSICIANS GROUP, LLC, a/a/o Terisa Williams, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020 SC 005635 NC. October 25, 2021. Phyllis Galen, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Alfred Villoch, III, and Stephen D. Strong, Savage Villoch Law, PLLC, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY, TO ABATE

THIS CAUSE having come before this Honorable Court on October 11, 2021, in regard to Defendant's Motion to Dismiss or, alternatively, to Abate, the Court having heard arguments from both parties, having reviewed the Motion, file, applicable law, both proposed orders and the Court otherwise being fully advised in the premises, this Court hereby adopts Plaintiff's Proposed Order and findings as such and denies Defendant's Motion for the reasons set forth below:

I. Background

1. On December 07, 2020, the Plaintiff filed a personal injury protection ("PIP") lawsuit against Direct General Insurance Company ("Defendant"). Attached to the Amended Complaint is an irrevocable assignment of benefits, which vested rights in the Plaintiff on December 09, 2019 [D.E. 7, Ex. A].

2. The Defendant, Direct general, filed a declaratory action against Terisa Williams, Christian Chan, and Alisa Crafts on January 30, 2020

in Duval County. Physicians Group, LLC was not named as a party.

3. On December 28, 2020, the Defendant filed a Motion to Dismiss or Alternatively, to Abate ("Motion"). [D.E. 10]. The Defendant also filed county court orders in support of the Motion. [See D.E. 25]. However, none of these orders were issued by a district court.

4. The Plaintiff filed a Response in Opposition to the Motion that cites to district court jurisprudence, which this court is bound to follow. [D.E 32]

II. Standard

5. A motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact. *Bolz v. State Farm Mut. Auto. Ins. Co.,* 679 So. 2d 836, 837 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2010c]. In ruling on a motion to dismiss, a trial court is limited to considering the four corners of the complaint along with the attachments incorporated into the complaint. *Neapolitan Enterprises, LLC v. City of Naples,* 185 So. 3d 585, 589 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D299a]. The allegations in the complaint must be accepted as true. *Touchton v. Woodside Credit, LLC,* 46 Fla. L. Weekly D768a [316 So. 3d 392] (Fla. 2d DCA Apr. 7, 2021) (reversing trial court's dismissal because the court improperly extended its review beyond the four corners of the complaint and resolved the "very question sought to be answered in the . . . action").

6. In Florida, all that is required to state a claim for breach of contract is to allege (1) a valid contract existed; (2) a material breach of the contract; and (3) damages. *See, e.g., People's Tr. Ins. Co. v. Alonzo-Pombo,* 307 So. 3d 840, 843 (Fla. 3d DCA 2020 [45 Fla. L. Weekly D2110a]). Thus, the aforementioned allegations are sufficient to withstand a motion to dismiss for failure to state a cause of action. *See Touchton,* 46 Fla. L. Weekly D768a (finding that simple allegations addressing the elements of the cause of action were sufficient to withstand a motion to dismiss for failure to state cause of action).

7. In this case, the Plaintiff's Amended Complaint clearly and expressly allege the elements to state a claim for breach of contract. Thus, dismissal is inappropriate.

III. Abatement does not apply

8. In Florida abatement is disfavored, and "the party asserting it must clearly show . . . the reason for its enforcement." *Relinger v. Fox,* 55 So. 3d 638, 640 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D294a] (quoting *Moresca v. Allstate Ins. Co.,* 231 So.2d 283, 285 (Fla. 4th DCA 1970)(allowance of abatement amounts to a dismissal without prejudice of the abated action.). "Abatement may be ordered *only* where the identities of parties in the actions are exact because the court is necessarily projecting the effect of a case which has not been tried and a judgment which has not yet been rendered." *Relinger,* 55 So. 3d at 640 ("Relinger is the plaintiff in the later civil action challenging the validity of the trust, but he is the defending party in the Foxes' probate action seeking to establish the validity of the concomitant will. This critical difference rendered abatement inappropriate in this case.")(Emph. added).

9. In *Bruns v. Archer,* 352 So.2d 121, 122 (Fla. 2d DCA 1977), the Second District Court of Appeals stated:

> [T]he general rule [is] that a plea of a prior action pending applies only where plaintiff in both suits is the same person, and both are commenced by himself, and not to cases in which there are cross-suits by a plaintiff in one suit who is defendant in the other; in other words, that, where the party defendant in the prior suit is plaintiff in the subsequent suit, the first suit cannot be pleaded in abatement of the second.

10. Here, the Plaintiff in this case was not a named Defendant (i.e., a party) in the Duval County declaratory action. Thus, the parties are not "exact" or identical. Furthermore, even assuming *arguendo,* that privity would somehow apply to the Plaintiff's claim for purposes of abatement, this case, and Duval County declaratory action, constitute impermissible "cross suits"[1], and contain different causes of action. Thus, under Florida law, abatement is not available to the Defendant.

IV. A stay is not warranted as Florida's Declaratory Judgment Statute expressly prohibits declaratory decrees from prejudicing the rights of non-parties.

11. A declaratory action obtained by an insurer against its insured is not binding on a party who was not a party to the declaratory judgment action. *Indep. Fire Ins. Co. v. Paulekas,* 633 So.2d 1111, 1113 (Fla. 3d DCA 1994). See §86.091, Fla. Stat. (2021)("No declaration shall prejudice the rights of persons not parties to the proceedings."); *Reinstein v. Pediatric Gastroenterology, Hepatology & Nutrition of Florida, P.A.,* 25 So. 3d 54, 59 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2550b] (in order for declaratory decree to be binding against an adverse person in interest, the interested person must be a named party before the court); *Pagan v. Sarasota County Pub. Hosp. Bd.,* 884 So. 2d 257, 264 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1869a] (section 86.091, Florida Statutes does not permit a declaratory decree to have a binding effect on non-parties); *Allstate Ins. Co. v. Conde,* 595 So. 2d 1005, 1008 (Fla. 5th DCA 1992)("parties possessed of a potential claim are . . . essential parties to the insurer's declaratory action if they are to be bound by the coverage decision."); *Citizens Prop. Ins. Corp. v. Ifergane,* 114 So. 3d 190, 195 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a] (assignor who assigned their rights under the policy was not a proper defendant to a declaratory action); *Physicians Group, LLC a/a/o Beverly Walker v. Direct General Insurance Company,* 28 Fla. L. Weekly Supp. 626a (13th Jud. Cir. August 24, 2020, Daryl M. Manning, Judge)(order denying summary judgment and finding that the Plaintiff's assignment gave it a due process right to be adequately heard before its rights were decided, and that the intentional exclusion of Plaintiff from the prior declaratory action violated Plaintiff's constitutional right); *Orlando Injury Ctr., Inc. a/a/o Arley Marrero Couzo v. Imperial Fire and Cas. Ins. Co.,* 29 Fla. L. Weekly Supp. 139b (11th Jud. Cir. March 8, 2021, Elijah A. Levitt, Judge)(*Ifergane* and *Paulekas* both hold an assignee and third-party claimant, is a necessary party for the declaratory action on insurance coverage).

12. Here, the assignment occurred on December 09, 2019 before institution of the declaratory action or any decree. Since, "[a]t any one time, only the insured or the medical provider "owns" the cause of action against the insurer for PIP benefits" *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic,* 913 So. 2d 1281, 1285 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D2622b], it was incumbent upon the Defendant to include the Plaintiff is the declaratory action, if the Defendant wanted to obtain a binding ruling against the Plaintiff.

13. Accordingly, a stay is inappropriate because the Plaintiff in this case has vested rights and is not party to the Duval County declaratory action. The Plaintiff has a right to be heard.

THEREFORE, based on the foregoing, it is ORDERED and ADJUDGED that the Defendant's Motion to Dismiss or, alternatively, to Abate **is DENIED.**

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[1]Direct Gen. Ins. Co. is the Plaintiff and Terisa Williams, Christian Chan, and Alisa Crafts are the Defendant's in the Duval County declaratory action. In this breach of contract case, the Plaintiff is Physicians Group, LLC and the Defendant is Direct Gen. Ins. Co.

* * *

Criminal law—Driving under influence—Evidence—Breath test results—Motion alleging that breath test results should be suppressed because subject Intoxilyzer failed its annual inspection eleven days after defendant's breath test is denied—All that is required for admissibility of breath test result is the most recent inspection, and monthly inspection taken three days after defendant's test found instrument to be in compliance—Alleged deficiencies in annual inspection at best go to weight, not admissibility

STATE OF FLORIDA, Plaintiff, v. WANDA FLOWE MINGO, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2019 CT 001193SC. September 30, 2021. David Denkin, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This cause came to be heard on September 8th, 2021, on the Defendant's Motion to Suppress dated January 27th, 2021. In essence, the motion alleges that the breath test results of the Defendant should be suppressed because eleven days after the Defendant's breath test, the subject Intoxilyzer failed a Department inspection when it detected alcohol on a known alcohol-free sample. This Court having heard the testimony of Florida Department of Law Enforcement (FDLE) Alcohol Testing Program Manager (TJ Graham), FDLE Quality Assurance Manager (Shayla Platt), argument by counsel and being otherwise advised in the premises, the Court finds as follows:

FACTS

1. The Defendant is charged with Driving Under the Influence, a violation of Section 316.193, Florida Statutes.

2. On December 28, 2018 (prior to the Defendant providing breath samples) an agency inspection was performed on an Intoxilyzer 8000, Instrument Serial Number 80-001344. The agency inspection found the instrument in compliance with Fla. Admin. Code R. 11D-8.

3. On January 27, 2019, following the arrest of the Defendant, the Defendant provided breath samples on that same Intoxilyzer 8000, Instrument Serial Number 80-001344, with results of .293 and .301 grams of alcohol per 210 liters of breath.

4. On January 30, 2019, three days after the Defendant's breath test an agency inspection was performed on the same instrument and found to be compliant with Fla. Admin. Code R. 11D-8. This instrument was then taken out of service and sent to the Florida Department of Law Enforcement for the required yearly department inspection.

5. Eleven days after the Defendant's breath test (February 7, 2019) the Intoxilyzer 8000, Instrument Serial Number 80-001344, failed the department inspection. The instrument detected alcohol when the department inspector introduced an alcohol-free sample. Pursuant to Fla. Admin. Code R. 11D-8, ATP Form 36 when a check or test is reported as out of compliance (as was here), the instrument prompts the Department Inspector to repeat the check or test once. The reason must be entered when prompted and recorded in the Remarks section of FDLE/ATP Form 41.

6. The Department Inspector did not notice the failure and initially found the Intoxilyzer to be in compliance. As proper procedure dictates, her work was sent off for review to another inspector. A review by a second inspector found the inspection not in compliance and it was retested within 24 hours whereupon it passed. No reason was provided for the initial out of compliance showing.

7. Neither the Program Manager nor the Quality Assurance Manager who both testified knew why the instrument failed initially by showing alcohol present in an alcohol-free sample.

LAW

The Defendant posits that the department inspection that took place eleven days after his breath test renders the instrument out of compliance with Chapter 11D-8 maintenance requirements back to the date of his providing breath samples and requires suppression of his breath test results. Fla. Admin. Code Rule 11D-8.006(1) states that evidentiary breath test instruments shall be inspected by an agency inspector at least once each calendar month. Fla. Admin. Code R. 11D-8.004(2) provides in part that registered breath test instruments shall be inspected by the Department at least once each calendar year. The Defendant argues that both agency inspections and department inspections are required for a breath test result to be valid.

In *State v. Buttolph*, the Fourth DCA found that all that was required for admissibility of the breath test results is the most recent inspection, whether that be the monthly or the annual inspection. *State v. Buttolph,* 969 So.2d 1209 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2919a].

The breath test in this case was performed after a monthly agency inspection was found in compliance. Alleged deficiencies in the annual inspection eleven days *after* the Defendant submitted to the breath test may at best go to weight but not admissibility.

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is DENIED

* * *

Criminal law—Driving under influence—Evidence—Breath test results—Motion to suppress breath test results, alleging that Intoxilyzers used should have been taken out of service prior to their use for defendants, is denied—Court rejects argument that measurement of uncertainty estimate should be added to results logged on FDLE/ATP Form 41 as part of inspection process, which in this case would have made the instrument inspections noncompliant with Chapter 11D-8—Based on definition of measurement of uncertainty and how estimate is calculated, there is no basis to add the measurement of uncertainty estimate into a known measurand—No evidence was provided to show legal basis for altering current process for a department inspection that currently complies with Chapter 11D-8

STATE OF FLORIDA, Plaintiff, v. KHALID BOUHAMID, MISTI DANIELLE JENSEN, GERGO KEKESI, MICHAEL STEVEN KNICELEY, DANIEL MARK MIGASHKIN, WANDA FLOWE MINGO, and SARAH C. TODD, Defendants. County Court, 12th Judicial Circuit in and for Sarasota County, Criminal Division. Case Nos. 2018 CT 018814 SC, 2019 CT 003164 SC, 2020 CT 009324 SC, 2018 CT 013134 SC, 2020 CT 014432 SC, 2019 CT 001193 SC, 2019 CT 012014 SC. October 26, 2021. David L. Denkin, Judge. Counsel: Kevin Hindson, Assistant State Attorney, for Plaintiff. Robert N. Harrison, for Defendants.

ORDER DENYING MOTION TO SUPPRESS BREATH TEST

THIS MATTER came to be heard on September 8th, 2021, upon Defendant's Motion to Suppress Breath Test results filed in seven separate cases. Each Motion alleges that the Intoxylizer used in the seven cases (a total of four separate instruments) should have been taken out of service prior to their use for each of the seven Defendants. The Defendants allege that the latest Department inspection on the four instruments they provided breath samples on, when corrected for measurement uncertainty, includes results not within the acceptable range as set forth in Fla. Admin. Code Chapter 11D-8. The Defendants posit that this is a failure of the State to carry its burden that the breath test results were in compliance with implied consent and thus requires suppression.

No testimony was presented. The court took judicial notice of the absence of a search warrant and the following documents were entered into evidence:

Exhibit A.	Composite of seven breath test affidavits.
Exhibit B.	Alcohol Testing Program Measurement of Uncertainty Policy, ATP-MU v.1
Exhibit C.	Alcohol Testing Program Measurement of Uncertainty Policy, ATP-MU v.2019
Exhibit D.	Alcohol Testing Program Measurement of Uncertainty Policy, ATP-MU v.2020

Exhibit E. FDLE/ATP Form 69 dated February 6, 2018, for Intoxilyzer 80-001344.
Exhibit F. FDLE/ATP Form 41 dated February 6, 2018, for Intoxilyzer 80-001344.
Exhibit G. FDLE/ATP Form 69 dated November 6, 2019, for Intoxilyzer 80-001347.
Exhibit H. FDLE/ATP Form 41 dated November 6, 2019, for Intoxilyzer 80-001347.
Exhibit I. FDLE/ATP Form 69 dated January 30, 2020, for Intoxilyzer 80-005076.
Exhibit J. FDLE/ATP Form 41 dated January 30, 2020, for Intoxilyzer 80-005076.
Exhibit K. FDLE/ATP Form 69 dated October 26, 2018, for Intoxilyzer 80-006767.
Exhibit L. FDLE/ATP Form 41 dated October 26, 2018, for Intoxilyzer 80-006767.

No additional evidence was presented by the parties.

The Defendants posit that the Measurement of Uncertainty estimate should be added to the results logged on the FDLE/ATP Form 41 Department Inspection Form as part of the inspection process. The Defendants assert that the largest positive (+) number of the Measurement of Uncertainty estimate should be added to the results logged on the various FDLE/ATP Form 41's and this would result in a variance of the known measurements exceeding the allowed variance. It is argued that by adding the estimate to the results, the previously complying instrument inspections would now not comply with Chapter 11D-8. The court does not accept this assertion.

The Measurement of Uncertainty as stated in the three versions of the Alcohol Testing Program Measurement of Uncertainty Policy (ATP-MU v.1), (ATP-MU v.2019), and (ATP-MU v.2020) states, "***The measurement results subject to uncertainty are those obtained during calibration when known traceable control standards are used. Measurement uncertainty is a parameter, associated with the result of a measurement, that characterizes the dispersion of the values that could reasonably be attributed to the measurand."***

Based on the definition of the Measurement of Uncertainty and how the estimate is calculated, there is no basis to add the Measurement of Uncertainty estimate into a known measurand. As the measurands are known to be .05, .08, .20, and .08 Dry Gas, the Measurement of Uncertainty estimate is created to represent an estimate of what the expected variance would be from the known measurands results of these inspection tests to a 99.73% certainty. As stated on the FDLE/ATP FORM 69, "***Uncertainty is based on fleetwide data and is expressed to a 99.73% level of confidence.***" As viewed on the Form 41 Inspection Reports, the known measurand tests may have a variance to the known measurand value. Example: .048 on a known .05 measurand and a .199 on a known .20 measurand (**Exhibit H**). These results and the variance from the known measurand are the numbers that are used to create the estimate for the Measurement of Uncertainty. There is no basis to add the Measurement of Uncertainty estimate into the results where the measurands have a known value.[1]

There was no evidence provided to the Court to show a legal basis for altering the current process for a Department Inspection that currently comply with Chapter 11D-8.

Furthermore, as provided in the Alcohol Testing Program Measurement of Uncertainty Policy (ATP-MU v.1) (**Exhibit B**), ***"This estimation of uncertainty does not replace any existing policy established for the maintenance of quality control. It does not supersede any legal, statutory, or regulatory guidance on breath alcohol testing or instrument calibration***."

The measurement uncertainty for blood or breath alcohol content even if found to be relevant and otherwise admissible would go to weight, not admissibility. *State v. King County District Court West Division*, 175 Wash.App. 630, 307 P.3d 765 (2013).[2]

It is therefore ORDERED AND ADJUDGED that the MOTION TO SUPPRESS BREATH TEST is hereby DENIED.

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[1]Guide to the Expression of Uncertainty in Measurement (GUM).

[2]The court in *State v. Jones,* 160 Idaho 449, 451, 375 P.3d 279,281 (2016), found the evidence not admissible as being irrelevant. In *State v. Jones,* 160 Idaho 449, 451, 375 P.3d 279,281 (2016) the Defendant argued that the measurement of uncertainty is relevant to proving his actual alcohol concentration. However, the Idaho Supreme Court noted the actual alcohol concentration is irrelevant. Rather, it is the alcohol concentration as shown by the test result that is determinative of a violation. Thus, the measurement of uncertainty as it relates to the actual alcohol concentration, rather than the reliability of the testing equipment or procedures, is irrelevant. The equipment need not precisely measure the alcohol concentration in the person's blood. The test need only be based upon the correct formula, and the equipment must be properly approved and certified.").

* * *

Insurance—Venue—Transfer—Venue selection clause—Domestic corporation

PHYSICIANS GROUP, LLC, a/a/o Johnathan Crofton, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020 SC 005329 NC. October 22, 2021. Dana M. Moss, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Teodora Siderova, Kubicki Draper, Tampa, for Defendant.

ORDER TRANSFERRING VENUE

This matter came before the Court on the Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051. Although titled as a motion to dismiss, Defendant's motion reflects that it seeks either dismissal or transfer of this action. The Court, having conducted a hearing and considered the arguments of the parties, hereby,

ORDERED and ADJUDGED that Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 is granted as following:

1. This action shall be transferred to Miami-Date County.
2. Plaintiff shall pay any filing fee or other costs necessary to effectuate the transfer.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Filing of duplicate claim for same date of loss, claimant, and dates of service as pending suit

CROSSWINDS PHYSICIAN SERVICES, INC., a/a/o Jason Manning, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-003339, Division I. November 18, 2021. Christine K. Vogel, Judge. Counsel: C. Spencer Petty, Irvin and Petty, P.A., St. Petersburg, for Plaintiff. Robert A. Lowry and Michael E. Bringuier, Progressive PIP House Counsel, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO SEEK ATTORNEY FEES PURSUANT TO FLORIDA STATUTE § 57.105

THIS MATTER came before the Court for hearing on October 4, 2021, on Defendant's Motion to Seek Attorney Fees Pursuant to Florida Statute § 57.105 filed April 7, 2020.[1] Having reviewed and considered the Motion, argument of counsel for the parties, relevant case law, the record, and being otherwise fully advised, the Court finds:

1. On January 18, 2020, Plaintiff instituted this action for breach of contract seeking unpaid PIP benefits. On February 18, 2020, Defendant filed its Motion to Dismiss asserting this action should be dismissed because Plaintiff had previously filed the exact same cause

of action (same motor vehicle accident, same PIP benefits, same claimant) in Hillsborough County case 19-CC-002102. The Motion to Dismiss was scheduled for hearing to occur on November 2, 2020 at 11:00 a.m. *See* Not. of Hearing (April 1, 2020).

2. On February 27, 2020, Defendant served Plaintiff with a 57.105 safe harbor letter and a then unfiled Motion to Seek Attorney Fees Pursuant to Florida Statute § 57.105. *See* Def.'s Notice of Filing Proof of Service of Def.'s Mot. to Seek Att'y Fees Pursuant to Florida Statutes § 57.105 (Sept. 27, 2021).

3. On April 7, 2020, Defendant filed its Motion to Seek Attorney Fees Pursuant to Florida Statute § 57.105 dated February 27, 2020.

4. In the 57.105 Motion dated February 27, 2020, Defendant asserted "[t]hat Plaintiff (as well as the same opposing counsel) previously filed a lawsuit against Defendant for the same date of loss, claimant, and dates of service. Defendant has confessed judgment in the previously filed suit. Accordingly, the instant action is frivolous in nature." Def.'s Mot. to Seek Attorney Fees Pursuant to Florida Statute § 57.105 ¶ 2 (filed April 7, 2020). Defendant cited case law on the doctrine of res judicata and Florida Statutes section 627.736(15) in support of its position. *See id.* at ¶¶ 4-5. Defendant placed Plaintiff and its counsel on notice of its intention to seek fees pursuant to section 57.105 if this claim was not withdrawn within twenty-one (21) days. *See id.* at ¶¶ 8-9.

5. Plaintiff did not dismiss this action within the twenty-one (21) day period.

6. On October 20, 2020, Defendant filed its Motion/Request for Judicial Notice requesting that the Court take judicial notice of case number 19-CC-002102.

7. In response to Defendant's Motion to Dismiss, Plaintiff filed copies of its pre-suit demand letter and the Defendant's response to the demand letter. *See* Pl.'s Opp'n Evidence to Def.'s Mot. to Dismiss (Oct. 29, 2020).

8. On November 2, 2020, at 8:58:47 a.m., approximately 2 hours before the scheduled motion to dismiss hearing, Plaintiff voluntarily dismissed this matter without prejudice.

9. Florida Statutes section 57.105(1) provides:

> Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.

10. At the hearing on October 4, 2021, in support of its entitlement to attorneys' fees under section 57.105(1), Defendant raised the case law and arguments contained in its 57.105 Motion and its motion to dismiss regarding the filing of this action—an exact duplicate of the action filed in January 2019 in case 19-CC-002102, which is still currently pending. In opposition, Plaintiff asserted that Defendant confessed judgment in the 2019 case, but has never paid attorney's fees[2] and Plaintiff also raised a potential dispute as to the amount paid in the confession of judgment—both matters that could and should be addressed in the open 2019 case. Plaintiff did not provide any argument that indicates the filing of a duplicate suit under these circumstances is permitted. The Complaint in this action did not assert a claim of failure to pay attorney's fees or a claim distinct from the 2019 action, it simply duplicated the prior complaint.

11. The Court finds that Plaintiff or Plaintiff's attorney knew or should have known that the filing of a duplicate complaint was not supported by the application of existing law to the material facts in this case. Plaintiff was put on notice of the issue at multiple points in the parties' dealings, including Defendant's statutory 57.105 safe harbor notice to Plaintiff and the Motion to Dismiss—aside from the fact that both lawsuits were filed by the same counsel for Plaintiff. Plaintiff had the opportunity and should have taken appropriate steps to avail itself of the protection of section 57.105(4). As such, Defendant is entitled to attorneys' fees pursuant to section 57.105(1).

It is it is therefore **ORDERED AND ADJUDGED** that Defendant's Motion to Seek Attorney Fees Pursuant to Florida Statute § 57.105 filed April 7, 2020, is hereby **GRANTED** as to entitlement to an award of attorneys' fees in this matter. The Court reserves jurisdiction to determine the amount and allocation of the award of attorneys' fees.

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[1]The Court recognizes Defendant has various filings referencing that the materials are in support of Defendant's Motion to Tax Costs. *See* Def.'s Notice of Filing Proof of Taxable Costs in Supp. of Def.'s Mot. to Tax Costs (Sept. 27, 2021); Def.'s Notice of Filing Case Law in Supp. of Def.'s Mot. to Seek Att'y Fees Pursuant to Florida Statute § 57.105 and Def.'s Mot. to Tax Costs (Sept. 27, 2021); Def.'s Second Notice of Filing Case Law in Supp. of Def.'s Mot. to Seek Att'y Fees Pursuant to Florida Statute § 57.105 and Def.'s Mot. to Tax Costs (Sept. 29, 2021). However, the record does not reflect that a Motion to Tax Costs has been filed by Defendant in this action. As such, the issue of costs in this matter is not before the Court.

[2]The Court notes that from review of the 2019 case it does not appear that Plaintiff's motion for attorney's fees and costs as a result of the confession of judgment has been heard by the court for resolution.

* * *

Insurance—Personal injury protection—Attorney's fees—Claim or defense not supported by material facts or applicable law—Suit filed after exhaustion of benefits

DR. JASON P. HURLEY, D.C., d/b/a MOTION COUNCIL, a/a/o Melissa Ruiz, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case 19-CC-006378, Division I. November 18, 2021. Christine K. Vogel, Judge. Counsel: C. Spencer Petty, Irvin and Petty, P.A., St. Petersburg, for Plaintiff. Robert A. Lowry, Progressive PIP House Counsel, Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR ENTITLEMENT AND MOTION TO TAX ATTORNEYS' FEES AND COSTS

THIS MATTER came before the Court for hearing on October 4, 2021, on Defendant's Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs filed November 2, 2020. Having reviewed and considered the Motion, argument of counsel for the parties, relevant case law, the record, and being otherwise fully advised, the Court finds:

1. On January 25, 2019, Plaintiff instituted this action for breach of contract seeking unpaid PIP benefits. On March 5, 2019, Defendant filed its Answer and Affirmative Defenses, which included affirmative defenses related to the statute of limitations in this matter and the exhaustion of benefits.

2. On April 26, 2019, Defendant served Plaintiff with a 57.105 safe harbor letter and a then unfiled Motion to Seek Attorney Fees Pursuant to Florida Statute § 57.105. *See* Def.'s Notice of Filing Proof of Service of Def.'s Mot. to Seek Attorney Fees Pursuant to Florida Statutes § 57.105 (Sept. 28, 2021).

3. On May 23, 2019, Defendant filed its Motion to Seek Attorney Fees Pursuant to Florida Statute § 57.105 dated April 26, 2019, indicating the safe harbor period under section 57.105(4) had expired. *See* Notice of Filing (May 23, 2019).

4. In the 57.105 Motion dated April 26, 2019, Defendant asserted "[t]hat all personal injury protection benefits affordable under this policy, as issued by the Defendant to Melissa M Ruiz have, in fact, been paid in accordance with the terms and conditions of the subject policy and applicable Florida law, and the benefits have been exhausted. Accordingly, the instant action is frivolous in nature."

Def.'s Mot. to Seek Att'y Fees Pursuant to Florida Statute § 57.105 ¶ 2 (filed May 23, 2019). The Motion alleged that notice of exhaustion was provided to Plaintiff in the form of the PIP Ledger. *Id.* at ¶ 3. Defendant also asserted that Plaintiff and counsel were aware of the exhaustion issue during the pre-suit stage, and through Defendant's affirmative defenses. *Id.* at ¶ 4. Defendant cited relevant case law on the issue of exhaustion of benefits, *see id.* at ¶¶ 5-8, and placed Plaintiff and its counsel on notice of its intention to seek fees pursuant to section 57.105 if this claim was not withdrawn within twenty-one (21) days. *See id.* at ¶¶ 9-10.

5. Plaintiff did not dismiss this action within the twenty-one (21) day period.

6. On September 9, 2019, Defendant filed its Motion for Final Summary Judgment. In its Motion, Defendant asserted that the subject policy of insurance provided $10,000 in PIP benefits to its insured; that Defendant "made reasonable payments to different providers by virtue of various assignments"; that Defendant "continued to issue payments for benefits claimed to be due as such claims were received"; that "Defendant did not have reasonable proof that it was not responsible for payment of these bills" and that "all bills/HCFA/CMS 1500 forms allowed by [Defendant] were properly completed and timely submitted." Def.'s Motion for Final Summary Judgment ¶¶ 3-5. Additionally, Defendant asserted that the $10,000.00 limit for PIP benefits was exhausted on or about January 14, 2013. *Id.* at ¶ 6. Defendant cited case law relative to the issue of exhaustion of benefits. *Id.* at ¶¶ 7-12. In support of its summary judgment motion, Defendant filed the Affidavit of Michael Parker, the claims adjuster assigned to this matter. *See* Notice of Filing Affidavit of Michael Parker in Support of Defendant's Motion for Summary Judgment (April 8, 2020).

7. On July 27, 2020, Defendant's Motion for Final Summary Judgment was scheduled for hearing to take place on October 28, 2020, at 2:30 p.m.

8. On October 28, 2020, at 10:45:28 a.m., less than 4 hours before the scheduled summary judgment hearing, Plaintiff voluntarily dismissed this matter without prejudice.

9. On November 2, 2020, Defendant timely filed its Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs. *See* Fla. R. Civ. P. 1.525. The Motion seeks costs under Florida Rule of Civil Procedure 1.420(d) and attorneys' fees under Florida Statutes section 57.105.

10. Florida Statutes section 57.105(1) provides:

> Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.

11. At the hearing on October 4, 2021, in support of its entitlement to attorneys' fees under section 57.105(1), Defendant raised the case law and arguments contained in its 57.105 Motion and its summary judgment motion regarding the exhaustion of benefits.[1] Plaintiff did not point to any facts in the record, or provide any facts not in the record, to dispute those facts set forth by affidavit in support of Defendant's position. Nor did Plaintiff provide any argument that distinguished this matter's exhaustion of benefits issue from the relevant case law. There is no indication of the existence of conduct on the part of Defendant in this matter that would provide an arguable basis for further liability for payment of PIP benefits.

12. The Court finds that Plaintiff or Plaintiff's attorney knew or should have known that the benefits were exhausted in this matter and that, based on current case law, the claim was not supported by the application of existing law to the material facts in this case. Plaintiff was put on notice of the exhaustion of benefits at multiple points in the parties' dealings, including Defendant's statutory 57.105 safe harbor notice to Plaintiff. Plaintiff had the opportunity and should have taken appropriate steps to avail itself of the protection of section 57.105(4). As such, Defendant is entitled to attorneys' fees pursuant to section 57.105(1).

13. Additionally, Defendant seeks costs under Florida Rule of Civil Procedure 1.420(d), which provides: "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs." As noted above, Plaintiff voluntarily dismissed this action without prejudice prior to the summary judgment hearing. As such, Defendant is entitled to an award of costs under rule 1.420(d).

It is it is therefore **ORDERED AND ADJUDGED** that Defendant's Motion for Entitlement and Motion to Tax Attorneys' Fees and Costs filed November 2, 2020 is hereby **GRANTED**. The Court reserves jurisdiction to determine the amount and allocation of the award of attorneys' fees and the amount of costs to be awarded.

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[1]At the hearing, the issue of the statute of limitations defense was also raised; however, that defense was not raised in Defendant's 57.105 Motion or its summary judgment motion, as such the Court's ruling does not consider that basis.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reply to affirmative defenses that simply denies defenses and does not assert any additional facts is insufficient and is stricken—Allegation of bad faith on part of insurer is premature where there has been no determination of insurer's liability and extent of damages owed

USA SPINE, LLC, a/a/o Andi Zdrava, Plaintiff, v. AUTO-OWNERS INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-024616, Division H. November 1, 2021. James S. Moody, III, Judge. Counsel: Walter A. Reynoso, II, 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 AND REPLY TO AFFIRMATIVE DEFENSES

THIS CAUSE, having come to be heard before the Court on Auto-Owners's ("Defendant") Motion to Strike USA Spine, LLC's, a/a/o Andi Zdrava ("Plaintiff"), Allegations as to Bad Faith and Reply to Affirmative Defenses, and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDGED:

For the reasons stated below, Defendant's Motion to Strike Plaintiff's Allegations as to Bad Faith and Reply to Affirmative Defenses is **GRANTED.**

Further, Plaintiff's Reply to Affirmative Defenses is hereby **STRICKEN** without prejudice.

I. Plaintiff's Reply to Defendant's Answer and Affirmative Defenses does not contain any additional factual allegations as to overcome Defendant's affirmative defenses.

Florida Rule of Civil Procedure 1.100(a) states that "[I]f an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance. Fla. R. Civ. P. 1.100(a). An avoidance is an allegation of additional facts intended to overcome an affirmative defense. *Kitchen v. Kitchen*,

404 So. 2d 203 (Fla. 2d DCA, 1981).

Here, Defendant filed its Answer and Affirmative Defenses on April 29, 2021. On May 19, 2021, Plaintiff filed its Reply to Affirmative Defenses. Importantly, Plaintiff's Reply to Affirmative Defenses contained the following language:

> 1. Defendant has raised 7 defense(s), which is hereby denied. All other defenses are not preserved and thus waived by Defendant.
>
> 2. Plaintiff avoids the 7 defense(s) by asserting substantial compliance, laches, waiver, estoppel, bad faith, strict compliance, lack of reasonable proof, failure to pay statutory fee schedule minimums, failure to properly adjuster claim, gratuitous payments to other providers, claim manipulation, overpayments to other providers, community standards and practices as to coverage.

A reply that "contains no additional factual allegations" is insufficient and "may be challenged by a motion to strike [under] Fla. R. Civ. P. 1.140(b)." *Buss Aluminum Prods. v. Crown Window Co.*, 651 So.2d 694, 695 (Fla. 2nd DCA, 1995) [20 Fla. L. Weekly D138a]. "It is well established that a reply should never be used to simply deny an affirmative defense." *Buss Aluminum Prods. v. Crown Window Co.*, 651 So.2d 694 (Fla. 2nd DCA, 1995) [20 Fla. L. Weekly D138a], citing *Moore Meats, Inc. v. Strawn*, 313 So.2d 660 (Fla. 1975). "For all practical purposes, a document entitled 'reply' which does not contain any additional facts in the nature of avoidance is not a pleading." *Id.*

Here, Plaintiff's Reply simply denies Defendant's affirmative defenses and does not contain any additional facts intended to overcome the affirmative defenses. Thus, pursuant to the cited case law and Florida Rule of Civil Procedure 1.140(b), Plaintiff's Reply is ruled as insufficient and therefore stricken from the record.

II. Plaintiff's bad faith allegations are improper because there has been no determination of the Auto-Owners's liability and neither has there been a determination of the extent of damages in this case.

Paragraph two (2) of Plaintiff's Reply states that "Plaintiff avoids the 8 defense(s) by asserting. . .bad faith. . ." However, a bad faith allegation is premature until there is a determination of the insurer's liability and extent of damages owed. *See Vest v. Travelers Inc. Co.*, 753 So.2d 1270, 1276 (Fla. 2000.) [25 Fla. L. Weekly S177a] "[T]he supreme court [has] held that a bad-faith action cannot accrue until the underlying lawsuit seeking insurance benefits is resolved in the insured's favor." *Hunt v. State Farm Fla. Ins. Co.* 112 So.3d 547, 549 (Fla. 2nd DCA, 2013) [38 Fla. L. Weekly D774a] *citing Blanchard v. State Farm Mutual Auto. Ins. Co.*, 575 So.2d 1289, 1291 (Fla. 1991). This can include a "judgement against [the insurer]" *Hunt*, 112 So.3d at 549. Also, "an arbitration award. . .satisfies the condition precedent required to bring a bad faith action." *See Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.* 100 So.3d 1155, 1158 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2139b]. Another example would be, "an appraisal award establishing the validity of [the insured's] claim . . . . *Hunt v. State Farm Fla. Ins. Co.* 112 So.3d 547, 549 (Fla. 2nd DCA, 2013) [38 Fla. L. Weekly D774a].

Here, the condition precedent required to bring a bad faith allegation has not been met. There has been no judgment against Auto-Owners in this case. Neither has an arbitration award nor an appraisal award been granted in favor of the Plaintiff. Thus, there has been no determination of the Auto-Owners's liability and neither has there been a determination of the extent of damages in this case. Therefore, Plaintiff has improperly brought forth a bad faith allegation in its Reply. Until the condition precedent is met, Plaintiff cannot bring a bad faith allegation against Auto-Owners.

For these reasons, Plaintiff's Reply to Affirmative Defenses is hereby **STRICKEN** without prejudice.

* * *

Insurance—Personal injury protection—Claims handling—Evidence—Routine business practices—While insurer's affiant can testify as to insurer's's routine practices in handling mail, she cannot testify as to what a particular employee did or did not due on a specific day with the particular piece of mail at issue in instant case where affiant had no personal knowledge of this information

SANDRA PHIPPS, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 19-CC-016250, Division M. December 17, 2021. Miriam Valkenburg, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER ON PLAINTIFF'S MOTION TO STRIKE ADDIDAVIT OF VIVIAN FOREMAN

This matter came before this Court on December 13, 2021on Plaintiff's Motion to Strike the Affidavit of Vivian Forman filed on November 20, 2021. Both counsel for Plaintiff and Defendant were present for the hearing. Having reviewed and considered the motions, the parties' arguments, the relevant law, and being otherwise fully advised in the premises, the Court finds as follows as follows:

1. Plaintiffs moves to strike the Affidavit of Vivian Forman an employees of Geico pursuant to Florida Rule of Civil Procedure 1.510(e) which states in pertinent part that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *See Id.*

2. In the affidavit of Vivian Forman filed with the Court, Ms. Forman attest that she has "personal knowledge of the procedures for the receipt of mail as it relates to Florida PIP Claims." *See Affidavit.*

3. She further attest to routine practices of employees at Geico as it relates to handling mail in the Mailroom department.

4. Florida Statute 90.406 allows evidence of routine practice(s) of an organization "to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice," regardless of the presence of eyewitnesses. *See id.*

5. In the deposition of Vivian Forman on August 26, 202 Forman testified as follows:

> [Attorney Dougherty]: Q. And just to clarify what Mr. Patrick was discussing earlier, all of your testimony here today is based upon your knowledge and supervision of the regular Geico practices and not any personal knowledge of you handling a particular piece of mail that is at issue in this case; is that accurate?
>
> [Witness Vivian Forma]: A. That's correct.
>
> *See Page 11 line, 2-7*

6. Here, Vivan Forman can testify as to Geico's routine practices in handling its mail but the affiant cannot testify as to what an employee did or did not do without independent knowledge. The affiant is speculating as to what Mr. Lewis did on the day in question. Additionally, paragraph 21 of the affidavit is based upon inadmissible hearsay.

7. Based on the forgoing the Court grants the Plaintiff's Motion as follows:

> A. Affiant can testify as the routine practices of Geico but cannot speculate as to what Mr. Lewis did without personal knowledge. The affidavit is hereby stricken in part as to the affiant attesting to what Mr. Lewis did on the day in question with the specific mail in question;
>
> B. Paragraph 21 of the affidavit is based upon inadmissible hearsay and is stricken in its entirety.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reply to affirmative defenses that simply denies defenses and does not assert any additional facts is insufficient and is stricken—Allegation of bad faith on part of insurer is premature where there has been no determination of insurer's liability and extent of damages owed

USA SPINE, LLC, a/a/o Jessica Klymczuk, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 21-CC-030441, Division H. November 1, 2021. James S. Moody, III, Judge. Counsel: Walter A. Reynoso, II, 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 AND REPLY TO AFFIRMATIVE DEFENSES

THIS CAUSE, having come to be heard before the Court on State Farm's ("Defendant") Motion to Strike USA Spine, LLC's, a/a/o Jessica Klymczuk ("Plaintiff"), Allegations as to Bad Faith and Reply to Affirmative Defenses, and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDGED:

For the reasons stated below, Defendant's Motion to Strike Plaintiff's Allegations as to Bad Faith and Reply to Affirmative Defenses is **GRANTED.**

Further, Plaintiff's Reply to Affirmative Defenses is hereby **STRICKEN** without prejudice.

I. Plaintiff's Reply to Defendant's Answer and Affirmative Defenses does not contain any additional factual allegations as to overcome Defendant's affirmative defenses.

Florida Rule of Civil Procedure 1.100(a) states that "[I]f an answer . . . contains an affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance. Fla. R. Civ. P. 1.100(a). An avoidance is an allegation of additional facts intended to overcome an affirmative defense. *Kitchen v. Kitchen*, 404 So. 2d 203 (Fla. 2d DCA, 1981).

Here, Defendant filed its Answer and Affirmative Defenses on June 17, 2021. On July 7, 2021, Plaintiff filed its Reply to Affirmative Defenses. Importantly, Plaintiff's Reply to Affirmative Defenses contained the following language:

> 1. Defendant has raised 8 defense(s), which is hereby denied. All other defenses are not preserved and thus waived by Defendant.
>
> 2. Plaintiff avoids the 8 defense(s) by asserting substantial compliance, laches, waiver, estoppel, bad faith, strict compliance, lack of reasonable proof, failure to pay statutory fee schedule minimums, failure to properly adjuster claim, gratuitous payments to other providers, claim manipulation, overpayments to other providers, community standards and practices as to coverage.

A reply that "contains no additional factual allegations" is insufficient and "may be challenged by a motion to strike [under] Fla. R. Civ. P. 1.140(b)." *Buss Aluminum Prods. v. Crown Window Co.*, 651 So.2d 694, 695 (Fla. 2nd DCA, 1995) [20 Fla. L. Weekly D138a]. "It is well established that a reply should never be used to simply deny an affirmative defense." *Buss Aluminum Prods. v. Crown Window Co.*, 651 So.2d 694 (Fla. 2nd DCA, 1995) [20 Fla. L. Weekly D138a], citing *Moore Meats, Inc. v. Strawn*, 313 So.2d 660 (Fla. 1975). "For all practical purposes, a document entitled 'reply' which does not contain any additional facts in the nature of avoidance is not a pleading." *Id.*

Here, Plaintiff's Reply simply denies Defendant's affirmative defenses and does not contain any additional facts intended to overcome the affirmative defenses. Thus, pursuant to the cited case law and Florida Rule of Civil Procedure 1.140(b), Plaintiff's Reply is ruled as insufficient and therefore stricken from the record.

II. Plaintiff's bad faith allegations are improper because there has been no determination of the State Farm's liability and neither has there been a determination of the extent of damages in this case.

Paragraph two (2) of Plaintiff's Reply states that "Plaintiff avoids the 8 defense(s) by asserting. . .bad faith. . ." However, a bad faith allegation is premature until there is a determination of the insurer's liability and extent of damages owed. *See Vest v. Travelers Inc. Co.*, 753 So.2d 1270, 1276 (Fla. 2000.) [25 Fla. L. Weekly S177a] "[T]he supreme court [has] held that a bad-faith action cannot accrue until the underlying lawsuit seeking insurance benefits is resolved in the insured's favor." *Hunt v. State Farm Fla. Ins. Co.,* 112 So.3d 547, 549 (Fla. 2nd DCA, 2013) [38 Fla. L. Weekly D774a] *citing Blanchard v. State Farm Mutual Auto. Ins. Co.*, 575 So.2d 1289, 1291 (Fla. 1991). This can include a "judgement against [the insurer]" *Hunt*, 112 So.3d at 549. Also, "an arbitration award. . .satisfies the condition precedent required to bring a bad faith action." *See Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.,* 100 So.3d 1155, 1158 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2139b]. Another example would be, "an appraisal award establishing the validity of [the insured's] claim . . . . *Hunt v. State Farm Fla. Ins. Co.,* 112 So.3d 547, 549 (Fla. 2nd DCA, 2013) [38 Fla. L. Weekly D774a].

Here, the condition precedent required to bring a bad faith allegation has not been met. There has been no judgment against State Farm in this case. Neither has an arbitration award nor an appraisal award been granted in favor of the Plaintiff. Thus, there has been no determination of the State Farm's liability and neither has there been a determination of the extent of damages in this case. Therefore, Plaintiff has improperly brought forth a bad faith allegation in its Reply. Until the condition precedent is met, Plaintiff cannot bring a bad faith allegation against State Farm.

For these reasons, Plaintiff's Reply to Affirmative Defenses is hereby **STRICKEN** without prejudice.

* * *

Insurance—Venue—Transfer—Venue selection clause—Domestic corporation

TAMPA BAY IMAGING LLC, a/a/o Ana Santos, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil. Case No. 19-CC-016446. September 1, 2021. James S. Moody, III, Judge. Counsel: Benjamin A. Kincer, Morgan and Morgan, Tampa, for Plaintiff. Teodora Siderova, Kubicki Draper, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051

THIS CAUSE, having come before the Court on September 1, 2021 at 11 AM., having heard arguments from both parties, the Court having reviewed the filings and Court docket, and being otherwise advised in the premises, it is:

ORDERED AND ADJUDGED as follows:

1. Defendant's, UNITED AUTOMOBILE INSURANCE COMPANY, Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 is hereby **GRANTED.**

2. Said action shall be moved from Hillsborough County, Florida to Miami-Dade County, Florida.

3. The Defendant shall bear the cost to transfer the case to Miami-Dade County, Florida.

* * *

Criminal law—Driving under influence—Arrest—Citizen's arrest—Fellow officer rule—Court denies motion to suppress allegedly illegal arrest by law enforcement that had arrived on scene after defendant was observed and evaluated by fire rescue officer who had been dispatched to the scene where defendant had been found unresponsive in driver's seat of vehicle parked on the shoulder of an exit ramp—Breach of peace element of a citizen's arrest was met because commission of the crime of DUI through driving or actual physical control of a vehicle constitutes a breach of the peace—A non-law enforcement citizen is not required to utter certain words in order to deprive a suspect of their right to leave—It is enough that non-law enforcement citizen take sufficient action to keep suspect from leaving the scene pending law enforcement's arrival under belief that it is necessary—Fire rescue officer's lack of knowledge as to whether a crime had been committed and his reluctance to physically restrain defendant were inconsequential since those thoughts were not communicated to defendant—Fire rescue officer's actions deprived defendant of his right to leave for purposes of citizen's arrest, which allowed fire rescue officer to relay the fact that defendant was behind the wheel of his vehicle to law enforcement under the fellow officer rule

STATE OF FLORIDA, v. MILO MOBLEY, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County, Criminal Division P. Case No. 2021-CT-000027-ASB. November 22, 2021. Sherri L. Collins, Judge.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE was considered by the Court on October 18, 2021, on the Defendant's Motion to Suppress an Illegal Arrest. The Court heard testimony from Lieutenant Scott Sieben of Boca Raton Fire Rescue, as well as Trooper Jefferson Guerrier from the Florida Highway Patrol. After reviewing the pleadings, hearing the testimony of the witnesses and the argument of counsel, and being otherwise fully advised in the premises, the Court makes the following findings of fact and reaches the following conclusions of law:

1. On or about January 2, 2021, a Road Ranger located Defendant unresponsive in the driver's seat of his vehicle parked on the shoulder of an exit ramp on Interstate 95 in Palm Beach County. FDOT dispatched law enforcement and fire rescue units. Lieutenant Scott Sieben, with Boca Raton Fire Rescue, arrived on the scene first along with other emergency rescue personnel. The fire rescue driver purposely parked the fire engine in front of the Defendant's vehicle to serve as a "blocker" as part of the scene for safety purposes to keep Defendant's vehicle from going forward into any traffic. At the time of their arrival, a Road Ranger vehicle was still on scene parked approximately 75-100 feet behind the Defendant's vehicle. The road ranger advised Lt. Sieben that he could not wake up the driver.

Defendant did not respond to Lt. Sieben's verbal commands. Lt. Sieben testified that there are numerous reasons for a person to be unresponsive behind the wheel of a car, including, but not limited to, death, medical issues, drug and/or alcohol intoxication, and sleeping. Lt. Sieben testified that he, unfortunately, starts at death and works from there. He reached in and rubbed Defendant's sternum which caused Defendant to respond as if startled. As Lt. Sieben asked questions to determine the level of consciousness, Defendant continued to exhibit unusual behavior by not answering verbal inquiries, not making eye contact, and being standoffish. Lt. Sieben declared he wanted to check Defendant's vital signs to continue to try to establish a level of consciousness and asked Defendant to go to the ambulance. Defendant did not want to get out of the car.

Lt. Sieben indicated that it is normal practice in this type of situation to take any car keys out of the ignition, separate the driver from their keys, and move to the ambulance for safety concerns. He does not remember if the keys were already removed by someone else or if he took possession of Defendant's keys. Once Lt. Sieben cajoled Defendant to enter the rear of the ambulance, Lt. Sieben began to attempt to evaluate Defendant for any existing medical concerns. The ambulance doors were closed during the evaluation for the purpose of reducing intrusion of road noise and fumes.

Lieutenant Sieben acknowledged that the Defendant's vehicle was not involved in an accident and was not blocking traffic. He further testified that there were no signs of damage to the Defendant's vehicle or the surrounding area. Additionally, Lieutenant Sieben stated that, during COVID, the presence of a mask covering his nose and mouth causes him to only smell his own breath and he could not smell anything as he interacted with Defendant.

Lieutenant Sieben testified that after checking the Defendant's vital signs, the Defendant's respiration rate and heart rate did not indicate the existence of any opioids in his system. He did not recall whether or not the Defendant's eyes were red, and testified that he was not trained to administer any field sobriety tests. Lieutenant Sieben's completed the review of Defendant and alleviated any concerns for the need to transport defendant to the hospital for an immediate medical issue. He indicated that the trooper arrived on scene as he ended his assessment or immediately thereafter. Lt. Sieben articulated that he intended to transfer the scene including the defendant to the police. He did not advise the Defendant at any time that he was free to leave or that he was being detained. Instead, Lt. Sieben stated that he and the Defendant exited the ambulance and waited for the arrival of law enforcement. He told Defendant that police were on their way and they would remain with him until police arrival. However, Lt. Sieben expressly stated that he was not waiting for law enforcement because he thought a crime had occurred but instead that law enforcement would have a different job to investigate the "odd" scene once they arrived.

2. The Court also heard the testimony of Trooper Jefferson Guerrier from the Florida Highway Patrol. Trooper Guerrier testified that the Defendant was still being evaluated in the back of the ambulance with the doors closed when he arrived at the scene. Upon arrival, Trooper Guerrier parked his vehicle behind the Road Ranger vehicle, which was behind the Defendant's vehicle.

Trooper Guerrier acknowledged that he did not observe the Defendant in control of his vehicle, and that Defendant's vehicle was not involved in an accident. Trooper Guerrier could not remember where defendant's keys were during the investigation but thinks they might have been in the defendant's pocket since he remembers them placed on the hood of the patrol car along with defendant's wallet upon arrest. Nevertheless, Trooper Guerrier noticed multiple signs of impairment and asked the Defendant to participate in Field Sobriety Exercises after which he developed probable cause to effect an arrest for Driving Under the Influence.

The issue in this case is whether Lieutenant Sieben's conduct constituted a citizen's arrest which would permit him to relay the fact that the Defendant was behind the wheel of his vehicle to Trooper Guerrier under the Fellow Officer Rule. The Defendant has moved to suppress the evidence alleging that his arrest was illegal, as the misdemeanor with which he was charged was committed outside the presence of the arresting officer.

3. A DUI is a misdemeanor offense under Florida Law. . §316.193(2)(a), Fla. Stat.; §775.08(2) Fla. Stat. Section § 901.15(1), Florida Statutes, provides that an officer may only arrest a person without a warrant if that person has committed a misdemeanor in the presence of the officer. The general rule is that an officer may only make a warrantless arrest for a DUI if the arresting officer observes all the elements sufficient to establish probable cause. In this case, it is undisputed that Trooper Guerrier did not observe all of the elements sufficient to establish probable cause to arrest the Defendant for DUI;

namely, Trooper Guerrier did not observe the Defendant in control of his vehicle.

However, if the arresting officer did not witness all of the elements of DUI, there are several exceptions to the warrant requirement, including the "Fellow Officer Rule", which might allow an arrest if there is more than one officer with knowledge and the collective knowledge of the officers gives probable cause for arrest. The prosecution, distinguishable from cases cited by defendant, argues that Lieutenant Sieben's conduct constituted a citizen's arrest which would permit him to relay the fact that the Defendant was behind the wheel of his vehicle to Trooper Guerrier .

4. At common law, a private citizen may arrest a person who commits a felony or breach of the peace in the citizen's presence. *Edwards v. State*, 462 So.2d 581 (Fla. 4th DCA 1985) *citing State v. Schuyler*, 390 So.2d 458, 460 (Fla. 3d DCA 1980). Since driving under the influence in this factual circumstance is not considered a felony under Florida law, in order for a citizen's arrest to be lawful, the Defendant's actions must have constituted breach of the peace. When a citizen effects an arrest based on breach of the breach of the peace, it is not necessary for the citizen to have "probable cause." *Mattos v. State*, 199 So.3d 416, 420 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1974b] ("[Defendant] argues that [the off-duty officer who effected a citizen's arrest] lacked probable cause to arrest him, but this argument is misplaced Because [the officer] observed a breach of the peace, probable cause was not necessary to effect a citizen's arrest of Mattos.")

5. Florida Courts have held driving under the influence constitute breach of the peace. *Mattos*, 199 So. 3d 416, 420 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1974b] (off-duty officer observed breach of the peace when he saw a driver passed out in the driver's seat of a vehicle stopped in the middle of traffic); *Edwards v. State,* 462 So.2d 581 (Fla. 4th DCA 1985)(off-duty police officer observed a breach of the peace when he followed defendant for approximately five miles and witnessed him cross the center line several times forcing other vehicles to take evasive action); *Seay v. DHSMV,* 12 Fla. L. Weekly Supp. 312a (Fla. 9th Cir. Ct. Dec. 27, 2004)(finding a breach of the peace where driver was asleep at the wheel in the middle of the street with the engine running); *Cortinas v. State*, 11 Fla. L. Weekly Supp. 416d (Fla. 17th Cir. Ct. Feb. 11, 2004)(breach of the peace where driver swerved into oncoming traffic and struck median); *Kuse v. State,* 6 Fla. L. Weekly Supp. 473a (Fla. 11th Cir. Ct. May 28, 1999)(breach of the peace where driver swerved from lane to lane and drove onto sidewalk on two occasions).

6. The defense argues that since Lt. Sieben encountered Defendant unresponsive on the I-95 off ramp and did not observe any driving pattern that would constitute a danger, these facts did not constitute a breach of peace. The Court disagrees. Driving or being in actual control of a vehicle on the roadways is an inherently dangerous activity to vehicles, property, and people. As the United States Supreme Court stated in 1957, "[t]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S. Ct. 408, 412, 1 L. Ed. 2d 448 (1957).

In *State v. Furr*, 723 So.2d 842 (Fla. 1st DCA 1998) [23 Fla. L. Weekly D2514a] the Court cited cases from Indiana, Wisconsin, and Michigan in holding that "operating a motor vehicle while intoxicated is an activity which threatens the public security and involves violence. As such, it amounts to a breach of the peace." *Id*. at 844 citing *City of Waukesha v. Gorz,* 166 Wis.2d 243, 479 N.W.2d 221, 223 (1991), *rev. denied,* 482 N.W.2d 107 (Wis.1992). The *Furr* opinion also found that "a person who operates a motor vehicle while intoxicated commits a breach of the peace, whether such conduct in a particular case consists of actual or threatened violence. *Furr* at 844 citing *State v. Hart*, 669 N.E.2d 762, 764 (Ind. Ct. App. 1996). As Defendant's vehicle did not magically appear on the interstate off-ramp, it follows that Defendant was driving his vehicle on I-95 prior to pulling off. As Defendant alone was in actual physical control of the vehicle, he could have started the car and pulled back on to the roadway at anytime. Therefore, this Court finds that when a defendant commits the crime of DUI through driving or actual physical control, a breach of the peace is committed. *Mattos*, 199 So. 3d at 420 (holding that it "strains credulity" to assert that a defendant passed out intoxicated behind a wheel of a vehicle does "not pose a threat to the safety and order of the public"). Accordingly, the Court finds that the breach of the peace element of a citizen's arrest has been met in this case.

7. Also, the Fourth District Court of Appeal has consistently held, "in order to effectuate a citizen's arrest, a misdemeanor must not only be committed in the presence of the private citizen, but there must be an arrest—that is a deprivation of the suspect's right to leave." *Steiner v. State*, 690 So.2d 706 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D850a]. In this case, Lieutenant Sieben indicated the normal practice when a driving is found unresponsive behind the wheel is to separate the driver from their keys. However, he candidly told the Court that he did not remember if the keys were already out of the ignition or if he took the keys. He further detained Defendant by convincing him to enter the medical vehicle and closing the doors. He additionally did not advise Defendant that he could leave after being cleared medically and communicated that law enforcement officers were on the way and that uniformed fire rescue personnel would remain with Defendant until they arrived.

Ironically, most of the case law that involve citizen's arrests discuss circumstances where off duty or out of jurisdiction police officers act to detain and the courts evaluate whether the actions constitute a citizen's arrest. This Court holds that a non-law enforcement citizen is not required to utter certain words in order to deprive a suspect of their right to leave. Rather, it is enough that they take sufficient action to keep a suspect from leaving the scene pending law enforcement arrival under the belief that it is necessary. Lt. Sieben testified he did not have the requisite training to investigate whether defendant was under the influence of alcohol. He did his job to determine there existed no requirement for immediate transport to the hospital and then intentionally kept defendant at the scene for law enforcement to do their job to investigate what he deemed odd circumstances. The Court determines that Lt. Sieben's lack of knowledge as to whether a crime was being committed and his reluctance to physically restrain defendant if he had tried to leave to be inconsequential since his thoughts were not communicated to Defendant. By insuring Defendant did not have his keys, separating Defendant from his vehicle, blocking Defendant's vehicle with the ambulance, moving Defendant into the ambulance with closed doors, and informing Defendant that he was to wait until law enforcement arrived, Lt. Sieben deprived Defendant of his right to leave for purposes of a citizen's arrest. Therefore, the Court finds that Lt. Sieben did effectuate a lawful citizen's arrest of the Defendant.

In light of the foregoing, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion to Suppress is hereby **DENIED**.

* * *

Insurance—Personal injury protection—Affirmative defenses—Amendment—Motion to amend response to assert additional affirmative defenses is denied where insurer should have been aware of proposed defenses if it acted diligently in preparing its case, and proposed defenses would inject new issues and theories into case and necessitate reopening discovery

ALLAN GUEVARA, et al., Plaintiffs, v. UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO19013249, Division 53. November 21, 2021. Robert

W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO AMEND RESPONSE TO ASSERT ADDITIONAL AFFIRMATIVE DEFENSES, UPON A FINDING OF PREJUDICE

This cause came before the Court on November 19, 2021 for hearing of the Defendant's Motion for Leave to Amend Response to Assert Additional Affirmative Defenses. The Court's having reviewed the Motion and entire Court file, having heard argument, and having considered the relevant legal authorities, finds as follows:

This case was filed on October 14, 2019 and is now in a jury trial posture, with the pretrial conference set for December 10, 2021. This case was originally in the South Satellite Courthouse, but was transferred to this division for jury trial pursuant to Administrative Order upon the parties' filing their compliant joint pretrial stipulation indicating their readiness for jury trial. The joint pretrial stipulation consists of 102 pages. At that point, the Defendant had pled and preserved 12 affirmative defenses.

The Honorable Terri-Ann Miller entered her Uniform Order Setting Pretrial Deadlines on May 5, 2021. Discovery cutoff occurred on August 3, 2021. The joint pretrial stipulation was filed on August 24, 2021. No motion has been made to extend either deadline. The Defendant filed the instant Motion on September 15, 2021, two days after Judge Miller entered her Order of Transfer. The Defendant's Motion did not, however, specify which defenses it desires to add—while the Motion states that a proposed set of Amended Defenses was attached to the Motion, it was not. As a matter of fact, the proposed Amended Defenses were not filed until the day before the hearing, November 18, 2021. This Motion purports to add and 13th and 14th affirmative defense. Additionally, the Defendant did not diligently move its Motion forward to hearing, although this Court has plenty of available hearing time.

The Court notes that the proposed new defenses were of a nature that the Defendant should have clearly been aware had it acted diligently in preparing its case. That it "found out" about these possible defenses late in the game was through no fault of the Plaintiff. Indeed, Defendant clearly should have known about the possibility of these defenses before discovery cutoff and before the parties had filed their joint pretrial stipulation. Rather, the Defendant ignored the pretrial deadlines and is trying to reap the reward of its own recalcitrance.

The Court notes that this case is outside the standards for resolution of this type of case. More importantly, the Court concludes that granting this late request would unfairly prejudice the Plaintiff. These new defenses are not merely restated emanations of what the parties had already prepared for. Rather, the proposed new defenses would inject new issues into the case and advance new theories for the first time. Discovery would have to be reopened, as the proposed added new defenses were not something that the Plaintiff was anticipating. Additionally, the joint pretrial stipulation would have to be amended, as to witnesses, exhibits, and jury instructions. The pretrial conference and jury trial would have to be postponed further. *See State Farm Mutual Auto. Ins. Co. v. Baum Chiropractic Clinic PA,* 323 So.3d 756, 757 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1548a]; *Alliance Spine & Joint III, LLC v. GEICO Gen. Ins. Co.,* 321 So.3d 242, 245 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1149a]. As a result, it is respectfully

ORDERED that the Defendant's Motion is DENIED. The pretrial conference shall proceed as scheduled.

* * *

Landlord-tenant—Commercial lease—Force majeure clause—COVID-19 pandemic—Where Governor's executive order closing gyms and fitness centers was proximate cause of tenants' nonpayment of rent on fitness center, and executive order was clearly within meaning of force majeure clause of lease, no rent is due for period of executive order—No merit to arguments that tenants must prove inability to pay rent during force majeure period or that they could not rely on order until it had been appealed and found to be valid by Florida Supreme Court—No merit to argument that force majeure clause is not applicable because tenants still could have operated tanning beds at fitness center where executive order commanded "closure" of all gyms and fitness centers

DIVITA FITNESS CORPORATION d/b/a ANYTIME FITNESS, a Florida Profit Corporation and NANCY C. DIVITA, Individually, Plaintiffs/Counter-Defendants, v. PROSPERE II INVESTMENT LLC, a Florida limited liability company, Defendant/Counter-Plaintiff. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 2021-CC-000726. October 29, 2021. Frederic Schott, Judge. Counsel: J. Marc Jones, J. Marc Jones, P.A., Winter Springs, for Plaintiff. Rania A. Soliman, Soliman Law, Altamonte Springs, for Defendant.

ORDER GRANTING PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came on to be heard before the Court on the 20th day of October, 2021, upon Plaintiffs/Counter-Defendants' Motion for Partial Summary Judgment. After carefully considering the arguments raised by Counsel for the Plaintiffs/Counter-Defendants, after carefully considering the arguments raised by Counsel for the Defendant/Counter-Plaintiff, after taking Judicial Notice of the entire Court file with agreement from both parties, after carefully considering all applicable Florida Statutes, after carefully considering all applicable Florida and Federal case law, and being otherwise fully advised in the premises, the Court makes the following findings:

1. As set forth above, the Court took Judicial Notice of the Court file and all of its contents based on the agreement by the parties. A Lease Agreement was entered into between the parties on August 31, 2014, filed by the Defendant. This Lease Agreement was specifically for rental by Plaintiff of commercial property located at 3950 South Highway17-92, Suite 2024, Casselberry, Florida.

2. This is a case of first impression for this Court as this is the first case in which a commercial tenant or commercial landlord has sought to enforce or avoid enforcement of a force majeure clause in a commercial lease to either recover arrearages owed or to discharge duties under a lease based upon force majeure allegedly resulting from Covid-19.

3. The subject Lease Agreement had a plethora of rights of and obligations for each of the parties. Section 2 of the Lease Agreement entails a "USE/EXCLUSIVITY" clause. Specifically, the Defendant/Counter-Plaintiff was not willing to enter into the Lease Agreement unless the Plaintiffs/Counter-Defendants agreed to "use and occupy the Demised Premises solely as a Twenty Four hour fitness center/boutique with personal training and tanning." Furthermore, this exclusivity of use clause was "in the nature of a restrictive covenant."

4. The issue before this Court was whether force majeure applied to the withholding of rent by the Plaintiffs/Counter-Defendants. In Florida, parties have broad discretion to allocate risks between them by contract. Here, the Lease Agreement contained therein a specific force majeure clause as agreed to by the parties. Section 39 of the Lease Agreement specifically set forth, "Neither Landlord nor Tenant shall be required to perform any term, condition or covenant in this Lease so long as such performance is delayed or prevented by force majeure, which shall mean acts of God. . .restrictions by any governmental authority. . .and any other cause not reasonably within the control of Landlord or Tenant and by which the exercise of due diligence Landlord or Tenant is unable, wholly or in part, to prevent or overcome. Lack of money shall not be deemed force majeure."

5. Executive Order 20-71 was issued by Florida Governor Ronald DeSantis on March 20, 2020. In this Executive Order, Governor DeSantis prohibited all gyms and fitness centers from operating within the State of Florida effective the following day, including within Seminole County, with four limited exceptions, none of which were applicable in the case sub judice. This prohibition of activity was not lifted until Governor DeSantis's Executive Order 20-123 on May 18, 2020.

6. Arguments were raised on numerous grounds by the Defendant/Counter-Plaintiff that force majeure could not apply to any withholding of rent for any period of the Lease Agreement by the Plaintiffs/Counter-Defendants. The Court rejected all of these arguments as contrary to the application of Florida law to the uncontroverted facts in this case. Before addressing certain arguments specifically, it is clear to this Court that an Executive Order issued by the Governor of Florida prohibiting certain activities constitutes "restriction by governmental authority." There may be no clearer example of such a restriction.

7. Three arguments will be addressed specifically herein. First, the Defendant/Counter-Plaintiff argued that the sentence, "Lack of money shall not be deemed force majeure" would preclude the Plaintiffs/Counter-Defendants from benefiting from any period in which force majeure might apply unless Plaintiffs/Counter-Defendants could provide evidence of an inability to pay the rent during said period. If the Court were to accept Defendant/Counter-Plaintiff's argument, the entirety of the Force Majeure section of the Lease Agreement would be meaningless. It is clear to this Court that the sentence, 'Lack of money shall not be deemed force majeure," means exactly what it says: an inability to afford rent cannot be used under the guise of force majeure (for example, if Plaintiffs/Counter-Defendants were unable to sell fitness center memberships or they left fitness equipment outside and an act of God such as unexpected rain ruined it such that their fitness center could not operate) to withhold rent.

8. Second, the Defendant/Counter-Plaintiff argued that, although Plaintiffs/Counter-Defendants were limited to using the rented property as a twenty-four-hour fitness center/boutique, they could still operate tanning beds while Administrative Order 20-71 was in effect. This argument fails to account for the language of Governor DeSantis's directive. Section 3 of the Administrative Order 20-71, specifically stated, "I hereby order the closure of gymnasiums and fitness centers within the State of Florida." Closure means the act of closing. Therefore, even if the Plaintiffs/Counter-Defendants had tanning beds in their fitness center, they were prohibited by law to open their fitness center for any reason, whether to train Olympic athletes or to provide tanning services to local citizens.

9. Third, arguments were raised that perhaps the Plaintiffs/Counter-Defendants could or should have appealed Governor DeSantis's Administrative Order issued on March 20, 2020, or that the Administrative Order might ultimately be invalidated by the Florida Supreme Court as unconstitutional and, therefore, until that decision is rendered, Plaintiffs/Counter-Defendants cannot rely upon it as valid. One of the basic tenets of our justice system is that of "controlling law": parties may rely on the law as it exists at the time that they make their decisions. If these arguments were accepted, endless numbers of civil litigation disputes would turn on what might happen in the future with laws and/or cases being reconsidered, distinguished, or reversed. These arguments and the other remaining arguments raised by the Defendant/Counter-Plaintiff either miss the mark or their logical conclusions left the Plaintiffs/Counter-Defendants with a Hobson's choice: try to somehow skirt the clear mandate of the Governor of Florida, with its concomitant possibilities of daily fines or potential criminal prosecution, or close their facility and rely on the force majeure clause to which both parties contracted.

10. In sum, this Court finds that Governor DeSantis' COVID-19 Executive Order 20-71, issued on March 20, 2020, was the proximate cause of the Plaintiffs/Counter-Defendants' non-performance for payment of rent and that restrictive laws or regulations, such as that of Governor DeSantis, clearly are within the meaning of the force majeure clause as found in Section 39 of the Lease Agreement entered into between the parties as attached as Exhibit "A" to Plaintiffs/Counter-Defendants' Complaint in the instant case. Plaintiffs/Counter-Defendants made a valid exercise of the force majeure provision in Section 39 of the Lease Agreement in effect between the parties between March 21, 2020, and May 17, 2020.

THEREFORE, IT IS ORDERED AND ADJUDGED that:

1. Plaintiffs/Counter-Defendants' Motion for Partial Summary Judgment is **GRANTED.**

2. No rent is due from Plaintiffs/Counter-Defendants to Defendant/Counter-Plaintiff for the time period that Executive Order 20-71 was in effect, from March 21, 2020, through May 17, 2020.

* * *

Insurance—Confession of judgment—Where medical provider asserts that amount of judgment confessed by insurer is 7 to 11 cents less than amount due, case over "trifling" amount is dismissed

ISO DIAGNOSTIC TESTING INC., Plaintiff. v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21033618, Division 53. November 24, 2021. Robert W. Lee, Judge. Counsel: Kevin R Jackson, Fort Lauderdale, for Plaintiff. Jacqueline Cheryl Whittingham, Miami Gardens, for Defendant.

FINAL ORDER OF DISMISSAL

This case came before the Court this day for case management conference. Counsel for both parties appeared. The Defendant has confessed judgment in this case. The Plaintiff hesitates to accept the confession, claiming that the math is off from somewhere between 7 cents to 11 cents.

The Fourth DCA, in a detailed ruling upholding Judge Fry's judgment in favor of an insurer when the amount ultimately in dispute was only $4.17, held that this was a "trifling amount" that was a "waste of time and money, and impair[ed] the dignity of the court and the judge." *Precision Diagnostic, Inc. v. Progressive American Ins. Co.*, 46 FLW D2282, D2283 (Fla. 4th DCA Oct. 20, 2021) [46 Fla. L. Weekly D2282d]. Certainly, the same is true in this case.

Accordingly, this case is DISMISSED, with the Court retaining jurisdiction to enforce the terms of the confession, as well as address any issues involving attorney's fees and costs.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Memberships, organizations, and avocational activities—Judge may no write comments to be included in upcoming book by expert witness when comments are intended to be included in published book and potentially used in advertisements

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-17. Date of Issue: November 2, 2021.

ISSUE

May a judge write comments about a book by an expert witness when the comments are intended to be included in the published book and potentially used in advertisements?

ANSWER: No.

FACTS

A judge was requested by the author of an upcoming book to provide short written comments on its merits. The book was written by a person who holds himself out as an expert in scientific matters related to court cases and who was retained by the judge as an expert when the judge was in private law practice. The author requests that the comments be addressed from a judge's perspective and is to indicate how the work would contribute to the legal profession. The comments would be included in the published book and would potentially be used in promotional materials for the book.

DISCUSSION

The inquiring judge has been asked to provide comments on the "merits you might discern" in a book to be published by an author whom the judge retained as an expert witness when the judge was in legal practice. The author seeks favorable comments that would be included in the published book and would potentially be used in promotional materials. The comments are to be made from a judicial perspective.

Canon 2B of the Florida Code of Judicial Conduct states that ". . . A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. . ."

The book is clearly a commercial endeavor. Its success would bring profits to the publisher and to the author. Further, due to the role of the author as an expert witness, the book's success and the judge's endorsement of the book and its author could enhance the author's career as an expert witness.

This Committee has addressed several questions involving situations similar to the one currently posed, but none dealing with the exact issue raised by the present inquiry. Varying answers have been given, depending upon the unique circumstances described in each inquiry.

In Florida Judicial Ethics Advisory Committee Opinion 20-11 [28 Fla. L. Weekly Supp. 245a], a judge asked if it would be permissible to write a foreword to a memoir written by a family member of the judge. Such an action was approved by the Committee. In that instance, it was made clear that the judge's official title would not be used in the book. The opinion cautioned that "If it did our answer may be different." Today we deal with that issue.

Some earlier opinions have allowed judges to write critiques of books, but have expressed reservations. In Fla. JEAC Op. 12-34 [20 Fla. L. Weekly Supp. 190a], a judge asked if the judge would be allowed to critique a book written by a lead defense attorney about a well-publicized criminal case. The Committee's answer should give pause to any judge asked to take such action, even when it may be permitted. It read, "Yes. However, given the restrictions which the Code of Judicial Conduct would place on the judge in this specific case, the Committee advises the inquiring judge to decline the invitation." As stated in that opinion, "There is no blanket prohibition on judges writing book reviews, or writing books themselves, on legal or other subjects." (Cites omitted) The exact concern raised by the present inquiry was clearly anticipated. "It is possible that the book's publisher or the criminal defense attorney will use the proposed critique to advance their private interests. An argument could be made that the judge, recognizing this possibility, indirectly lent the prestige of judicial office to advance the private interests of the book's publisher or the criminal defense attorney in violation of Canon 2B."

Fla. JEAC Op. 21-14 [29 Fla. L. Weekly Supp. 490a], a quite recent opinion, dealt with a judge who wished to post a congratulatory message on the LinkedIn website when a book written by the judge's spouse was to be released. This Committee found, in that instance, that such an action would violate Canon 2B. The perception that the message would be considered an endorsement and promotion of the book, and the substantial likelihood that the message would come to the attention of attorneys and other persons whom the judge is in a position to influence led the Committee to the conclusion that posting the message would not be appropriate.

In the present case, the request made by the author seems clearly intended both to lend the prestige of the judicial office to the author and to advance the private interests of the author and the publisher of the book. The Committee finds that the judge should respectfully decline the request.

REFERENCES

Fla. Code Jud. Conduct, Canon 2B
Fla. JEAC Ops. 12-34, 20-11, 21-14

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—Family member affiliations—Professional relationships—Judge assigned to felony criminal division does not have to disqualify himself/herself in all criminal cases because judge's spouse is employed as an administrative assistant at state attorney's office prosecuting cases over which judge presides—Judge not required to disclose in every criminal case that judge's spouse is employed as an administrative assistant at SA office prosecuting cases over which judge presides—Judge not required to recuse or disqualify himself/herself when the judge's spouse has notarized an information or indictment in case over which judge will be presiding, but judge must disclose this fact to the parties—Judge does not have to recuse or disqualify himself/herself from presiding in sex offender/predator failure to register cases where underlying sex offense convictions that formed basis of registration requirement were initially charged by judge when he/she was an assistant state attorney, but judge must disclose to parties that he/she made the charging decision

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2021-18. Date of Issue: November 3, 2021.

ISSUES

1. Must a judge who is assigned to a felony criminal division recuse himself/herself in all criminal cases because the judge's spouse is employed as an administrative assistant at the State Attorney's office prosecuting the cases over which the judge presides?

Answer: No.

2. Whether the judge must disclose in every criminal case that the judge's spouse is employed as an administrative assistant at the State Attorney's office prosecuting the cases over which the judge presides?

Answer: No.

3. Must the judge recuse himself/herself when the judge's spouse has notarized an information/indictment in the case over which the judge will be presiding?

Answer: No.

4. Must the judge disclose to the parties involved in felony criminal cases that appear before him/her that his/her spouse who works as an administrative assistant in the State Attorney's office has notarized an information/indictment in the case over which the judge will be presiding?

Answer: Yes.

5. Must the judge recuse/disqualify himself/herself from presiding in sex offender/predator failure to register cases where the underlying sex offense convictions that formed the basis of the registration requirement were initially charged by the inquiring judge when he/she was an assistant state attorney before taking the Bench?

Answer: No.

6. Must the judge disclose to the parties in such a case that he/she made the charging decision in the sex offense case that formed the basis of the registration requirement?

Answer: Yes.

FACTS

The inquiring judge is currently assigned to preside over felony criminal cases. The judge's spouse is employed as a supervising administrative assistant at the State Attorney's office in the county where the judge presides. The judge's spouse works specifically for the prosecutor who makes charging decisions and handles presentments before the grand jury as well as indictments. The judge's spouse, as the supervising administrative assistant, routinely notarizes circuit criminal information and indictments in the county in which the judge presides. The judge's spouse does not make any executive decisions regarding the filing of the charging documents, but performs the administrative function of notarizing the documents for the attorney/decision maker.

In addition, for seven years prior to the judge taking the Bench, the judge was an assistant state attorney in the county over which he/she now presides and made virtually all of the charging decisions regarding sex crimes submitted for prosecution to the State Attorney's office. Although the judge engaged in significant investigations on some of these cases before making the charging decisions, he/she did not prosecute such cases, nor did he/she supervise any attorneys who did.

As a judge assigned to preside over felony criminal cases, the judge is now assigned sex offender/predator failure to register cases where the underlying sex offense conviction that forms the basis for the registration requirement is a case that was initially charged by the inquiring judge.

DISCUSSION

Canon 3E provides, in pertinent part:

(1) a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually . . . , or the judge's spouse . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

Issues 1-4: Spouse Related Issues

Issues 1 and 3: Whether Disqualification is Required

The employment of a judge's spouse or other relatives can create an ethical violation for the judge if the employment is sufficiently involved or related to the judge's particular court or its operation. As this Committee recognized in *Fla. JEAC Op. 02-15* [9 Fla. L. Weekly Supp. 647b], "the result depends upon the relationship of the employing entity to the judge and the spouse's degree of participation."

A judge is not disqualified merely because the judge's relative is employed by the State Attorney's office *(Fla. JEAC Op. 77-12)* or the Public Defender's office (*Fla. JEAC Op. 77-4)*. However, this Committee has opined that a judge is subject to disqualification if the judge's relative is the Public Defender. *See Fla. JEAC Op. 01-05* [8 Fla. L. Weekly Supp. 471a].

Similarly, this Committee has rendered opinions that the judge should recuse himself or herself where a spouse has a supervisory role in a state agency. *See Fla. JEAC Op. 90-23* (judge's spouse was the district program administrator of the Department of Health and Rehabilitative Services and supervised attorneys appearing before the judge*); Fla. JEAC Op. 93-51* (judge's spouse was employed by the Department of Health and Rehabilitative Services as the managing attorney for dependency where dependency attorneys were under the spouse's chain of command).

From the facts presented by the inquiring judge, it does not appear that the judge's spouse works in a supervisory capacity over lawyers who would appear on cases in the judge's division, and his/her involvement in any case is merely notarizing a supervisor's signature on a charging document. As such, disqualification would not be required under these circumstances.

However, it should be noted that if the judge's spouse gains pertinent information concerning any such case and communicates the information to the judge, this would likely lead to a different result.

The Committee believes that recusal or disqualification is not required under the circumstances described by the inquiring judge.

Issues 2 and 4: Whether Disclosure is Required

The judge also inquires whether disclosure would be appropriate.

The Commentary to Canon 3E(1) provides, in pertinent part:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

The Committee is of the opinion that the spouse's mere employment with the State Attorney's office does not need to be disclosed unless the judge believes that his/her impartiality might reasonably be questioned.

As to the circumstance where the spouse has notarized an indictment or information that is before the judge, the Committee believes that disclosure would be appropriate. Even though the spouse serves in an administrative capacity by notarizing charging documents and does not make any charging decisions, disclosure would be required because the spouse would be technically considered "directly or indirectly" involved in the case pending before the judge. *See Fla. JEAC Op. 18-26* [26 Fla. L. Weekly Supp. 694a].

Issues 5 and 6: Issues Related to the Judge Being a Former Prosecutor

Issue 5: Whether Disqualification is Required

The next issue is whether the judge should recuse/disqualify himself/herself from presiding over sex offender/predator failure to register cases where the underlying sex offense conviction that forms the basis of the registration requirement was initially ***charged*** by the inquiring judge when he/she was an assistant state attorney.

It should be noted that Canon 3E(1)(b) provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where (b) the judge served as a lawyer . . . ***in the matter in controversy***. . . ." (Emphasis added).

The facts provided suggests that the inquiring judge, when employed by the State Attorney's office made the charging decisions, but did not prosecute the cases or supervise the attorneys who did. The inquiring judge investigated many of these cases by interviewing witnesses, consulting with law enforcement, and seeking search warrants. However, after making the charging decision, he/she had no further involvement or responsibility in the case.

When applying the plain reading of Canon 3E(1)(b), the inquiring judge did not serve as a lawyer in the matter in controversy, as the matter in controversy is a failure to register charge and not the original sexual offense. That being said, if the judge's investigation before making the charging decision has caused the judge to develop a personal bias or prejudice concerning a particular party, or the judge has personal knowledge of disputed evidentiary facts related to the pending charges, disqualification would be required.

The Committee does not believe that recusal is necessary or required in the circumstances provided by the inquiring judge.

Issue 6: Whether Disclosure is Required

The Committee believes that the judge's involvement in making the charging decisions in the underlying sex cases makes disclosure necessary. As we said in *Fla. JEAC Op. 12-02* [19 Fla. L. Weekly Supp. 507a], "[o]ur Supreme Court has made clear that different standards should govern for disqualification and disclosure." (citing *In re Frank*, 753 So. 2d 1228, 1239 (Fla. 2000) [25 Fla. L. Weekly S147a]). The *Frank* court explained as follows:

> [T]he standard for disclosure is lower. In other words, a judge should disclose information in circumstances even where disqualification may not be required. This view is supported by several decisions from other jurisdictions. *See O'Neill v. Thibodeaux*, 709 So. 2d 962, 967-68 (La.Ct.App.1998) (finding that trial judge correctly disclosed that he occasionally played cards with one of the parties, even though the judge was not required to disqualify himself from presiding over the case on that basis); *Collier v. Griffith*, 1 No. 01-A-01-9109-CV00339, 1992 WL 44893 at *4-*5 (Tenn.Ct.App. March 11, 1992) (analyzing comment to Canon 3 of the Code of Judicial Conduct and stating that "[g]iven the seminal importance of impartiality, both in fact and in appearance, we find that judges should disclose any information that the parties or their lawyers might consider relevant to the disqualification issue").
>
> Likewise, "a judge should disclose on the record information that the judge believes the parties or their lawyers ***might*** consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Comment to Rule 3E(1) of the Fla. Code of Jud. Conduct (emphasis added).

CONCLUSION

In conclusion, the judge's spouse's employment with the State Attorney's office in the county in which the judge presides does not prevent the judge from presiding over felony criminal cases in that county, nor does it require disclosure. The spouse's notarization alone of charging documents in cases that come before the judge should be disclosed as the judge's spouse would be technically considered directly or indirectly involved in that case. Such notarization alone would not call for recusal. If the judge's spouse shares any information with the judge concerning a specific case, recusal would be in order.

The judge is not required to recuse himself/herself from a failure to register case where the judge made the charging decision relating to the sex crimes that formed the basis of the registration requirement. However, if the judge developed a personal bias or prejudice concerning the defendant as a result of his/her investigation in determining whether to charge the defendant with an offense, he/she should recuse. Nonetheless, the judge should disclose that he/she made the charging decision in the underlying sex offense case.

REFERENCES

In Re: Frank, 753 So. 2d 1228, 1239 (Fla. 2000).
Fla. Code Jud. Conduct, Canon 3E(1)(a)(b)(c)
Commentary to Fla. Code Jud. Conduct, Canon 3E(1).
Fla. JEAC Op. 18-26, 12-02, 02-15, 01-05, 93-51, 90-23, 77-12, and 77-4.

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