Volume 30, Number 1, May 31, 2022

SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

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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.

Cumulative Index for Volume 29

is included in this packet

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FLW SUPPLEMENT

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Miami-Dade County v. City of Miami. Circuit Court, Eleventh Judicial Circuit (Appellate), Miami-Dade County, Case No. 2019-167-AP-01. Circuit Court Order at 29 Fla. L. Weekly Supp. 227a (August 31, 2021). Certiorari Review Denied at 47 Fla. L. Weekly D1011e

Milton and Patricia Wallace Irrevocable Trust Agreement, In re. Circuit Court, Eleventh Judicial Circuit, Case No. 2016-2767-CP-02. Circuit Court Opinion at 28 Fla. L. Weekly Supp. 813a (January 29, 2021). Affirmed In Part, Reversed In Part at 47 Fla. L. Weekly D1047a

Wallace Irrevocable Trust Agreement, In re Milton and Patricia. Circuit Court, Eleventh Judicial Circuit, Case No. 2016-2767-CP-02. Circuit Court Opinion at 28 Fla. L. Weekly Supp. 813a (January 29, 2021). Affirmed In Part, Reversed In Part at 47 Fla. L. Weekly D1047a

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Finding that stop was lawful welfare check is supported by stopping officer's statements that he received tip that licensee was driving erratically and was potentially drunk and he witnessed licensee driving slower than other traffic and weaving out of her lane—No merit to argument that video evidence contradicts officer's report—Record also contains competent substantial evidence showing that officer substantially complied with twenty-minute observation period prior to administration of breath test

KARLY NOEL SCHEUERMAN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2021 AP 0013. February 8, 2022. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(J. LAYNE SMITH, J.) **THIS CAUSE** came before the Court upon Petitioner's Petition for Writ of Certiorari filed September 13, 2021. After review of the Petition, Response, Reply the record before the Court, and otherwise being fully advised in the premises, the Court **FINDS**:

Section 322.2615, Florida Statutes provides for the suspension of one's driving license for driving under the influence. This section is to be read *in pari materia* with §316.1932, a statute which provides that a sobriety test requested under §322.2615 "must be incidental to a lawful arrest" and the officer "must have reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. *Fla. Dep't of Hwy. Safety & Motor Vehicles v. Hernandez,* 74 So.3d 1070, 1076 (Fla. 2011) [36 Fla. L. Weekly S243a] *as revised on denial of rehearing,* (Nov. 10, 2011) [36 Fla. L. Weekly S648c]; §316.1932(1)(a)1.a. Once the license is suspended, the driver may request review through an administrative hearing with the Florida Department of Highway Safety and Motor Vehicles ("the Department") §322.2615(1)(b)3. The review shall essentially function as a trial before the Department. §322.2615(6)(b). At the hearing, the hearing officer is limited to these questions, which must be established by a preponderance of the evidence:

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

C322.2615(7)(b). The hearing officer's authorization to determine the "lawfulness of the stop" is built into the provision of the essential element of whether probable cause existed." *Wiggins v. Fla. Dep't of Hwy. Safety & Motor Vehicles,* 209 So.3d 1165, 1165 (Fla. 2017) [42 Fla. L. Weekly S85a]. Finally, the officer's decision may be revived by an Article V judge or judges in a circuit court by a writ of certiorari. §322.2615(13).

To demonstrate entitlement to a writ of certiorari from the final order of a hearing officer, a petitioner must show that there was either (1) a failure to provide due process; (2) the hearing officer departed from the essential requirements of the law; or (3) the administrative findings and judgment were not supported by competent substantial evidence. *Nader v. Fla. Dep't of Hwy. Safety &, Motor Vehicles,* 87 So.3d 712, 723 (Fla. 2012) [37 Fla. L. Weekly S130a] (*quoting Haines City Community Dev. v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The reviewing 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 decisions." *Fla. Dep't Hwy. Safety & Motor Veicles v. Stenmark,* 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a].

In determining whether the administrative findings and judgment are supported by competent substantial evidence, the Florida Supreme Court has stated:

> Every case involving a license suspension contains a Fourth Amendment analysis of whether there was reasonable suspicion to stop the vehicle or probable cause to believe that the driver was in physical control of the vehicle while under the influence of alcohol. With that, first-tier review under this particular statute demands a close review of the factual record to determine whether the hearing officer's findings were supported by competent, substantial evidence and whether the essential requirements of the law were applied. Some consideration of the evidence is inescapable in the competent, substantial evidence determination.

Wiggins v. Fla. Dep't of Hwy. Safety & Motor Vehicles, 209 So.3d 1165, 1172 (Fla. 2017) [42 Fla. L. Weekly S85a]. When determining whether a stop is based upon reasonable suspicion, the court must determine "whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Fla. Dep't of Hwy. Safety & Motor Vehicles,* 874 So.2d 1171, 1173 (Fla. 2004) [29 Fla. L. Weekly S275a]. Put more succinctly, "the objective test 'asks only whether any probable cause for the stop existed,' making the subjective knowledge, motivation or intention of the individual officer involved wholly irrelevant." *Id*. (citations omitted). Finally, when conducting a Fourth Amendment analysis involving a welfare check, the analysis is governed by the reasonableness of the stop, "which is measured by the totality of existing circumstances." *Taylor v. State,* 326 So.3d 115, 118 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1641a].

Petitioner first argues that her DUI arrest was unlawful because it emanated from an unlawful traffic stop. Petitioner asserts that the hearing officer's finding that the stop was a welfare stop was not supported by the evidence. The Petitioner further argues that because the stop was mischaracterized by the hearing officer, the hearing officer applied the wrong legal standard to his analysis of whether the stop was a valid legal stop. The Court finds Petitioner's argument unpersuasive. As stated above, the hearing officer only needs to determine whether the stopping officer had an "objectively reasonable basis for making the stop." *Dobrin* at 1173. The officer's intention or motivation in making the stop is irrelevant. *Id*. Here, the hearing officer had substantial competent evidence that supported his characterization of the stop as a welfare stop. The hearing officer based his determination made by the arresting officer, who stated he witnessed driving irregularities, had received a face-to-face tip from another motorist, and that he wanted to check on the Petitioner to make sure she was okay to drive. This evidence is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached", i.e., that this stop was a welfare stop. *Fla. Dep't of Hwy. Safety & Motor Vehicles v. Trimble,* 821 So.2d 1084 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

The Petitioner argues that the stop was unlawful even if evaluated under the correct standard. Pet's Pet. at 10. However, under the correct standard, as determined above, there was substantial competent evidence to support the hearing officer's finding that the stop in this case was lawful. As stated above, when conducting a Fourth Amendment analysis involving a welfare check, the analysis is governed by the reasonableness of the stop, "which is measured by the totality of existing circumstances." *Taylor* at 115. Here, another motorist advised the officer that the Petitioner was driving erratically and was potentially drunk. Trooper Jeremy Barton Depo. at ll. 1-5, p. 9; Arrest Report p. 2. Though both the evidence and the hearing officers findings are not completely clear, at some point the officer also independently observed the Petitioner driving fifteen miles per hour slower than the speed limit, slower than surrounding traffic, and weaving out of her lane at least once. Trooper Jeremy Barton Depo. at ll. 1-5, p. 9; Arrest Report p. 2. This evidence, when taken together, is sufficient competent evidence of the hearing officer's determination that the arresting officer's welfare stop was reasonable and therefore lawful.

Petitioner further contends, in reliance upon *Wiggins v. Fla. Dept of Hwy. Safety & Motor Vehicles,* 209 So.3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a], that the video evidence in this case contradicts the officer's report and testimony. However, after review of the video, it is clear that the video footage supports the officer's general testimony that another driver informed the officer of the Petitioner's poor driving behavior, that the Petitioner was driving slower than ongoing traffic, and that she was driving erratically.

Petitioner further alleges that the officer did not properly comply with Fla. Admin. Code R. 11D-8.007(3) and that therefore the ensuing breath test was invalid. However, the record provides substantial competent evidence showing that the officer substantially complied with the rule. The officer testified that he observed the Petitioner for at least 20 minutes as required by the rule. The video evidence shows that the officer spent a considerable amount of time observing the Petitioner before tow services arrived and does not show anything to suggest that the Petitioner ingested or regurgitated anything.

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Early reinstatement—Denial—Continued driving while license was revoked due to designation as habitual traffic offender

KENNETH ERIC SAWYER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 5th Judicial Circuit (Appellate) in and for Sumter County. Case No. 2021-CA-267. February 14, 2022. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(MICHELLE T. MORLEY, J.) **THIS COURT** having considered Petitioner's Petition for Writ of Certiorari, filed on May 12, 2021; Respondent's Response to Petition for Writ of Certiorari, filed on December 20,2021; and having reviewed the records of this case, finds as follows:

1. Petitioner asserts Respondent departed from the essential requirements of law and due process since he was not aware that he was considered a habitual traffic offender; has satisfied his financial obligations; he is not in default with child support obligations; and needs a driver's license for employment.

2. Respondent maintains the hearing officer properly denied Petitioner early reinstatement of his driving privilege since he continued driving on January 9, 2021 despite his revocation due to being designated a habitual traffic offender. Respondent attached Petitioner's certified driving record; citation details for the January 9, 2021 offense: and the Final Order denying Early Reinstatement, dated February 12, 2021.

3. The Circuit Court may review by certiorari an order by the Florida Department of Highway Safety and Motor Vehicles to determine 1) whether due process has been accorded, 2) whether the essential requirements of law have been observed, and 3) whether the administrative findings were supported by competent, substantial evidence. *See Vichich v. Department of Highway Safety and Motor Vehicles,* 799 So.2d 1069 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a].

4. Pursuant to section 322.27(1)(b), Florida Statutes, a person whose driving privilege has been revoked under s. 322.27(5), may, upon expiration of twelve months from the date o f such revocation, petition the department for reinstatement of his driving privilege. Upon such petition and after investigation of the person's qualification, fitness, and need to drive, the department shall hold a hearing pursuant to Chapter 120 to determine whether the driving privilege shall be reinstated on a restricted basis solely for business or employment purposes. At such hearing, the department shall determine the petitioner's qualification, fitness, and need to drive. *See* section 322.271(4)(b), Florida Statutes. Additionally, in determining whether the person should be permitted to operate a motor vehicle on a restricted basis, whether such person can be trusted to so operate a motor vehicle is a factor to be considered. *See* section 322.271(2)(a), Florida Statutes. Section 322.271, Florida Statutes vests broad discretion in the Department of Highway Safety and Motor Vehicles to determine the qualification, fitness, and need to drive in the context of allowing hardship licenses. *See Woodard v. Department of Highway Safety and Motor Vehicles,* 25 Fla. L. Weekly Supp. 688a (Fla. 5th Cir. Ct. September 25, 2017).

5. In this case, Petitioner was afforded procedural due process by virtue of the hearing for early reinstatement of his driving privilege and the hearing officer's consideration of such request. The hearing officer also considered Petitioner's driving record, which included Petitioner continuing to drive on January 9, 2021 despite his revocation due to being designated a habitual traffic offender. Based upon Petitioner's driving record, Petitioner's testimony at the hearing, and Petitioner's qualification, fitness and need to drive, the hearing officer made the determination that reinstatement could not be recommended at this time. The Court further finds the hearing officer observed the essential requirements of the law and that the hearing officer's findings were supported by competent substantial evidence.

Based upon the foregoing, it is hereby;

ORDERED AND ADJUDGED: That, Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Municipal corporations—Code enforcement—Hearings—Continuance—Special magistrate's denial of property owner's motion for continuance of code violation hearing to allow owner, who is at high risk of contracting COVID-19, to testify virtually resulted in denial of due process where denial resulted in injustice to owner whose testimony was relevant to issue of compliance with construction deadlines set in prior code enforcement order, reason for continuance was not foreseeable and did not result from dilatory practice by owner, and requested continuance was for relatively short period of time that would not have prejudiced or inconvenienced town—Magistrate also departed from essential requirements of law and denied due process by refusing to admit proffered construction timeline as exhibit because owner was not present to establish predicate for its admission and by failing to allow owner's counsel to fully cross-examine town's engineer who testified about extension of deadlines—Magistrate erred in ruling that evidence explaining why owner had been unable to complete construction by deadlines could not be presented at hearing to impose fines, only at mitigation hearing after property had been brought into compliance—Magistrate's decision is reversed

FLORIDA WOOD RECYCLING, INC., Appellant, v. TOWN OF MEDLEY, FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2020-227-AP-01. L.T. Case No. ECC2017-0089. March 9, 2022. Appeal from an Order of a Special Magistrate of the Town of Medley, Code Compliance. Counsel: Carter N. McDowell, Brian S. Adler, Elise H. Gerson, and Kenneth Duvall, Bilzin, Sumberg, Baena, Price & Axelrod, LLP, for Appellants. Laura K. Wendell and Jose L. Arango, Weiss, Serota, Helfman, Cole & Bierman, P.L., for Appellees.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(TRAWICK, J.) Appellant comes before this Court on an appeal of a final order issued by a Special Magistrate for Code Compliance, Town of Medley. On April 18, 2017, Appellant received a Notice of Violation for several alleged code violations. These violations, as well as the Medley Code ("Code") provisions at issue, included: (1) airborne sediment and dust §62-86; (2) sediment, pollutants and pavement requirements §14-155; (3) vehicles on the Property §14-156; and (4) emission of dirt and smoke §14-158. Appellant was given until May 18, 2017, to bring the Property into compliance. Upon re-inspection, a Code Compliance Officer found the Property was still in violation of certain provisions of the Town Code. Accordingly, a hearing ("First Hearing") was set for March 13, 2018, before a Special Magistrate.

After the First Hearing, a final order ("First Order")[1] was issued April 3, 2018, that included a compliance schedule to complete the following tasks by specific dates:

1. Attain a professional consultant, engineer, or architect on or before April 12, 2018.
2. Meet with the Town's Development Review Committee on or before April 26, 2018.
3. Obtain a topographic survey for Property on or before June 25, 2018.
4. Develop plans for submittal on or before September 23, 2018.
5. Obtain a Town Permit on or before November 22, 2018.
6. Obtain a County permit on or before January 21, 2019.
7. Commence on-site construction on or before February 20, 2019.
8. Contact the Town Engineer for construction verification on or before February 27, 2019.
9. Complete construction and obtain final approval from the Town on or before August 26, 2019.

This First Order required that completion of corrective construction be completed by August 26, 2019, or a $200/day fine would be imposed commencing September 2, 2019.

Appellant contends that it diligently pursued completion of these tasks, but due to the difficulties inherent in meeting the required deadlines, the cooperation of Appellee was required. Indeed, it appears that the Appellee did extend various deadlines.

Sometime on or before October 3, 2020, a Code Compliance Officer posted a violation notice on the front gate of the Property. The notice asserted that the Appellant was still in violation of various Code provisions, and that there would be a hearing before a Special Magistrate on October 13, 2020.

On October 13, 2020, a second code enforcement hearing ("Second Hearing") was held before a Special Magistrate to determine whether the deadline for completion of construction of August 29, 2019, had been met and the violations corrected. At the start of the hearing, Appellant's counsel requested that the hearing be continued. He told the Special Magistrate that he believed that the service of notice on Appellant may have been improper and that he wanted proof of the posting of an affidavit or proof of certified mailing before proceeding with the hearing. The Special Magistrate, referring to the exhibits, concluded that there were affidavits of posting and there was a certified notice of mailing.

Appellant's counsel also asked that the hearing be continued due to health concerns of his client, Appellant's owner (Owner) who was at high risk for contracting COVID-19, as was a member of the Owner's family. He asked that the hearing be continued and that it be conducted virtually. He proffered that the Owner would be able to present plans and a timeline of events that would show why the final deadline had not been met. Appellant's counsel also hoped that the Owner and the Town could meet virtually to resolve this matter. Appellee's counsel opposed the requested continuance, maintaining that the hearing was not required by either state law or the Code, and that the case had been going on for two to three years.[2] He contended that the only relevant issue for the hearing was the certification of fines. Testimony regarding extensions of the timeline was, in his opinion, not relevant. Instead, Appellee's counsel argued, any evidence regarding why the final deadline had not been met could be presented at a later hearing, at which time Appellant could present the Special Magistrate with mitigating circumstances and perhaps have the certified fines reduced accordingly.

At first, the Special Magistrate seemed inclined to grant the continuance and allow a virtual hearing, stating:

> But if due to health concerns, the witness or something (sic) wants to appear virtually, I personally understand that and I would have no objection, but that's—I would like to hear from the Town.

After hearing from Appellee's counsel and the Appellant's response, the Special Magistrate stated, "I understand but the Town is—I appreciate what you're saying. I've been listening, ***but the Town is not agreeing to a continuance***." *Emphasis added.* He went on to adopt the rationale of Appellee's counsel, explaining that the First Order had been entered 2 ½ years before, and that the hearing was not an original hearing on violations but rather, a hearing to certify fines. No mention was made of the health concerns raised by Appellant. Thus, in denying the continuance, it appears that the Special Magistrate was delegating his authority and deferring to Appellee's counsel. It is greatly concerning that a supposedly fair and independent Special Magistrate, tasked by the Town Code to hear code compliance matters, would seemingly cede that independence to a representative of the Code Compliance Department.

At the start of the hearing, Appellant's counsel attempted to introduce into evidence a timeline to help explain that various interim deadlines established in the First Order had been extended by the Appellee, which, in their belief, should have resulted in an extension of the final deadline. Appellee's counsel objected, again contending that the hearing was only for the certification of fines. He repeated his argument that any evidence regarding the failure to meet the final deadline could be presented at a third hearing to mitigate fines. The

Special Magistrate subsequently refused to admit the exhibit, saying that it would be accepted for "informational purposes" as there was "no predicate as to who prepared it and why."

In response to the arguments made by Appellant's counsel regarding extensions of the timeline, the Special Magistrate called the Town's consulting engineer to testify. While conceding that certain benchmark items on the schedule had been extended, the engineer stated that the final deadline had not been. He also confirmed that the construction was not completed by the August 26, 2019, deadline as required. He concluded that the final deadline gave the Appellant a reasonable amount of time to complete the required construction and bring the Property into compliance. During cross-examination by Appellant's counsel, the engineer was asked whether extensions of interim benchmarks granted by the Town should have resulted in a shift in the entire schedule. Appellee's counsel objected, arguing once again that such testimony would only be relevant at a hearing to mitigate fines. Appellant's counsel retorted that "frustration of purpose" and "inability to comply" were relevant in determining whether fines should be imposed. The Special Magistrate responded by cutting off questioning by Appellant's counsel, ruling that the questions counsel was asking amounted to a rehearing of matters properly addressed in the First Hearing. The Special Magistrate then concluded the hearing by issuing the Second Order.

Appellant raises four primary issues, contending that 1) they it was denied procedural due process because it was not given proper notice of the Second Hearing as required by *162.12, Fla. Stat; 2) it was denied procedural due process and the Special Magistrate failed to follow the essential requirements of law when he denied. Appellant a continuance of the Second Hearing; 3) it was denied procedural due process and the Special Magistrate failed to follow the essential requirements of law by failing to admit Appellant's proffered timeline as a formal exhibit; and 4) it was denied procedural due process and the Special Magistrate failed to follow the essential requirements of law when he elicited testimony from Appellee's consulting engineer as to whether the final deadline for completion of the corrective construction work had been met, but failed to allow Appellant to present evidence in response to this testimony.

Appellate review of quasi-judicial proceedings in the circuit court is governed by well-established standards: (1) whether due process was afforded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Miami Dade County v. Omnipoint Holdings,* 863 So. 2d 195, 198 (Fla. 2003) [28 Fla. L. Weekly S717a].[3]

We first address the issue of whether the denial of Appellant's request for a continuance was a departure from the essential requirements of law and amounted to a denial of procedural due process.

As a result of the devastating threat presented by the COVID-19 pandemic, on March 20, 2020, Governor DeSantis issued Executive Order No 20-69. Section 2 of the Order reads: "[l]ocal government bodies may utilize communications media technology, such as telephonic and video conferencing, as provided in section 120.54(5)(b)(2), Florida Statutes." App. 5. In an apparent attempt to implement that Order, Appellee's website included the following statement: "[a]ll Town of Medley public meetings, committee meetings and hearings are being conducted virtually until further notice." App. 74.[4]

When Appellant's counsel requested a continuance, he informed the Special Magistrate that the Owner was at high risk for contracting COVID-19 and that a member of the Owner's household was also at high risk. For these reasons, counsel asked that a virtual hearing be held since Appellant had legitimate defenses. While the Special Magistrate seemed to agree that health concerns might justify a virtual hearing, he questioned whether a virtual hearing was authorized.[5] After hearing Appellee's arguments that the case had been going on for too long and that the arguments being raised by Appellant could be made at a subsequent fine mitigation hearing, the Special Magistrate denied the continuance.

In *A.P.D. Holdings, Inc., v. Reidel,* 865 So.2d 682 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D424b], citing *Fleming v. Fleming,* 710 So.2d 601, 603 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D730a], the court listed three factors that should be considered in determining whether a trial court abused its discretion in denying a motion for a continuance. As these factors involve considerations consistent with procedural due process, they are likewise applicable to an administrative proceeding. They are: (1) whether the denial of the continuance would create an injustice for the movant; (2) whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practice; and (3) whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance. *Id.* at 684. In considering these factors, the *A.P.D. Holdings* court found that since the appellant's president had personal knowledge of the issues, and since his testimony was relevant, the denial of a continuance created an obvious injustice. *Id,* at 684.

In *Vollmer v. Key Development Properties,* 966 So. 2d 1022, 1029 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2505a] the court held that "[I]t is generally reversible error to refuse to grant a motion for continuance when a party or his counsel is unavailable for physical or mental reasons, which unavailability prevents fair and adequate presentation of the party's case." Finally, in *Pares v. Soriano,* 306 So. 3d 236 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1396a], the court found that the trial court should have granted a continuance to consider a motion for rehearing where the appellant could not attend the hearing due to her hospitalization and illness, and she had submitted supporting documentation. *Id.* at 237.

The risks to individuals and family members at high risk for COV1D-19 has become a matter of common knowledge given the intensity of this pernicious pandemic. Appellant's counsel raised this as a concern for the Owner and asked for a short continuance so that the hearing could be conducted virtually. Counsel informed the Special Magistrate that the Owner had relevant testimony to present, telling him that the timeline for completion of construction on the Property was established in the First Order. Any failure to comply with the deadlines imposed in that order, including the final deadline, was at issue. As Appellant's counsel pointed out, extensions agreed to by Appellee may have resulted in "frustration of purpose" and "inability to comply" with the First Order. Countering Appellant's arguments, the Appellee's consulting engineer testified that while there were extensions, the final deadline was not extended since completion of construction by the final deadline was still reasonable. Thus, a factual issue was forged that the Owner could have attempted to rebut by testifying. On these facts, the Special Magistrate's denial of a continuance resulted in an injustice for Appellant as his testimony, like that of the appellant's president in *A.P.D. Holdings* was relevant; the reasons for the continuance were not foreseeable given the length, scope and intensity of the pandemic, and not the result of any dilatory practice by Appellant;[6] and finally, the requested continuance was for a relatively short period of time to allow the hearing to be conducted virtually which would not have prejudiced or inconvenienced Appellee. As a result, the essential requirements of law were not followed when the Special Magistrate denied the requested continuance. This denial also resulted in a denial of procedural due process.

The denial of a continuance directly impacted two of the remaining issues—the failure of the Special Magistrate to admit the Appellant's proffered timeline as a formal exhibit and the Special Magistrate's

failure to allow Appellant to fully cross-examine the Appellee's consulting engineer and present evidence regarding extensions of the interim and final deadlines for the completion of the corrective construction work. The decisions made by the Special Magistrate in both instances resulted in both a departure from the essential requirements of law and a denial of procedural due process.

The Special Magistrate declined to admit the timeline which included Appellant's efforts to meet deadlines, the frustration of those efforts due to inaction by the Appellee, and the Appellee's extensions of interim deadlines. The Special Magistrate ruled that there was "no predicate as to who prepared it and how and why." Yet, this predicate could not be tendered since a continuance to allow the Owner to appear virtually was denied. As a result, Appellant was placed between the proverbial "rock and a hard place." The Special Magistrate's exclusion of the timeline and his reason for doing so further supports our conclusion that the "injustice element" of the *A.P.D. Holdings* case was met here. While the exclusion of evidence which could not be authenticated is not, in and of itself a departure from the essential requirements of law or a due process violation, had the continuance been granted and the appellant permitted to testify, the exhibit would have been admitted and the cross-examination perfected.

After hearing Appellant's counsel's arguments regarding the timeline, the Special Magistrate called the Appellee's consulting engineer, who testified that while interim deadlines were extended, the final deadline was not. When Appellant's counsel attempted to cross examine him regarding the reasonableness of completion of construction by the final deadline, Appellee's counsel objected, arguing that the only issue was whether compliance was achieved, and that the proper forum for whether extensions would prevent completion by the final deadline would be at a mitigation hearing once the Property was brought into compliance. The Special Magistrate determined that the cross-examination was an attempt to relitigate the first hearing, at which point he cut-off the cross-examination. This puzzling decision was error. The First Order, which established the schedule of dates for completion of the required construction, included the following language at paragraph 6(j):

> If the violations are not corrected before that date(s), ***after considering*** the gravity of the violations, ***any actions taken by the owner,*** and any previous violations of the owner as evidenced by the record in this case, a fine will be imposed in the amount of $200 per day for every day that the violation continues to exist after September 2, 2019 until compliance is achieved.

Emphasis added. This language granted the Owner the opportunity to explain why he had been unable to complete construction in a timely manner **prior to the imposition of fines.** This flies directly in the face of the assertions of the Appellee that the hearing was not the proper forum for Appellant's failure to meet the required deadlines. Further, procedural due process dictates that Appellant be given the opportunity to show why it was either impractical or impossible to complete the construction by the final deadline before fines were imposed and a cloud placed on Appellant's title by the imposition of a lien on the Property. Thus, the Special Magistrate's rulings departed from the essential requirements of the applicable law, in this case the First Order, and were a denial of due process.[7]

Given our findings on the issues discussed above, we need not address the issue of whether statutory notice requirements were met.

The decision of the Special Magistrate is hereby **REVERSED.**[8]
(WALSH and SANTOVENIA, JJ. concur.)

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[1]As there were two "Final Orders", they will be denoted "First Order" and "Second Order."

[2]While Appellee contends that the requested continuance was for an indefinite period and would thus delay a resolution of this longstanding matter, a review of the hearing transcript indicates that Appellant was not asking for a lengthy continuance. Indeed, Appellant's counsel appears to say that the hearing could be continued to later in the month or in the following month when he said: "I'm respectfully requesting—if it goes to next month, what we have is the ability to have dialogue . . . "

[3]Appellant has not argued that there was a lack of competent substantial evidence to support the Second Order. This issue has thus been waived. "It is well settled that; in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal." *Singer v. Borbua,* 497 So. 2d 279, 281 (Fla. 3d DCA 1986).

[4]While it is not entirely clear that this statement was on the website on the date of the Second Hearing, a screenshot of the website included in the appendix to Appellant's brief, App. 74, includes a date at the top of the screenshot of October 19, 2020, well after the Governor's Order. It thus appears that this directive from the Appellee was in effect at the time of the Second Hearing on October 13, 2020.

[5]Appellee contends that the Special Magistrate lacked the authority to conduct a virtual hearing, arguing that the Governor's Executive Order did not reach code compliance hearings; that the Appellee's Emergency Order No. 1 merely adopted the parameters of the Governor's Order; and that nothing in the Town Code authorized virtual code enforcement hearings conducted by a Special Magistrate. Further, Appellee posits that Appellant acknowledged this lack of authority and waived this issue. First, contrary to Appellee's arguments, we find no support in the record for the assertion that this issue was waived. In fact, Appellant's counsel argued this point extensively. As to applicability of the Governor's Order, Section 2 of the Order refers to "local government bodies" utilizing telephonic and video conferencing. Arguably, this may be interpreted as being limited to legislative bodies such as the Town Council of Medley. *See* §162.01 (1), Fla. Stat., referencing Chapter 162 as the "Local Government Code Enforcement Boards Act" and §162.04 (1), Fla. Stat., defining a local governing body as "the governing body of the county or municipality." However, within Appellee's Emergency Order No. 1, which we assume is what is referenced in the screen shot of the Town's website at App. 74, the language is much broader, specifically stating that "[a]ll Town of Medley public meetings, committee meetings and ***hearings*** are being conducted virtually until further notice." *Emphasis added.* This language would seemingly have permitted a virtual hearing by the Special Magistrate. Finally, as to Town Code §2-84(a)(2) and (a)(5), Appellee references the following language in arguing that virtual code compliance hearings are not authorized:

> (2) At the time and place set for the hearing, the Special Magistrate shall hear and consider all testimony offered, and shall examine and consider all the evidence presented . . . .
>
> (5) All hearings of the Special Magistrate shall be open to the public . . . .

Nothing in this language prohibits virtual hearings. In fact, virtual hearings would allow the Special Magistrate to comply with each of these Code provisions. We interpret Emergency Order No. 1 and the Town Code to permit virtual code compliance hearings.

[6]Appellant contends that efforts were made prior to the hearing to obtain a continuance. A copy of a letter to Appellee's counsel requesting a continuance was transmitted to Appellee's counsel twice. App. 72. Appellant's counsel also told the Special Magistrate that he had also attempted to contact a representative of Appellee the morning of the hearing to ask for a continuance, but received no response until that afternoon.

[7]Appellee has consistently maintained that the only issue at the subject hearing was the certification of fines. It contends that any issue regarding the reasonableness of completion of construction by the final deadline could be addressed at a later fine mitigation hearing. In addition to the previously discussed reasons as to why this position is erroneous, we foresee the following at a subsequent mitigation hearing: Appellant attempts to present evidence to show that fines should not have been imposed because of the impossibility of meeting the final deadline due in part to the actions (or inaction) of Appellee. Appellee objects, arguing that while fines can be reduced, the issue of whether fines should have been imposed in the first instance cannot be reconsidered. Thus, taking Appellee's position to its logical conclusion, Appellant would not be permitted to contest the imposition of fines at any stage of the proceedings. Both the First Order and procedural due process dictate otherwise.

[8]We believe that we have the authority to remand this matter for proceedings consistent with this opinion. However, in *Miami-Dade County v. Snapp Industries, Inc.,* 319 So.3d 739 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1029a], the Third District indicated, without explanation, that this Court lacked the authority to remand a matter in a similar posture as this case. We believe that the Third District may have overlooked the fact that the *Snapp Industries* case was an appeal from a decision of a hearing officer rather than a petition for writ of certiorari. "As an appellate court ***granting a petition for certiorari,*** the circuit court could only quash the special magistrate's findings, conclusions, and order. A direction to the administrative agency to dismiss the enforcement action exceeds that authority. *Monroe Cnty. v. Carter,* 41 So.3d 954, 958 n. 6 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1638d]. *Id.* at 741." *Emphasis added.* No reason was given by the court as to why an appeal, specifically authorized by Section 162.11, Fla. Stat., was treated in the same manner as a petition for writ of certiorari. As the Third District has previously recognized, this Court may remand a matter brought before it on an appeal specifically authorized by law. For example, in *Dougherty ex rel. Eisenberg v. City of Miami,* 23 So. 3d 156 158 (Fla. 3d DCA 2009) [34 Fla. L. Weekly

D2047a], this Court, on an appeal provided for by the city code, reversed and remanded a decision of the city commission. After further proceedings, the Third District, in granting a second-tier petition for Writ of certiorari, specifically directed the city to comply with the initial decision of this Court. As Judge Wells stated in her concurring opinion, the city commission was obligated to comply with this Court's determinations on remand. *Id.* at 163. We see no substantive factual or legal distinction between *Snapp and Eisenberg.* While both cases are binding on this Court, we believe we are obligated to follow *Snapp as* the more recent case, despite our belief that the Third District may have misconstrued the nature and posture of that case. In the subject case, we point to both §162.11, Fla. Stat. (Appeals from county or municipal code enforcement), and the Town of Medley Code, 2-85(d)(1) ("Every enforcement order of the Special Magistrate shall be final, subject to the right of any aggrieved party, including the town or the violator, to appeal a final administrative order of the Special Magistrate to the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. An appeal shall be filed within 30 days of the rendition of the order to be appealed") for the proposition that matters brought before this court. such as the subject case are not petitions for writ of certiorari, but appeals, which, by their nature, would allow this Court to both reverse and remand as appropriate. It is our hope that the Third District will re-address and clarify the precedent set by *Snapp.*

* * *

Mandamus—Public employees—Law enforcement officers—Discipline—Hearings—Petition for writ of mandamus compelling sheriff's office to conduct compliance review hearing to determine whether violation of Law Enforcement Officers' Bill of Rights had occurred when imposing unpaid suspension on deputy is denied where deputy has not stated clear legal right to hearing—Because deputy's case is in investigative phase and unpaid suspension is pre-disciplinary, denial of requested hearing to address merits of suspension was proper—Further, it was not necessary to convene hearing to determine if LEO Bill of Rights violation occurred where deputy set forth no facts to suggest that violation had occurred and did not pursue steps to secure hearing

BENJAMIN THOMPSON, Petitioner, v. HILLSBOROUGH COUNTY SHERIFF'S OFFICE, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-137, Division H. January 12, 2022. Counsel: Kenneth J. Afienko, Kenneth J. Afienko, P.A., St. Petersburg, for Petitioner.

ORDER DENYING
PETITION FOR WRIT OF MANDAMUS

(EMMETT L. BATTLES, J.) This cause is before the court on Petitioner Benjamin Thompson's January 7, 2022 Petition for Writ of Mandamus. Petitioner seeks to compel Respondent Hillsborough County Sheriff's Office to convene a compliance review hearing to address the denial of a hearing concerning Petitioner's unpaid suspension, which denial he contends violates the Law Enforcement Officers' Bill of Rights codified in section 112.532, Florida Statutes. Petitioner initially requested a hearing to address the merits of his suspension from his employment without pay citing section 112.532(4)(b), Florida Statutes, as support for a hearing (which will be referred to as "merits hearing"). Petitioner's request was rejected because Petitioner's unpaid suspension is pre-disciplinary, and his case is still being investigated; thus, his right to a merits hearing has not ripened. For the same reason, a subsequent request for a compliance review hearing was rejected. This petition followed. Because Petitioner has not stated a clear, legal right to either a merits hearing or a compliance review hearing, the petition will be denied without need for a response.

I. JURISDICTION

This Court has jurisdiction to issue writs of mandamus. Art. V, § 5(b), Fla. Const.

II. LEGAL STANDARD

A writ of mandamus is an extraordinary remedy. Its issuance is appropriate only when necessary to vindicate the rights of citizens because a governmental agency or official has refused to perform a ministerial duty that the petitioner has established a clear legal right to see performed. *Fla. League of Cities v. Smith,* 607 So. 2d 397, 400-401 (Fla. 1992); *Migliore v. City of Lauderhill,* 415 So. 2d 62, 63 (Fla. 4th DCA 1982). Mandamus is appropriate to attempt to compel a compliance review hearing. *Migliore,* at 63.

III. FACTUAL BACKGROUND

Petitioner is a deputy employed by the Hillsborough County Sheriff. As law enforcement officers, he and his employer appear to be subject to the Law Enforcement Officers Bill of Rights codified in sections 112.532-112.535, Florida Statutes.[1] On December 14, 2021, because of his alleged policy violations during the arrest of a suspect the previous day, Petitioner was notified that he was being suspended without pay while the incident was being investigated. The notice, which Petitioner signed, set forth facts giving rise to the decision to investigate the matter. In furtherance of the investigation, an interview appears to have been scheduled for January 4, 2022. On January 3, 2022, Petitioner, through counsel, notified the investigator that he believed his unpaid suspension violated the law, specifically section 112.532(4), because he had not been given a merits hearing to address the supposed findings leading to his suspension. As a remedy, he requested to be reinstated to full pay, retroactive to the date he was suspended, until he could be afforded a hearing to address the findings. In the alternative, Petitioner requested a compliance review hearing in accordance with section 112.534, to address the alleged violation of his rights. According to correspondence in Petitioner's appendix, Respondent refused Petitioner's request for a compliance review hearing on the grounds that 1) Petitioner had received the required notice before the unpaid suspension, 2) the right to address any findings was not triggered where the matter was still being investigated, and 3) the suspension was not currently disciplinary. The petition, which asks this court to command the sheriff to conduct a compliance review hearing, followed.

IV. ANALYSIS

Section 112.532(1)'s enumerated rights include limitations on the time, place, and manner of any questioning of the officer, the officer's rights to counsel, and to be informed of specific matters. The appendix to the petition indicates that Petitioner has not been interviewed, is represented by counsel, and has been furnished all required notices. Section 112.532(4)(a) specifically affords officers the right to be notified when disciplinary *or* punitive action is imposed and the reason for it. In the event any potentially punitive personnel action is taken, all the statute requires is that the officer be notified of the action, and the reason for the action, before it is taken. *Id.* Here, Petitioner was informed of the unpaid suspension and the reason it was imposed. But potentially punitive personnel action is not necessarily disciplinary, and such is the situation here. *Cf.* §112.532(4)(a) and 112.532(4)(b), Fla. Stat. (distinguishing between punitive action and disciplinary action). After the investigation is complete, should any personnel action become disciplinary, Petitioner may then be entitled to a hearing to address the findings. §112.534(b), Fla. Stat. Nothing in the relevant statutes prohibits suspension without pay, or requires suspension only with pay, during the investigative period. Indeed, case law confirms the distinction between the pre-disciplinary investigative phase and the imposition of disciplinary action. *See Fraternal Order of Police, Gator Lodge 67 v. City of Gainesville*, 148 So. 3d 798, 808 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2035b] (investigative phase distinguished from disciplinary phase for purposes of requesting compliance review); *Migliore,* 415 So. 2d at 64-5. Because Petitioner's case is in the investigative phase and the suspension is pre-disciplinary, the denial of a merits hearing was not improper.

Nor was it necessary to convene a compliance review hearing to determine whether or not a violation had occurred. To start the

process, section 112.534(1)(a) requires an aggrieved officer to notify the investigator of the alleged "intentional violation" of the officer's rights. The notice of violation must set forth the factual basis for each violation. *Id.* Then, if the violation is not cured, the officer may request that the agency head or designee be informed of the violation. §112.534(1)(b), Fla. Stat. Here, however, there was nothing to cure because Petitioner's notice set forth no facts to suggest that a violation had occurred. In addition, Petitioner did not pursue the next step to secure a hearing.

In light of the court's determination that Petitioner has not stated a clear, legal right to a compliance review hearing, it is unnecessary to direct a response to the petition.

It is therefore ORDERED and ADJUDGED that the petition for writ of mandamus is DENIED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

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[1]Section 112.532(2), Florida Statutes, (the subsection), which relates to the composition of compliance review boards, does not apply to sheriffs or deputy sheriffs. It is not known, and this court did not investigate, the impact of this provision on the matter before it. However, it does not appear to negate the applicability of the statutes cited herein.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of detention—Officer responding to report of apparently impaired driver sitting in parked car made lawful consensual encounter with licensee to conduct welfare check—Licensee's confusion and difficulty in responding to officer's request to roll down window formed basis for ongoing concern permitting officer to continue contact with licensee despite his refusal to engage with officer—Petition for writ of certiorari is denied

EUGENE ZENTKO, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-3877, Division G. February 15, 2022. Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

(CHRISTOPHER C. NASH, J.) This matter is before the Court on Petition for Writ of Certiorari filed May 10, 2021. The petition is timely, and this court has jurisdiction. Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P.; and §322.31, Fla. Stat. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for his unlawful breath-alcohol level. Petitioner contends that the Department lacked the competent, substantial evidence necessary to find that Petitioner was lawfully arrested because the initial encounter with law enforcement was coercive and not a consensual encounter/welfare check. Upon review of the petition, response, reply, appendices, and relevant case law, the Court finds that where law enforcement had an ongoing concern for Petitioner's wellbeing, the Department did not err in relying on documentation of the officer's observations as competent, substantial evidence of a lawful encounter.

STANDARD OF REVIEW

The Court reviews an administrative decision to determine whether Petitioner received procedural due process, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). The Court may not reweigh the evidence contained in the record. *Dep't of Highway Safety & Motor Vehicles v. Rose,* 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

FACTS AND PROCEDURAL HISTORY

On February 22, 2021, the Tampa Police Department (TPD) received a call advising that a man, appearing to be impaired, had struggled to walk to his car, described as a white Mercedez Benz, urinated on his car, and had been sitting in his car for an hour with the ignition on. TPD Officer Barlaug responded to the call and found Petitioner parked as the caller had described. Officer Barlaug made contact with Petitioner to determine his state of wellbeing. Petitioner was confused upon waking up and had difficulty responding to Officer Barlaug's request to roll down the window. When Petitioner opened the door, Officer Barlaug observed multiple indicators of alcohol consumption, including bloodshot eyes, flushed face, slurred speech, and the distinct odor of alcohol on his breath. When asked for his driver's license, Petitioner provided a debit card. Petitioner admitted to consuming alcohol, exhibited difficulty answering the officer's questions, and performed poorly on the Field Sobriety Exercises (FSEs). Petitioner was arrested and transported to Central Breath Testing (CBT) where he provided breath samples with breath-alcohol level results of 0.217 and 0.226.

A formal review hearing of the administrative suspension was held March 31, 2021. When reviewing a suspension that is the result of a driver's unlawful breath-alcohol level, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, and whether Petitioner had a breath-alcohol level of 0.08 or higher. §322.2615(7)(a), Fla. Stat.

DISCUSSION

Petitioner contends that the Department departed from the essential requirements of law in finding that Petitioner was lawfully seized or detained. Specifically, Petitioner argues that Officer Barlaug's attempts to initiate an encounter were coercive and that the Department lacked competent substantial evidence for its finding.

The hearing officer in this case found that Officer Barlaug's contact with Petitioner was a lawful, consensual encounter/welfare check. Although individuals are permitted to refuse to engage with law enforcement officers during a welfare check, an officer is permitted to continue contact where the officer's concern for the individual's safety is not alleviated. *Dermio v. State,* 112 So. 3d 551, 556 (Fla. 2d DCA 2013) [38 Fla. L. Weekly D776a] (law enforcement's request that defendant roll down his window was not transform consensual welfare check into an investigator stop where there was an ongoing concern for his safety). Petitioner argues that his hand gestures in response to Officer Barlaug constituted a refusal to engage. But this overlooks that Petitioner voluntarily opened his car door when he was unable to comply with the officer's request to roll down the window, and voluntarily stepped out of his vehicle. The hearing officer found that Petitioner's confusion and difficulty responding to Officer Barlaug's request were the basis of the officer's ongoing concern for Petitioner's welfare. Pursuant to the continuance of Officer Barlaug's welfare check, reasonable suspicion, and, ultimately, probable cause that Petitioner was DUI were established.

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

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Finding that licensee refused to submit to breath test, was read implied consent warning, and maintained his refusal is supported by competent substantial evidence, including affidavit of refusal and implied consent warning document signed by licensee

JEREMI WITKOWSKI, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 2021-CA-70-M. February 24, 2022. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TIMOTHY KOENIG, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari, filed on May 3, 2021. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for refusing to submit to a breath, blood, or urine test under section §322.2615, Florida Statutes. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), sections §322.2615(13) and §322.31, Florida Statutes. This Court reviewed the Petition, Appendix, and the Response to Petition for Writ of Certiorari and finds as follows:

I. Factual Background and Procedural History:

On February 14, 2021, Petitioner was arrested by the Florida Highway Patrol for DUI and his license was subsequently suspended. Petitioner requested a formal administrative hearing, which was held on April 2, 2021. The hearing officer sustained the suspension, finding there was probable cause that Petitioner operated a motor vehicle under the influence of alcohol, refused to submit to a request for a breath test, and was warned of the consequences of refusal, specifically a one-year suspension of his driving privilege or an 18-month suspension in the case of a second refusal. Petitioner filed his petition with this Court, arguing that law enforcement did not read implied consent warnings to him after he refused to submit to a breath test. Respondent timely filed its response, arguing that based on law enforcement documents, Petitioner refused a request for a breath sample, was read implied consent warnings, and that Petitioner maintained his refusal.

II. Standard of Review:

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

III. Analysis:

This Court finds there was competent substantial evidence to support the hearing officer's determination that Petitioner refused to submit to a lawful request for a breath test and the final order does not depart from the essential requirements of law. Pursuant to §322.2615(2)(b), Florida Statutes, documents submitted by law enforcement to the Department shall be considered self-authenticating and will be considered by the hearing officer. The Affidavit of Refusal and the Implied Consent Warning documents submitted by Trooper Perlman establish that he requested Petitioner submit to a breath test after his arrest and Petitioner refused. The documents further state that Petitioner was then read implied consent warnings, after which he refused again. It is also noteworthy that Petitioner himself signed the Implied Consent Warning documents, stating that he refused the test after the reading of implied consent.

ACCORDINGLY, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Finding that licensee refused to submit to breath test after being read implied consent warning is supported by competent substantial evidence in form of affidavit of refusal, incident report, and testimony of officer

DOUGLAS WOLOSHIN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 2020-CA-249-K. February 24, 2022. Counsel: Elena J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TIMOTHY KOENIG, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari, filed on April 21, 2020. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for refusing to submit to a breath, blood, or urine test under section §322.2615, Florida Statutes. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), sections §322.2615(13) and §322.31, Florida Statutes. This Court reviewed the Petition, Appendix, and the Response to Petition for Writ of Certiorari and finds as follows:

I. Factual Background and Procedural History:

On January 21, 2020, Petitioner was arrested by the Key West Police Department for DUI and his license was subsequently suspended. Petitioner requested a formal administrative hearing, which took place on March 13, 2020. The hearing officer sustained the suspension, finding there was probable cause that Petitioner operated a motor vehicle under the influence of alcohol, refused to submit to a request for a breath test, and was warned of the consequences of refusal, specifically a one-year suspension of his driving privilege or an 18-month suspension in the case of a second refusal. Petitioner filed his petition with this Court, arguing that he did not refuse to consent to a breath test after the reading of the implied consent warning. Respondent timely filed its response, arguing that based on law enforcement documents and testimony at the administrative hearing that Petitioner refused a request for a breath sample, was read implied consent, and that Petitioner maintained his refusal.

II. Standard of Review:

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

III. Analysis:

This Court finds there was competent substantial evidence to support the hearing officer's determination that Petitioner refused to submit to a lawful request for a breath test. The Incident Report and

Affidavit of Refusal submitted by law enforcement both state that Officer Tyler requested Petitioner submit to a breath test after his arrest and Petitioner refused. The documents further state that Petitioner was then read implied consent, after which he refused again. Pursuant to §322.2615(2)(b), Florida Statutes, documents submitted by law enforcement to the Department shall be considered self-authenticating and will be considered by the hearing officer. Additionally, Officer Tyler's testimony at the administrative hearing also clearly set forth the fact Petitioner refused to submit to a breath test upon Officer Tyler's request and refused again after the reading of implied consent. The following is an excerpt between defense counsel and Officer Tyler:

Tyler: Yes. I read implied—yeah. He wouldn't take a breath test.

Q: I got you.

Tyler: I read him implied consent.

Q: I got you. And so he expressed to you Verbally in some way, shape or form that he wasn't interested in taking the test.

Tyler: He expressed it verbally, yes.

Q: I see. And then after he expressed to you verbally that he wasn't going to take the test, you referenced that you read him the implied consent warnings?

Tyler: Uh-huh.

Q: Were there further conversations after those warnings?

Tyler: Just told him that we'd observe him and (indiscernible audio) paperwork (indiscernible audio). He was talking, but (indiscernible audio) nothing rude or anything.

Q: I got you. So it goes you ask him initially whether he wants to take breath test, he says no, you read him implied consents and then there's some small talk and waiting for the 20 minutes thereafter, but nothing of significance after the implied consent warnings are read?

Tyler: No. No. Nothing. No he actually complimented us a few times. Very nice guy. (T, p. 20, lines 17-25, p. 21, lines 1-16)

Officer Tyler's testimony concerning Petitioner's refusal to submit to a breath test, continues as follows:

Q: I got you. And was there some conversation with the gentleman referencing a breath alcohol test?

Tyler: Yes.

Q: And how did that conversation go?

Tyler: When I got inside, when we got up to the DUI room I explained who I was, why I was there, and asked him if he would submit to a breath test. And told him about the observation period happening (indiscernible audio) breath test. He said he was hard of hearing, so I had to repeat numerous times. He said he wouldn't do a breath test. So I did implied, read implied consent card and asked him if he understood implied consent and he said yes and he still wasn't taking the breath test

Q: I see. Was he informed that a breath test was voluntary?

Tyler: Yes. I read implied—yeah. He wouldn't take a breath test.

Q: I got you.

Tyler: I read him implied consent.

Q: I got you. And so he expressed to you verbally in some way, shape or form that he wasn't interested in taking the test?

Tyler: He expressed it verbally, yes. (T, p. 20, lines 2-25)

ACCORDINGLY, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful blood or breath alcohol level—No merit to argument that failure to present properly attested breath alcohol test affidavit requires invalidation of suspension—Where licensee has submitted to test, statute only requires submission of test results, not that results be in affidavit form

PAUL SIMRELL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 2020-CA-000178-M. February 24, 2022. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TIMOTHY KOENIG, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari, filed on November 1, 2020. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for driving with an unlawful blood or breath alcohol level under section §322.2615, Florida Statutes. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), sections §322.2615(13) and §322.31, Florida Statutes. This Court reviewed the Petition, Appendix, and the Response to Petition for Writ of Certiorari and finds as follows:

I. Factual Background and Procedural History

On August 31, 2020, Petitioner was arrested by the Monroe County Sheriff's Office for DUI and his license was subsequently suspended. Petitioner requested a formal administrative hearing, which was held on September 29, 2020. The hearing officer sustained the license suspension, finding there was probable cause that Petitioner operated a motor vehicle under the influence of alcohol and submitted to a breath test, which indicated that he had a breath/blood alcohol level of 0.08 or higher. Petitioner filed his petition with this Court, arguing that the Breath Alcohol Test Affidavit in this case was not properly attested and, as a result, the suspension of his driving privilege should be invalidated. Respondent timely filed its response, arguing that submission of the Breath Alcohol Test Affidavit satisfied the requirements of §322.2615(2)(a), Florida Statutes, stating that only the results of a blood or breath test are required, whether an affidavit is attested or not.

II. Standard of Review

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

III. Analysis

This Court finds there was competent substantial evidence to support the hearing officer sustaining the suspension of Petitioner's driving privilege and the final order did not depart from the essential requirements of law. Section §322.2615(2)(a), Florida Statutes, only requires the results of a breath or blood test, not that those results be in affidavit form. The provision only requires an affidavit when a request for a blood, breath, or urine test has been refused which is not the case here. Further, the requirements for an affidavit in the context of an administrative proceeding are less stringent than those of a civil or criminal proceeding. *Dept. of Highway Safety & Motor Vehicles v. Anthol,* 742 So.2d. 813 (Fla. 2nd DCA 1999) [24 Fla. L. Weekly D1883c].

ACCORDINGLY, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Failure of subpoenaed witness to appear—Service of witness subpoena on law enforcement officer by mail was invalid and, therefore, licensee was not entitled to seek enforcement of subpoena—Hearing officer afforded licensee due process by offering him opportunity to properly serve subpoena personally or by substitute service, which licensee declined

DANIEL STEVEN HUGHES, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County. Case No. 2020-CA-000159-M. February 24, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TIMOTHY KOENIG, J.) This cause came before this Court upon the Petition for Writ of Certiorari (Petition) filed by Petitioner on October 2, 2020. Petitioner seeks review of the Findings of Fact, Conclusions of Law and Decision entered by the Respondent, Florida Department of Highway Safety and Motor Vehicles (Department), on September 2, 2020, which sustained the administrative suspension of Petitioner's driving privilege for refusing to submit to a breath test. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), sections 322.2615(13) and 322.31, Florida Statutes. This Court reviewed the Petition, Appendix, and the Response to Petition for Writ of Certiorari and finds as follows:

I. Factual Background and Procedural History:

On June 28, 2020, the Monroe County Sheriff's Office arrested the Petitioner for driving under the influence ("DUI") in violation of section 316.193, Florida Statutes. The Petitioner's driver license was suspended for refusing to submit to a breath test. The Petitioner sought administrative review before the Department's Bureau of Administrative Reviews to challenge the lawfulness of the suspension.

Prior to the administrative hearing, the Department issued subpoenas requested by the Petitioner's counsel to multiple law enforcement witnesses, including Deputy Garrett Bragg. While the other witnesses appeared and testified at the hearing, Deputy Bragg did not appear. Hearing Officer Geralean Davis asked Petitioner's counsel how Deputy Bragg was served his subpoena, and Petitioner's counsel stated that the subpoena was served *via registered mail.* The hearing officer explained that service by mail was invalid and provided an opportunity for the Petitioner to properly serve the subpoena on Deputy Bragg. Petitioner's counsel ultimately elected not to serve the subpoena personally or via substitute service, asserting that service had already been accomplished via registered mail.

The hearing officer's Findings of Fact, Conclusions of Law and ultimate Decision held that counsel was not entitled to seek enforcement of the subpoena on Deputy Bragg pursuant to section 322.2615(6)(c) because the subpoena was not properly served on the witness. The Petition before this Court asserts that service via registered mail is authorized by section §48.031(3), Florida Statutes, and the hearing officer's refusal to allow Petitioner to seek enforcement of the subpoena violated his procedural due process rights. This Court entered an order requiring the Department to show cause why relief should not be granted. The Response filed by the Department asserts that section §48.031(3) does not apply to service of subpoenas on law enforcement officers in administrative proceedings held pursuant to section §322.2615, Florida Statutes. Therefore, the Respondent asserts that the hearing officer afforded Petitioner procedural due process by offering the Petitioner an opportunity to effect personal service or substitute service on Deputy Bragg.

II. Standard of Review:

The scope of the circuit court's review of a hearing officer's suspension order is limited. In reviewing an administrative order by certiorari, the circuit court must determine (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. *Dep't of Highway Safety & Motor Vehicles v. Favino,* 667 So. 2d 305, 308 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a].

III. Analysis:

Section §48.031(3)(a), Florida Statutes, states as follows:

> The service of process of witness subpoenas, whether in criminal cases or civil actions, shall be made as provided in subsection (1). However, service of a subpoena on a witness in a civil traffic case, a criminal traffic case, a misdemeanor case, or a second degree or third degree felony may be made by United States mail directed to the witness at the last known address, and the service must be mailed at least 7 days prior to the date of the witness's required appearance. Failure of a witness to appear in response to a subpoena served by United States mail that is not certified may not be grounds for finding the witness in contempt of court.

By its plain language, this subsection of the statute allows service by mail in certain proceedings, but it does not apply to administrative hearings regarding driver license suspensions. The subsection is not incorporated by reference in section §322.2615, Florida Statutes or Chapter 15A-6 of the Florida Administrative Code. Instead, Fla. Admin. Code Rule 15A-6.012(3) states that service of subpoenas on law enforcement officers must be via personal service pursuant to section §48.031(1) or via substitute service on a person designated to accept such service on behalf of the law enforcement officer. Deputy Bragg was not served the subpoena personally or via substitute service. Petitioner's counsel was therefore not entitled to seek enforcement of the subpoena pursuant to section §322.2615(6)(c). The hearing officer afforded procedural due process by providing an opportunity for Petitioner's counsel to properly serve the subpoena on the witness.

Based on the above, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby DENIED.

* * *

MATTHEW KRINSKY, Plaintiff, v. BROWARD COUNTY ENVIRONMENTAL PROTECTION AND GROWTH MANAGEMENT DEPARTMENT, ENVIRONMENTAL AND CONSUMER PROTECTION DIVISION, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21019543, Division AP. February 25, 2022.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order Granting Motion to Dismiss, dated January 12, 2022. On January 12, 2022, this Court granted Appellee's Motion to Dismiss and dismissed Appellant's October 27, 2021, Notice of Appeal, allowing Appellant 30 days to file an Amended Notice of Appeal. Appellant was directed that a failure to comply would result in the dismissal of this Appeal. As of the date of this Order, Appellant has failed to comply with this Court's January 12, 2022, Order and file and Amended Notice of Appeal. Appellant has not submitted a filing since the initial Notice of Appeal filed October 27, 2021.

Accordingly, it is:

ORDERED that this Appellate proceeding is hereby **DISMISSED**, and the Broward County Clerk of Court is **DIRECTED** to close this case.

* * *

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CIRCUIT COURTS—ORIGINAL

Torts—Damages—Settlement—Liens—Allocation of net recovery between plaintiffs and employer/carrier's workers' compensation lien—Controlling factor for evaluating settlement allocation is ratio of net recovery to full value of damages—Settlement agreement is inadmissible to prove liability or absence of liability for claim or value of claim; and, in any event, settlement numbers are not probative of full value of plaintiffs' actual damages—Full value of damages established as over $20 million—Ratio of net recovery to full value of damages is 2.04%—Plaintiffs to reimburse employer/carrier for past medical bills and wage loss in an amount equaling 2.04% of net recovery—E/c may reduce future workers' compensation benefits by this same percentage until amount recovered by plaintiffs is reached

TAD SHAPPARD and DEBRA SHAPPARD, Plaintiffs, v. TALQUIN ELECTRIC COOPERATIVE, INC., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 18-CA-729. March 16, 2022. David Frank, Judge. Counsel: Martin W. Palmer, Joseph K. Lopez, Jr., and Cole C. Masterson, Lutz, for Plaintiff. Michael E. Reed and Lindsay T. Brigman, Tampa, for Defendants. Hinda Klein, Hollywood, Co-Counsel for Talquin Electric, Defendant.

AMENDED ORDER ON EQUITABLE DISTRIBUTION

This cause came before the Court for hearing on March 1, 2022 on Plaintiff's Motion for Equitable Distribution, and the Court having reviewed the documents and material submitted in support of and opposition to the motion, the stipulations of the parties, and the court file, heard the evidence and argument presented, including the testimony of the expert for each side, and being otherwise fully advised in the premises, finds

Plaintiffs brought negligence and consortium claims against various defendants and obtained settlements. The last settlement received was a "high—low" agreement between plaintiffs and Talquin Electric Cooperative, Inc. The settlement was triggered after a jury trial that result in a defense verdict on liability, for which the plaintiffs recovered the "low."

The parties entered into the following stipulations prior to the hearing:

> The claimant received a net recovery of $417,218.91 from settlements with defendants in this case. The Employer and its Workers' Compensation Carrier ("EC") has a lien of $2,063,359.98. The parties agree that the Supreme Court of Florida's decision in *Manfredo v. Employer's Casualty Insurance Co.*, 560 So.2d (Fla. 1990) controls the determination of the EC's lien recovery.

Manfredo tells us, ". . .the controlling factor for evaluating the settlement allocation is 'the ratio of net recovery to full value of damages.' " *Luscomb v. Liberty Mutual Insurance Co.*, 967 So.2d 379, 383 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D2468a], citing *Manfredo* at 1165.

As a preliminary matter, the EC requested "in camera" consideration of the high—low agreement reached by plaintiffs and defendant Talquin Electric Cooperative, Inc. The EC argued that the high and low numbers reflect the plaintiffs' actual damages.

We can start with this. "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim ***or its value***." § 90.408, Fla. Stat. (2021) (emphasis added); *and see Saleeby v. Rocky Elson Construction, Inc.*, 3 So.3d 1078 (Fla. 2009) [34 Fla. L. Weekly S106a].

Even if the law on inadmissibility of settlements did not control, the settlement is simply not relevant. "Relevant evidence tends to prove or disprove a material fact." *Balogh v. ABC Liquors, Inc.*, 308 So.3d 267, 268 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D2834a]. Based on the stipulations of the parties, the only material fact that remains to be determined by the Court is the full value of damages.

Settlement numbers are not probative of actual damages. They mostly are derived from a multitude of internal and external pressures on the parties, such as risk avoidance, time sensitive medical requirements, reputation, experience and skill of one's legal team, and financial condition. *See* Keet, Michaela, *Litigation Risk Assessment: A Tool to Enhance Negotiation* (May 1, 2017). Cardozo Journal of Conflict Resolution, Vol. 19, 2017, Available at SSRN: https://ssrn.com/abstract=3148691.

Next, with no statutory or appellate authority to support it, the EC seemed to argue that the defense verdict on liability somehow deprived the plaintiffs of their "full damages" calculation setoff. Neither the operative statute, Section 90.408, nor *Manfredo*, contain such a disqualification provision, and this Court will not graft one into them by judicial decree. The law requires the setoff calculation for settlements, period. High—low settlements are not excluded. Settlements that occur at a specific time are not excluded.

Settlements sometimes occur after a jury trial and defense verdict on liability, even without a prior high—low agreement. They typically result from the defendant's desire to eliminate any risk on appeal or on post-trial motions. According to the EC's novel suggestion, those settlements similarly would not qualify. Instead, presumably, the claimant would simply pay the entire lien, contrary to long-standing Florida law.

Moreover, a situation where the trial judge has had the opportunity to actually observe witnesses and evidence of damages firsthand, in the courtroom, is not a defect or odd. Indeed, it is an advantage when determining a lien recovery.[1] This Court's ruling on the full value of damages is buttressed by this special vantage point.

In addition to the Court's own observations during the trial, it considered all the evidence presented at the hearing. The Court's review included the depositions of Tad Shappard, Debra Shappard, Stephen Durham, Ph.D., Ronald Snyder, M.D., Edward Brill, the life care plan authored by Dr. Snyder, the economist report authored by Dr. Durham, as well as photographs of the Plaintiff's injuries.

The Court has also given due consideration to the expert opinions offered at the hearing by Attorney Michael Tonelli, on behalf of the Plaintiffs, and Attorney Jake Shickel, on behalf of the EC.

The undisputed facts in the case include recoverable past medical bills and wage loss for a total of $2,063,359.98. The plaintiffs economist priced the future medical and wages between $4,748,306.00 and $7,029,107.00. These damages for future care and future lost wages included those for attendant care and prosthetics.

The EC did not offer or file any evidence of record contradicting the opinions and evaluations made by plaintiff's economist or vocational rehabilitation expert / life care planner. Instead, they offered Mr. Shickel's opinion testimony regarding these topics.

The evidence also demonstrated that Mr. Shappard has a 21 to 22 year life expectancy. The evidence was also uncontroverted that he will need attendant care for his remaining natural life. The record evidence further demonstrates that Mr. Shappard is a bilateral amputee of his upper extremities, has severe scarring over a large portion of his body, and that he underwent dozens of medical procedures and surgeries and was in a medically induced coma for weeks. The evidence shows that Mr. Shappard is totally and permanently disabled by the incident.[2]

The evidence also demonstrates, and is not contested, that there was substantial comparative negligence on the part of Mr. Shappard himself and that he did not receive a full recovery.

Finally, Mr. Tonelli opined that the case had a value of $16,811,665.00 to $24,092,466.00. Mr. Shickel opined that the case had a value between $3,000,000.00, and $6,000,000.00.

Pursuant to Section 440.39 and *Manfredo*, the Court finds that the worker's compensation carrier is entitled to recoup some of the benefits previously paid and to reduce future benefits by the same percentage.

The Court having considered the entirety of the record evidence, and having applied its own training, education and experience, this Court finds that the full value of plaintiff's damages in this case is $20,452,065.00.

Accordingly, it is ORDERED and ADJUDGED that plaintiff's net recovery must be divided by the full value described above, and that ratio is multiplied by the stipulated lien to determine the amount owed on the lien. This results in 2.04% net recovery. The plaintiffs must therefore reimburse the lienholder $42,092.54. The EC also may reduce future worker's compensation benefits by this same 2.04% until they have recouped a total of $417,218.91.

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[1]Our Florida Supreme Court has long recognized the special vantage point of a trial judge:

> We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is an important principle of appellate review. In many instances, the trial court is in a superior position to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses. When sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility. Appellate courts do not have this same opportunity. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999) [24 Fla. L. Weekly S554a].

[2]The undersigned practiced law for almost 25 years and has been a judge for a little over 3 years and can safely say that the evidence at trial of injury and suffering sustained by Mr. Shappard was some of the most compelling he has seen. The court notes, however, that it did not consider sympathy or equity. In fact, the full value of plaintiff's damages determined by the Court, $20,452,065.00, if anything is conservative.

* * *

Civil procedure—Continuance—Denial—Difficulties and conflicts caused by counsel having overextended itself with work or having recently taken on case do not constitute good cause for continuance under circumstances

JOHN H. BAILEY, SR., Plaintiff, v. KELLY BROTHERS SHEET METAL INC., Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2020-CA-000593-AXXX-XX. February 16, 2022. David Frank, Judge. Counsel: Louis J. Baptiste and Stephen G. Webster, Tallahassee, for Plaintiff. Brian N. Heffner, Michael D. Logan, and Rina Clemens, Palm Beach Gardens, for Defendant.

ORDER DENYING CONTINUANCE

This cause came before the Court on defendants' February 14, 2022 motion for continuance of the trial and the Court having reviewed the motion and any other documents submitted in support or opposition to the motion and the court file, and being otherwise fully advised in the premises, finds

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

In other words, the present case does not qualify for treatment as complex litigation under the rules. This case is either a streamlined case or general case. *See* this Circuit's *Uniform Order for Active, Differential Civil Case Management* previously issued in this case.

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

This case has either exceeded or is perilously close to the Florida Supreme Court time limits for resolving a civil case. *Florida Rule of General Practice and Judicial Administration 2.250(a)* states, ". . .most cases should be completed within the following time periods: . . . Civil. Jury cases—18 months (filing to final disposition), Non-jury cases—12 months (filing to final disposition)." In fact, the Court's concern and determination that civil cases should resolve by these deadlines was serious enough to require trial courts to report when they do not. *Fla. R. Gen. Prac. & Jud. Admin. 2.250(b).*

The difficulties and/or conflicts about which the movant complains are not good cause for an exception to the strict policy governing continuances mandated by the Florida Supreme Court and this Court will not disregard them. Where a party moving for a continuance has caused its own problems by failing to diligently move the case forward, a continuance should be denied, even if it means the party will not have certain witnesses or evidence at trial. *HSBC Bank USA, N.A. v. Serban,* 148 So.3d 1287, 1293 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2218a]. The fact that a party has overextended itself with work is not good cause for a continuance. *Id.* at 1292. This includes situations where an attorney has recently taken over a case. As the Fifth District so aptly put it, "When a lawyer steps into a case in this posture, he or she should expect to proceed to trial immediately. If that is unacceptable, he or she should not take the case. *Merino v. Powell,* 325 So.3d 960, 961-62 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D1507a].

Finally, an injured plaintiff's MMI does not dictate docket control for this Court. *See CHARLEY SCOTT v. GADSDEN COUNTY SCHOOL BOARD,* Circuit Court, 2nd Judicial Circuit in and for Gadsden County, Case No. 18-802-CA, 27 Fla. L. Weekly Supp. 1011a (February 7, 2020).

Accordingly, it is ORDERED and ADJUDGED that the motion for continuance is DENIED.

* * *

Insurance—Affirmative defenses—Amendment—Motion to amend affirmative defenses to assert legal damages limitation issue is denied—Limitation of damages is not an affirmative defense and should be raised by motion in limine or during argument on jury instructions

LINDA SMITH, Plaintiff, v. SECURITY FIRST INSURANCE COMPANY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsen County. Case No. 20-CA-341. February 8, 2022. David Frank, Judge. Counsel: Nelson Crespo and Jariel Borges, Orlando, for Plaintiff. Michael J. Bonfanti, Tallahassee, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES

This cause came before the Court on defendant's July 30, 2021 motion for leave to amend to add an affirmative defense, and the Court having reviewed the submissions of the parties and the court file, and being otherwise fully advised in the premises, finds

Defendant requests leave to add the following affirmative defense:

EIGHTH AFFIRMATIVE DEFENSE

Defendant denies that it owes any further benefits regarding the Claim and Policy at issue. However, subject to and without waiving the foregoing, Defendant states that to the extent that the Court may find that it has any liability, Defendant's liability is limited to the actual cash value of the damages incurred. *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So.3d 1280 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a]. Defendant cannot be held liable for the costs of repairs and/or matching until and unless those repairs have been performed.

Plaintiff's primary opposition to the proposed amendment is unavailing. Plaintiff simply recites the magic word—prejudice—in conclusory fashion without any explanation other than the passing of time and being two months away from trial. At this point the plaintiff could indeed be legally disadvantaged by the timing of the proposed amendment, but the Court has not been told why.

On the other hand, plaintiff may be right that the proposed defense fails to assert sufficient "ultimate facts" in support, although it should be clear from the case cited that the pertinent facts are the wording of the relevant insurance policy and current Florida Statutes.

But neither of these observations matter. They do not matter because the present motion is unnecessary. The language proposed by defendant reflects a legal damages limitation issue that is properly handled by motion in limine or during argument on jury instructions. It is not an affirmative defense. See *Vazquez v. Citizens Property Insurance Corporation*, 304 So.3d 1280 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D642a]. Defendant will have the opportunity to argue the application of this limitation at the appropriate time.[1]

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED.

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[1]Regarding timing, the Court will take this opportunity to give both counsel fair warning regarding current active case management initiatives and the resulting new normal for litigating cases in Florida. The days when parties could amend to add additional parties, additional claims, and additional defenses at almost any point with no repercussions are over. To comply with Florida Supreme Court directives on active case management (setting cases for trial promptly, resolving motions quickly, being tougher on continuances), and to power through the backlog of civil jury trials due to the pandemic, there will be strict deadlines for amending pleadings, at least in this Court, and I would surmise the same will be true in courts across this state. Defendant filed the present motion in July 2021. Defendant waited almost seven months to call up the matter for hearing. She made it by a hair. The deadline for amending affirmative defenses in this case will pass in three days. Had the hearing occurred four days from now, another ground for denying the motion would have been defendant's failure to comply with the Court's Order Setting Pretrial Conference and Jury Trial's time limit. Finally, plaintiff did not have to sit back and wait for the defendant to set the hearing. She was fully able to call up the motion for hearing herself.

* * *

Civil procedure—Pro se filings—Prohibition—Because plaintiff has abused right to pro se access to courts by filing frivolous pleadings, court will no longer accept pro se legal documents filed by plaintiff

DAVID NATHANIEL REESE, Plaintiff, v. DOCTOR SARAH REBEB, M.D., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-122. March 18, 2022. David Frank, Judge. Counsel: David Nathaniel Reese, Pro se, Chattahoochee, Plaintiff.

ORDER PROHIBITING DAVID NATHANIEL REESE FROM FILING PRO SE IN THE SECOND JUDICIAL CIRCUIT

This cause came before the Court on plaintiff's February 28, 2022 civil cover sheet that lists defendants and states he seeks "500 million dollars" for a "constitutional challenge—proposed amendment" that lists the "causes of action" as: "Many of Causes, Co-Conspirators to Hide the Facts of the Violation of Laws to Kidnap My Two Daughters Too Protect the White Children Rapist," and the Court having reviewed the filing, and being otherwise fully advised in the premises, ordered the plaintiff to show cause at a hearing on March 18, 2022 why he should no longer be permitted to file papers pro se in this circuit.

Although Mr. Reese was given clear instructions and reasonable notice for the show cause hearing (Zoom session) on March 18, 2022, he did not appear. The hearing also was Mr. Reese's opportunity to oppose any of the materials previously identified for judicial notice. In addition to not appearing at the hearing, Mr. Reese did not file any opposition to the materials identified for judicial notice.

Pursuant to Florida Statutes 90.202 and 90.204, judicial notice is taken of the court records for the cases described in the docket summaries attached to the Court's March 2, 2022 Order to Show Cause and on Judicial Notice.

David Nathaniel Reese's initial involvement with the courts was through the criminal justice system. He has a criminal history dating back to 2000. He has four charges in Duval County of trespass and possession of cannabis through 2009. In October of 2010 he was charged with sexual battery, lewd or lascivious molestation on (2) victims less than 12 years old (his daughters). This case is "disposed" but filings as recent as December of 2021 somehow continue. In July of 2018 he was charged in Duval County (case #2018-6900-CF) with written threats to kill or do bodily injury. That case apparently is still open, as he was found incompetent to proceed on September 17, 2020.

In 2019, Mr. Reese launched his barrage on the civil justice system. From that point through to today, he has filed no less than 15 cases in Leon and Gadsden Counties alone. *See* attached case docket summaries. His filings included multiple complaints for conspiracies to violate civil rights, multiple habeas corpus petitions, one titled, "Complaint to Show Causes No Governor or His Administration Has the Authority to Violate Another State Extradition Laws," and one titled, "Motion to Show Causes Fruit of the Poisonous Tree," and one titled, "Motion to Know What Happen With the Above Case Matter I Have Not Heard Nothing From the Court Since the Motion of May, 2021."

Of these 15 cases, 13 were dismissed, 1 was transferred, and 1 is still pending (this case).

A review of the filings in these cases shows almost every one of them to be legally insufficient and vexatious.

Mr. Reese has been able to maintain his onslaught of frivolous actions because of Florida's lenient system that waives payment for pro se filings as long as they fill out a one-page form saying they are indigent.

This Court must balance defendant's ". . .right of access to the courts against the need to prevent a torrent of repetitive, meritless, and abusive pleadings from diverting the court's limited resources away from the timely adjudication of other cases." *Windsor v. Longest*, No. 5D21-942, 2021 WL 3233605, at *1 (Fla. 5th DCA. July 30, 2021) [46 Fla. L. Weekly D1735a]. "Because frivolous motions and petitions use limited judicial resources, placing an unnecessary burden on the courts and the public, a bar on pro se filing is sometimes required for the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings." (citations and

internal quotations omitted). *Johnson v. State*, 321 So.3d 853, 855 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D697b], review denied, No. SC21-533, 2021 WL 2964024 (Fla. July 14, 2021), and review denied, No. SC21-927, 2021 WL 3713874 (Fla. Aug. 20, 2021).

Accordingly, it is

ORDERED and ADJUDGED that pursuant to the Court's inherent power, and section 68.093(2)(d), Florida Statutes, the Court has determined that DAVID NATHANIEL REESE, DOB 3/24/1962, is a vexatious litigant who has drained scarce judicial resources with frivolous filings. ***The Clerks of this Circuit will not accept any paper*** he attempts to file, unless it is submitted by, and contains the signature of, an attorney licensed to practice law in the State of Florida and who is in good standing with the Florida Bar. This order is effective immediately.

* * *

Civil procedure—Pro se filings—Prohibition—Because plaintiff has abused right to pro se access to courts by filing vexatious and frivolous pleadings, court will no longer accept pro se legal documents filed by plaintiff

JOSEPH CLARK, Plaintiff, v. DAVE BANEY, Defendant. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 21-CA-104. January 10, 2022. David Frank, Judge. Counsel: Joseph Clark, Pro se, Apple Creek, Ohio, Plaintiff. Ryan Kelly, Rolling Meadows, Illinois, for Defendant.

ORDER PROHIBITING JOSEPH CLARK FROM FILING PRO SE IN THE SECOND JUDICIAL CIRCUIT

This cause came before the Court on January 6, 2022 on the Court's order to show cause why Joseph Clark, the plaintiff in the current action, should not be sanctioned for vexatious and frivolous litigation, and the Court having reviewed the court file, considered the evidence, and given Mr. Clark proper notice and ample opportunity to respond, finds

Procedural History and Findings of Fact

Plaintiff Joseph Clark ("Clark") filed pro se a Complaint for Monetary Relief in this Court on November 2, 2021. Clark is suing Dave Baney, the chief probation officer of Wayne County, Ohio, because he allegedly, "causes libelous statements to be viewed, or viewable (sic), in Florida." The complaint alleges that, "The defendant, Dave Baney, for some odd reason, has the unwavering proclivity to write knowingly false statements about individuals." He seeks $50,000 in unspecified, "presumed" damages.

Clark alleges that defendant, "authored [ ] knowingly false statement[s]" about Clark being convicted for assault, charged with a probation violation, charged with telephone harassment in 2005, charged with telephone harassment in 2013, and charged with forgery without also stating the forgery case was dismissed. The complaint says nothing about how these alleged tortious statements were supposedly sent to Florida, or how and by whom they were published or accessed in Florida. The alleged statements are all about an Ohio resident allegedly made by Ohio residents.

Even if the alleged statements were simply posted on a website that is theoretically accessible to everyone in Florida, a complaint would have to allege that the communication was disparaging a Florida resident and had actually been accessed in Florida. "Applying [Section 48.193(1)(a)(2)], the Florida Supreme Court has held that a nonresident who posts defamatory material about a Florida resident on a website accessible in Florida commits a tortious act within the state, and therefore submits himself to the jurisdiction of the state's courts, once the material is accessed in Florida. *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1214-16 (Fla. 2010) [35 Fla. L. Weekly S349a]." *Baronowsky v. Maiorano*, 326 So.3d 85, 87-88 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1860a] (emphasis added).

The complaint, therefore, was deficient and frivolous under Florida's common law and statutes governing defamation and long arm jurisdiction.

On November 3, 2021, Clark filed Florida's simple, one-page Application for Determination of Civil Indigent Status which resulted in the clerk determining he was indigent. He put "0" for every conceivable type of income and asset, except $41.00 in cash and a $2,500 vehicle. Interestingly, in Florida there is a presumption that the applicant is not indigent if the applicant owns property having a net equity value of exactly $2,500 or more.

On November 10, 2021, because he submitted his certificate of indigency, Clark was able to get a Wayne County, Ohio sheriff's deputy to serve the present lawsuit on Mr. Baney, without having to pay any fee.

On December 9, 2021, Attorney Kelly, an Ohio lawyer licensed to practice in Florida who appeared for Mr. Baney, filed a Motion for Enlargement of Time to Answer or Otherwise Plead. In the motion, Mr. Baney requested the Court take judicial notice of several documents that were attached and other information under Florida Statute 90.202, which provides, "A court may take judicial notice of the following matters. . . (6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." Having received no objection or response from Clark on the matter of judicial notice, the Court granted the request.

The Ohio court records admitted under Section 90.202 are summarized as follows:

> This [present] pro se case arises from the ongoing criminal prosecution of Plaintiff Joseph Clark in Wayne County, Ohio. On September 22, 2020, Mr. Clark was charged with misdemeanor assault in violation of Ohio Revised Code § 2903.12 from an incident that occurred on May 30, 2020. The case is being adjudicated in the Municipal Court of Wayne County, Ohio and has been assigned to Judge Rickett. Mr. Clark initially pled no contest, was found guilty, but then asked for a series of continuances of the sentencing hearing. On January 25, 2021, Judge Rickett issued a decision, captioned "Journal Entry", denying one of Mr. Clark's requests for a continuance.
>
> Mr. Clark responded to this by repeatedly asking the Supreme Court of Ohio to disqualify Judge Rickett from the case and then filing dozens of pro se lawsuits against Judge Rickett in Florida, Indiana, and Utah. Joseph Clark has a long history of filing pro se, frivolous lawsuits in Ohio. In 1998, the Ohio Supreme Court adjudicated Clark, whose name was then "Lonny Bristow," a vexatious litigator pursuant to Ohio Revised Code § 2323.52. The principal purpose and effect of this "vexatious litigator" designation was to prohibit Mr. Clark from filing lawsuits in Ohio without first obtaining leave of court. See Ohio Rev. Code § 2323.52(D)(3) ("A person who is subject to an order entered pursuant to this section may not institute legal proceedings. . . without first obtaining leave of the court.")
>
> Upon being presented with evidence of his name change (via legal proceedings in Kentucky), the Ohio Supreme Court extended the vexatious litigator designation of Lonny Bristow to Joseph Clark in a "Judgment Entry' dated June 16, 2020.
>
> Unable to freely file lawsuits in Ohio as either "Lonny Bristow" or "Joseph Clark," Mr. Clark has resorted to filing frivolous, pro se lawsuits against not only Judge Rickett but also Judge Rickett's mother, Defendant Kristine Rickett, the Chief Probation Officer of Wayne County, Defendant Dave Baney; and other persons connected to Judge Rickett or Mr. Clark's ongoing prosecution in Wayne County, Ohio.

On December 13, 2021, the Court issued its 127-page Order on Propriety of Judicial Notice and Order to Show Cause. The purpose of the order was to advise Clark that the Court was going to take judicial notice of Florida court records that outline Clark's litigation

in Florida, and to order Clark to appear via Zoom on January 6, 2022, to show cause why he should not be prohibited from filing papers pro se in this circuit. Clark did not object or respond regarding the Court's intention to take judicial notice of the Florida records.

The Florida court records admitted under Section 90.202 are summarized as follows:

> Clark has filed 137 lawsuits in 61 of Florida's 67 counties since October of 2018. It appears that the only counties in which he has not filed are Brevard (18th Circuit), Holmes (14th Circuit), Monroe (16th Circuit), Okaloosa (1st Circuit), Santa Rosa (1st Circuit), and Walton (1st Circuit). While Clark has been found a vexatious litigant in Escambia County (1st Circuit), he remains free to file elsewhere.
>
> Last year was his highest output of complaints. Clark filed 106 lawsuits in Florida over the course of 2021. None of the lawsuits he filed have gone to trial, and only one can be considered even a partial victory: he got a default summary judgment in his favor in 18-1539-CA on one count, but the others were dismissed. Of the 136 other cases, 13 remain open. Clark voluntarily dismissed 106 of them before a judge could rule on the defendant's motion to dismiss. Of the 17 others, 6 were dismissed pursuant to a defendant's motion, 6 were dismissed for lack of prosecution, 2 were dismissed for failure to appear, 1 was dismissed for lack of service, 1 was dismissed for lack of jurisdiction, and 1 was dismissed as a duplicate case.
>
> In a single day, September 25, 2021, Clark filed 14 different lawsuits in 14 different counties, all against a defendant named Michael Rickett. Of those 14 cases filed on September 25, 2021, plaintiff voluntarily dismissed 10.
>
> The examples of this type of overload of the Florida courts appear to be endless.
>
> Clark was found to be a vexatious litigant under Florida Statute 68.093 in Escambia County. He was prohibited from filing pro se any new action in the courts of the First Judicial Circuit of Florida, including county and circuit courts, without first obtaining leave of the administrative judge for the circuit. See *Joseph Clark v. Annette E. Windsor*, Case No.: 2020 CA 000094, In the Circuit Court of the First Judicial Circuit, Escambia County, Florida, Issued February 13, 2020.
>
> Mr. Clark/Bristow's record on cases which have concluded is 0-123-1.

On December 28, 2021, Clark filed a voluntary dismissal of the present case. Nonetheless, such a dismissal does not end the sanctions proceeding that had already begun in this case. *Welch v. Inch*, 264 So.3d 383, 384, FN 2 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D484a]; *Van Meter v. State*, 726 So.2d 388, 389 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D502a]; *Pino v. Bank of New York*, 121 So.3d 23, 42, FN 13 (Fla. 2013) [38 Fla. L. Weekly S78a]; *Hester v. State*, 312 So.3d 173 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D300b].

To ensure there was no confusion about the status of the pending sanctions proceeding, the Court on the same day issued an "Order Retaining Jurisdiction to Assess Sanctions and Notice That the January 6, 2022 Hearing on the Court's Order to Show Cause Is Not Cancelled."

After seeing the Court's order retaining jurisdiction, Clark filed a written "Response to Order to Show Cause" on December 29, 2021. His response was:

> In an order dated December 28, 2021, it is quite clear the judge assigned to this case wants to hear this plaintiff's response to the "show cause order". So here's the response: I DON'T GIVE A FUCK ABOUT YOUR STUPID SHOW CAUSE HEARING!!! And let me tell you something. . .you do NOT "order" me to do a god damn thing!!! I will not appear for your stupid show cause hearing!!! What you write on paper and sign your name to means ABSOLUTELY NOTHING TO ME. You are apparently one of those CLOWNS who think they are "making a difference". Well let me tell you something buddy boy: there are THOUSANDS UPON THOUSANDS of jurisdictions where I can file lawsuits (AND YOU CAN DO ABSOLUTELY NOTHING ABOUT). You, buddy boy, have a couple counties in your jurisdiction. SO MOTHER FUCKIN WHAT!!! YOU ARE MORE THAN WELCOME TO SHOVE THAT SHOW CAUSE HEARING UP YOUR MOTHER'S ASS!!! I WILL NOT BE ATTENDING. FUCK YOU!!! And by the way. . . mail is already being returned at the address below and any and all e-mail addresses have been deleted. What that means, buddy boy, is that I will see NOTHING ELSE FROM YOU.

Contrary to the assertion in his written response, Clark appeared at the January 6, 2022 show cause hearing, via remote Zoom videoconference, along with Attorney Kelly representing Mr. Baney. At the hearing, the Court urged Clark to take the time provided to him to explain, and present evidence if any, why he should not be sanctioned and prohibited from filing any subsequent papers pro se. Instead, Clark launched into his typical barrage of profanity and intentionally disconnected from the session, thus waiving any further participation in the hearing. Based on no cause having been shown, the Court exercised its inherent authority and verbally issued its order enjoining Clark from filing any papers without legal representation (the signature of an attorney).

At the hearing, Attorney Kelly stated that Clark told him he targeted Florida because the indigent application process here is such that a vexatious litigant can inflict damage without paying a penny before he is forced to stop.

Conclusions of Law

"[Trial] Courts have 'the inherent authority to limit abuses of the judicial process by pro se litigants whose frivolous or excessive filings interfere with the timely administration of justice.' *Flowers v. State*, 278 So. 3d 899, 902 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2263a]; *cf. Attwood v. Singletary*, 661 So. 2d 1216, 1217 (Fla. 1995) [20 Fla. L. Weekly S597a]." *Hester v. State*, 312 So. 3d 173, 175 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D300b].

"Because frivolous motions and petitions use limited judicial resources, placing an unnecessary burden on the courts and the public, a bar on pro se filing is sometimes required for the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings." *Johnson v. State*, 321 So.3d 853, 855 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D697b], review denied, No. SC21-533, 2021 WL 2964024 (Fla. July 14, 2021), and review denied, No. SC21-927, 2021, WL 3713874 (Fla. Aug. 20, 2021) (citations and internal quotations omitted).

It is clear that Clark has brought his vendetta against several Ohio public officials to Florida. He takes the time to learn the basics of Florida law so that each time he initiates an action, he can survive long enough to have the case filed, accepted, and served on his litigation abuse victims, without having to pay a fee, and then dismisses his case before any serious sanctions can be administered. In doing so, he can harass and embarrass these officials and sometimes cause them to incur the expense of attorney's fees as revenge for their audacity to prosecute him in Ohio. As the saying goes, enough is enough.

Accordingly, it is ORDERED and ADJUDGED that

1. The plaintiff in this case, Joseph Clark, is a vexatious litigant under Florida Statutes and as determined by the Court under the Court's inherent authority.

2. Effective immediately the Clerks of Court in the counties of this Circuit—Leon, Gadsden, Liberty, Wakulla, Jefferson, and Franklin—will not accept for filing any paper received from Joseph Clark, or from any other name that can be shown that he is using, without legal representation, which means the paper must be signed by an attorney licensed to practice law in Florida and who is in good standing with the Florida Bar.

* * *

Torts—Civil theft—Default—Service of process—Defects—Motion to set aside default final judgment based on alleged defect in return of service of process is denied—Notation on return that person who accepted service was "employee" satisfied requirement that process server note "position occupied" by person accepting service in representative capacity—Hearsay affidavit did not constitute credible evidence to support claim that person who accepted service was not employee of defendant—No merit to claim that court should have allowed defendant time to supplement record because counsel was unaware of evidentiary nature of hearing—Evidentiary hearing is standard procedure in challenge to return of service

ROBERT SERING, Plaintiff, v. SMART STORM SOLUTIONS, LLC, a Florida limited liability company, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 21-CA-201. February 1, 2022. David Frank, Judge. Counsel: Lester Makofka, Jacksonville, for Plaintiff. R. J. Haughey, II and Nicholas R. Consalvo, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE FINAL JUDGMENT (QUASH SERVICE OF PROCESS)

This cause came before the Court on January 26, 2022, on Defendant's Motion to Quash Service of Process and to Set Aside Default and Final Judgment, and the Court having reviewed the motion and response, considered the testimony of witnesses and exhibits entered into evidence at the hearing, heard argument of counsel, and being otherwise fully advised in the premises, finds

Procedural History and Established Facts

On March 31, 2021, plaintiff Robert Sering filed a complaint that included a count for civil theft against defendant Smart Storm Solutions, LLC ("SSS").

Licensed process server Teddy Jacobs served copies of the complaint and summons on "Smart Storm Solutions, LLC, c/o Denis Nuhic as RA . . . by leaving with Angela Ortiz, EMPLOYEE-AUTHORIZED TO ACCEPT At Business 3654 W. CYPRESS STREET TAMPA, FL 33607,[1] Latitude: 27.951559, Longitude: -82.503536 On 4/12/2021 at 08:30 AM." Ms. Ortiz was described as, "Age: 55, Sex: Female, Race: White-Caucasian, Height: 5 7″, Weight: 170, Hair: Black Glasses: No."

No paper having been served, a proper clerk's default was entered against SSS on May 10, 2021.

On June 16, 2021, the Court entered an Order Setting Non-jury Trial that set the trial of the civil theft case for August 6, 2021.

The Court mailed a copy of the order setting non-jury trial to: "Smart Storm Solutions, LLC, 3654 West Cypress Street, Tampa, Florida 33607." In addition, plaintiff served a copy of the order on SSS via personal service by licensed process server Anthony Nassor on June 15, 2021.

The non-jury trial was held on August 23, 2021 and final judgment in the amount of $127,855.00 was entered against SSS on August 24, 2021.

As outlined above, a proper default final judgment was obtained by the plaintiff against SSS. The findings of fact established at the trial are as follows:

The plaintiff, Robert Sering, is a disabled veteran who owns a home at [Editor's note: Address redacted], Havana, Florida.

On about October 10, 2018, the plaintiff's home, including the roof and supporting structures, was severely damaged by Hurricane Michael.

The plaintiff signed a document prepared by SSS which was received in evidence entitled "Customer Agreement Contract Proposal," whereby SSS would act on plaintiff's behalf to get plaintiff's homeowner's insurance company to pay his homeowner's insurance claim and utilize the proceeds to repair plaintiff's home. The timing of the repairs was critical in that plaintiff was rendered homeless during this period.

On about June 26, 2019, SSS filed a lawsuit against plaintiff's homeowner's insurance company to recover plaintiff's homeowner's insurance claim proceeds and repair plaintiff's home, utilizing these insurance proceeds funds for their intended purpose—the repair of the hurricane damage to plaintiff's home.

SSS settled the lawsuit with plaintiff's homeowner's insurance company without plaintiff's knowledge or consent.

Instead of using the settlement proceeds to make the repairs on the plaintiff's home, SSS kept the homeowner's insurance proceeds money for its own use and purposes, and never repaired plaintiff's home.

SSS intentionally and willfully kept plaintiff's money with the specific intent to defraud him and as such committed civil theft under Florida law.

In the final judgment, the Court, ". . .requested that plaintiff's counsel bring / refer [the] matter to the Office of the State Attorney with jurisdiction over SSS for possible criminal investigation and prosecution.

SSS's Present Motion to Set Aside Final Judgment

Presumably after being subject to collection activities, SSS has now retained counsel, made an appearance in the matter, and attempts to erase everything outlined above due to an alleged defect in the return of service of process. It is true that an actual defect could render the judgment void for lack of personal jurisdiction. However, SSS has not met the heightened burden required by our appellate courts for such a challenge.

Applicable Law

Although plaintiff responded to the present motion with various legal theories why SSS's motion should fail, they will not be addressed because the defendant failed to meet its factual evidentiary burden.

If a return of service is "regular on its face," a legal presumption of a valid service of process is created, and the burden of proof shifts to the party seeking to overturn it. *Robles-Martinez, et al., v. Diaz, Reus & Targ, LLP*., 88 So.3d [177,] 178 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D1834a]; *Koster v. Sullivan*, 160 So.3d 385, 389 (Fla. 2015) [40 Fla. L. Weekly S63a]; *Klosenski v. Flaherty*, 116 So.2d 767 (Fla. 1959); *Montano v. Montano*, 472 So.2d 1377, 1378 (Fla. 3d DCA 1985). The burden on the party seeking to overturn a presumptively valid service of process is "***clear and convincing evidence***." *Id.* (emphasis added).

In *Robles*, the court explained the difference between a challenge where the return is defective and simply challenging the veracity of a return that is regular on its face:

> In contrast with *Johnston* and *Gonzalez*, the instant case involves returns of service that are regular on their face; the returns contained all of the information required to show compliance with the statute. The affidavits offered by Appellants did not challenge the facial regularity of the return of service; rather, by alleging that Appellants were not living at the apartment on the date process was served, the affidavits challenged the veracity of the information on the face of the return; Appellants' challenge is to the validity of the service of process itself, which created an issue of fact that required resolution at an evidentiary hearing. At that hearing, Appellee was entitled to the presumption that valid service was effectuated, and Appellants had the burden of establishing, by clear and convincing evidence, that service of process was invalid. In the absence of such clear and convincing evidence, the presumption created by a return of service regular on its face satisfied Appellee's burden of establishing valid service of process.

Robles-Martinez at 180-81.

A return of service is regular on its face if it complies with Sections 48.031 and 48.21, Florida Statutes. *Sadlak v. Nationstar Mortg., LLC*, 252 So.3d 302, 303 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D1625b].

SSS contends that the subject return is defective—not regular—in only one respect. It allegedly violates a provision of Section 48.21(1), which reads:

> Each person who effects service of process shall note on a return-of-service form attached thereto the date and time when it comes to hand, the date and time when it is served, the manner of service, the name of the person on whom it was served, and, if the person is served in a representative capacity, the position occupied by the person. The return-of-service form must list all pleadings and documents served and be signed by the person who effects the service of process. However, a person who is authorized under this chapter to serve process and who effects such service of process may sign the return-of-service form using an electronic signature.

Sec. 48.21(1), Fla. Stat. (2021).

Where a return is regular on its face, a bare bones affidavit contesting the veracity of the information on the return is insufficient to carry a defendant's "clear and convincing" burden. Florida appellate courts have repeatedly told us that there must be more.

In *Preudhomme v. Matthews*, 194 So.3d 1057 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1423a], the court held, "Here, appellant met her initial burden of establishing the validity of service, as the return of service was regular on its face. The burden thus shifted to appellee to demonstrate that the place of service was not his usual place of abode. Appellee presented no documentation or live testimony at the hearing on the motion to quash, only his affidavit, which fell short of the 'clear and convincing evidence' standard." *Id*. at 1058.

In *Johnson v. Christiana Tr.*, 166 So.3d 940 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1406a], the defendant below failed to corroborate two affidavits and a 'verified' letter that said the defendant did not live at the address where service was accepted. *Id*. at 944. " '[U]ncorroborated affidavits that [the person to be served] did not reside at the address to which service was accepted' are insufficient to sustain [defendant's] high burden of demonstrating the invalidity of their service." *Id*. at 944.

In *Telf Corp. v. Gomez*, 671 So.2d 818 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D800b], the court held, "Where as here, the individual appellant, who happens also to be the resident agent/ officer/ director/ shareholder of the corporate appellant, sought to attack the service of process with uncorroborated affidavits that he did not reside at the address to which service was accepted and that the corporate appellant transacted no business at that address, we conclude that appellants have not sustained their high burden of demonstrating the invalidity of their service." *Id*. at 819.

In *Robles-Martinez*, the plaintiff presented testimony that contradicted the defendants' affidavits. "The testimony and other evidence presented by the parties required the trial court, as the factfinder, to make credibility determinations and resolve the conflicts in the evidence." *Robles-Martinez* at 182.

An example where a defendant did it correctly is *Carone v. Millennium Settlements, Inc.*, 84 So.3d 1141 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D741a]. In *Carone*, the court found that the defendant presented "clear and convincing evidence" that substituted service on her father was improper by submitting her sworn affidavit, a certified copy of the deed to her father's condominium, copies of his driver's license, U.S.P.S. form, and homestead exemption, and testimony from him, all demonstrating that he did not reside with the defendant. *Id*. at 1142-43.

One can easily understand the judicial and public policies underpinning the burden shifting rule set forth by Florida's appellate courts as discussed above. Imagine a litigant who, as here, is capable of intentionally defrauding a disabled veteran. Would anyone believe such a person would hesitate to lie on an affidavit to escape accountability? Our civil justice system would be crippled. See *Slomowitz v. Walker*, 429 So.2d 797, 799 (Fla. 4th DCA 1983) (holding that "clear and convincing evidence" "must be presented to corroborate the defendant's denial of service," because permitting "a defendant to impeach a summons by simply denying service would create chaos in the judicial system"), as noted in *Johnson* at 940.

Applying the Law to the Facts

SSS relies on the requirement in Section 48.21(1) that the process server "*shall note. . . .if the person is served in a representative capacity, the position occupied by the person*." SSS contends that the process server did not note the "position occupied" of the person who accepted service.

Well, not exactly. SSS contends that the process server only wrote "employee" on the return and that is somehow facially invalid or incomplete.

Without any statute, rule, or appellate case addressing the amount of detail required for "position occupied," SSS would have this Court re-write the statute to state that "employee" is not sufficient. That when serving an employee of the registered agent, the return must contain the words "of the registered agent" and not just "employee" of the person to be served. The return identifies the person to be served. It was the registered agent of SSS ("c/o Denis Nuhic as RA").[2]

The Court declines SSS's invitation. The word "employee" does indeed note the position occupied by Ms. Ortiz. Accordingly, the Court finds the subject return of service to be regular on its face, and that the burden shifts to SSS to prove by clear and convincing evidence that service was improper.

The linchpin of SSS's challenge is that Ms. Ortiz, the lady who accepted service, does not work for SSS's registered agent. To prove this, SSS submitted one one-page self-serving hearsay affidavit from the registered agent, Mr. Nuhic, stating that Ms. Ortiz neither worked for Mr. Nuhic or SSS.[3] There was no attempt by SSS to present any credible evidence—no payroll records, no other business records, no live testimony, etc.

Plaintiff, however, did present credible evidence. Plaintiff began by admitting into evidence: the "Verified Return of Service" of the original Summons and Complaint (Plaintiff's Exhibit 1); the "Florida Limited Liability Annual Report of Smart Storm Solutions;" (Plaintiff's Exhibit 2); a "Verified Return of Service" of an "Order Setting Case for Trial;" (Plaintiff's Exhibit 3) and a "Verified Return of Service" showing non-service of another pretrial order. (Plaintiff's Exhibit 4).

Plaintiff called two witnesses. These were licensed process servers Teddy Jacobs and Larry Nassor. Mr. Jacobs served the original process. He corroborated the entries made on the verified return of service which he prepared. He testified that he served Smart Storm Solutions, LLC's Registered Agent, Denis Nuhic, at the address reflected on the State of Florida LLC registry, by leaving the Summons and Complaint with a person at the dispatch desk at the designated address who identified herself as an employee who was authorized to accept service. Process server Jacobs' testimony was consistent with his verified return of service. The return shows that service was made on April 12, 2021, at 8:30 a.m., at 3654 West Cypress Street, Tampa, Florida, (the designated address of Smart Storm Solutions, LLC's registered agent, Denis Nuhic), by leaving a copy of the Summons and Complaint with one Angela Ortiz. Ms. Ortiz, seated at the "dispatch desk," at the designated address, identified herself to the process server as an employee who was authorized to accept service of court papers for Mr. Nuhic, Smart

Storm's Registered Agent. Ms. Ortiz' name and physical description were all stated with particularity in the process server affidavit.

The second process server, Mr. Nassor, corroborated the entries made on a Verified Return of Service which he prepared. Mr. Nassor testified that he served Smart Storm's Registered Agent, Denis Nuhic, at the same designated address by leaving the court paperwork with another person at the dispatch desk who also identified herself as an employee and authorized to accept service of the court documents. He further testified that he attempted service of other court documents in this case on another occasion, but this time the people at the Registered Agent's listed office refused to accept them "for this case."

Finally, the Court will briefly address SSS's counsel's suggestion that he was either unaware or confused about the nature of the hearing. Even though the hearing was set by SSS's counsel, for which exhibits from both parties were filed in advance, and for which the long-established standard procedure requires an evidentiary hearing, he stated that he did not know that the proceeding was an evidentiary hearing.

This very tactic was roundly rejected by our own First District Court of Appeal in *Panama City General Partnership v. Godfrey Panama City Inv., LLC*, 109 So.3d 291, 293 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D553a]. In *Panama City General Partnership*, the defendant below challenged the sufficiency of service of process but requested a continuance at the hearing "to present evidence." *Id*. The First District held:

> We do not find that the trial court abused its discretion in declining to continue the hearing in order to allow the Partnership to present additional evidence."[A] process server's return of service on a defendant which is regular on its face is presumed to be valid absent clear and convincing evidence presented to the contrary." *Telf Corp. v. Gomez*, 671 So.2d 818, 818 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D800b]. "[A] defendant may not impeach the validity of the summons with a simple denial of service, but must present 'clear and convincing evidence' to corroborate his denial." *Id*. at 819 (quoting *Fla. Nat'l Bank v. Halphen*, 641 So.2d 495, 496 (Fla. 3d DCA 1994)). Here, the Partnership called up its own motion to quash service and was aware that an affidavit of service had been filed, yet came to the hearing only prepared to deny the service to Porretta. This was insufficient as a matter of law, thus, the trial court did not abuse its discretion in declining to continue the hearing to give the Partnership additional time to prepare.

Id.

The Court was under no obligation to allow SSS more time to supplement the record. SSS was required to show up with all the evidence it relied upon to challenge the sufficiently of the return of service. That's the well-known procedure, plain and simple.

Based upon the foregoing, the Court finds that SSS did not sustain its burden of overcoming the presumption of validity of a facially sufficient return of service of process by clear and convincing evidence.

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED. .

[1]There is no dispute that this address is the proper address on record with the Florida Department of State for service of process on SSS at the time of service.

[2]48.062(1), Service on a limited liability company, states, "Process against a limited liability company, domestic or foreign, may be served on the registered agent designated by the limited liability company under chapter 605. A person attempting to serve process pursuant to this subsection may serve the process on any employee of the registered agent during the first attempt at service even if the registered agent is a natural person and is temporarily absent from his or her office."

[3]Oddly, the affidavit says nothing about who Ms. Ortiz does work for or why she was in SSS's registered agent's office at the time of service. It also is odd that SSS did not get Ms. Ortiz to do the affidavit, which would have been more credible.

* * *

Torts—Product liability—Tobacco—Punitive damages—Motion for leave to amend complaint to add punitive damages claim in *Engle* progeny case is granted—Plaintiff has demonstrated reasonable basis for recovery of punitive damages

WALTER J. COXWELL, et al., Plaintiffs, v. R.J. REYNOLDS TOBACCO COMPANY, et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 21-CA-6. March 9, 2022. David Frank, Judge. Counsel: James D. Clark, Tampa, for Plaintiff. Stacey E. Deere and Anitra F. Raiford, Kansas City, Missouri, for Defendant.

AMENDED ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO ADD PUNITIVE DAMAGES CLAIM

This cause came before the Court for hearing on February 23, 2022 on plaintiffs' motion for leave to add a punitive damages claim, and the Court having reviewed the motion and other papers submitted and the court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

Plaintiff's motion to amend was timely. The motion, proffer and evidence relied upon, and the proposed Third Amended Complaint were filed and provided to defendants before the deadline of 20 days prior to the hearing.

"Reprehensibility is 'the most important indicium of the reasonableness of a punitive damages award.' *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)." *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 306-07 (Fla. 2017) [42 Fla. L. Weekly S951b]. The analytical focus is unmistakably on the conduct of the defendant. For punitive damages it must be intentional misconduct or gross negligence. *R. J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1070 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2754c].

The focus is not on plaintiffs' evidentiary burden to prove causation for the four theories of liability plead. That will be a matter plaintiffs will have to navigate with the jury or on directed verdict at trial.[1]

In *Schoeff* , the Florida Supreme Court gave us its view of "reprehensibility" pursuant to the facts in that case:

> The reprehensibility component of our analysis is supported by the fact that RJR **increased the addictive qualities of cigarettes, concealed their health defects, and widely marketed their defective product for profit. The harm in this case was both physical and economic, done with reckless disregard for the health or safety of others, involved repeated actions, and was the result of intentional deceit.** These factors lead to the conclusion that this conduct is among the most reprehensible.

Schoeff at 307 (citations omitted) (emphasis added).

Florida Statute 768.72(1) provides the procedural vehicle for assessing a defendant's conduct. "In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." *See also* Fla.R.Civ.P. 1.190(f) and *Watt v. Lo*, 302 So.3d 1021 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1997a], reh'g denied (Sept. 18, 2020).

Although not required to issue specific findings, *see Watt*, the Court will provide some examples of plaintiffs' "showing" using the criteria discussed by the Florida Supreme Court in *Schoeff*:

Defendants increased the addictive qualities of cigarettes,

November 23, 1956, Memo to Hoover from Senkus re Isolation of Compounds from Tobacco; (PT04993).

March 24, 1961, Memo from Wakeham to Cullman re Trends of Tar and Nicotine Deliveries over the last 5 Years; (PT02199).

concealed their health defects,

February 2, 1953, Survey of Cancer Research with emphasis upon Possible Carcinogens from Tobacco; (PT03608).

October 29, 1954, Letter from Heller to DuPuis re cancer scare; (PT01327).

widely marketed their defective product for profit,

March 30, 1954, a Talk re Public Relations and Cigarette Marking by Weissman; (PT02443).

1954 A Frank Statement to Cigarette Smokers (PT00307).

harm in this case was both physical and economic,

Plaintiff's Verified Answers to First Set of Interrogatories.

Plaintiff's Amended/Supplemental Answers to Interrogatories.

Select medical records of Walter J. Coxwell.

involved repeated actions,

November 13, 1978, Memo from Osdene to File re Recommendations for Long-Term Plans for CTR; (PT02211).

December 4, 1973, Inter-Office Memo from Colby to Blevins re Cigarette Concept to Assure RJR a Larger Segment of the Youth Market; (PT01233).

did so with reckless disregard for the health or safety of others and was the result of intentional deceit.

This last statement is more an articulation of the inference that can result from reprehensible behavior. The present plaintiffs' evidence and proffer support such an inference and are proper circumstantial evidence of liability in a civil case. They do not require ". . .indulging in the prohibited mental gymnastics of constructing one inference upon another inference." *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So.3d 536, 541 (Fla. 1st DCA 2018) [44 Fla. L. Weekly D4a] (citation omitted).

Although "reasonable showing" and "reasonable basis" are not defined, intentional misconduct and gross negligence are. "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. §768.72(2)(a), Fla. Stat (2021). "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. §768.72(2)(b), Fla. Stat. (2021).

The Court finds that the proffer and evidence presented by plaintiff are a reasonable showing which would provide a reasonable basis for recovery of punitive damages.

Although not needed to meet the threshold, plaintiff's proffer is reinforced by the *Engle* class phase 1 findings.

Defendants argue that the seminal Florida Supreme Court *Engl*e case and progeny stand for the proposition that a punitive damages determination is not a finding entitled to "res judicata." *Taken within the proper contextt*, this is correct.

Sometimes it helps to step back and remember what *Engle* actually held. The court declined to approve a conclusive finding on punitive damages for all future cases primarily due to timing issues. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1262-63 (Fla. 2006) [32 Fla. L. Weekly S1a]. However, the court never excluded the phase I findings from punitive damages analysis, especially at the motion to amend stage. Plaintiffs are entitled to rely, at least in part, on the phase 1 findings to support their motion to amend. [2]

Defendants also argues the motion should be denied because plaintiffs proposed Third Amended Complaint is itself legally insufficient on the ground that the claim for punitive damages is placed in a separate section of the complaint (the last section), citing *Keen v. Jennings*, 327 So.3d 435 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2013a].

Keen, however, does not say that a plaintiff cannot place a claim for punitive damages in a separate section of the complaint. It says a plaintiff may not plead punitive damages as a stand-alone count, unrelated to the other counts in the lawsuit. The *Keen* court explained why the request for punitive damages in that case was a stand-alone count unto itself:

> We first note that the only cause of action in Respondents' proposed Fourth Amended Complaint that actually requested or sought an award of punitive damages was the stand-alone count VI titled "Punitive Damages." . . . Second, none of the other five causes of action pleaded in the Fourth Amended Complaint actually sought an award of punitive damages. Third, none of the allegations contained in the one count upon which Respondents based their claim for a punitive damages award were incorporated into any of the first five causes of action. Lastly, the sole cause of action containing the allegations ostensibly justifying an award of punitive damages related to a project referred to as the "Dittmer Project," which had nothing to do with the claims raised in the other five causes of action that sought damages regarding "The Meadows" project.

Id. at 438-39.

Compare that to the proposed complaint here. First, the section that sets forth the claim for punitive damages incorporates all the other paragraphs of the complaint. "All allegations above are re-alleged and incorporated by reference." Complaint at 9. Plaintiffs demand is for ". . .judgment against Defendants and for: (a) compensatory and punitive damages for all injuries and losses described above. . . ." Complaint at 9.

Clearly, plaintiffs here have added a request for punitive damages to each of the four underlying, and sufficiently plead, counts—strict liability, conspiracy to commit fraud by concealment, fraudulent concealment, and negligence. They do not plead punitive damages as a stand-alone cause of action.

Plaintiff's proposed Third Amended Complaint also is legally sufficient on all other grounds. Defendants did not move to dismiss the Second Amended Complaint or otherwise challenge the clarity of the allegations or causes of action. They answered. The underlying counts in the Third Amended Complaint are essentially identical to those plead in the Second Amended Complaint.

The Court is mindful of its gatekeeping responsibility regarding punitive damages discovery. However, the Florida Legislature has provided a path for litigants to recover punitive damages. To require the production of ultra-precise, personalized evidence of harm at this stage would in effect re-write or repeal these laws by essentially establishing a threshold too high to reach. The Court declines to do so.

ORDERED and ADJUDGED that the motion is GRANTED.

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[1]Regarding the issue of reliance on a "specific statement" made by defendants that concealed the dangers of smoking, defendants are correct that the jury must be so instructed, at least in this District. The Second, Third, and Fourth Districts disagree. Conflict has been certified to the Florida Supreme Court. *PHILIP MORRIS USA INC. & R.J. REYNOLDS TOBACCO COMPANY,* Appellants, *v. KEVIN DUIGNAN,* as personal representative for the Est. of Douglas Clarence Duignan, Appellee., No. 2D20-2714, 2022 WL 697793, at *1 (Fla. 2d DCA Mar. 9, 2022) [47 Fla. L. Weekly D579a].

[2]The court held: "We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes *1277 causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning

the health effects or addictive nature of smoking cigarettes or both), 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants), and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the Engle Class can stand." *Engle* at 1276-77.

* * *

Guardianships—Incapacitated persons—Motion to dismiss, as sham pleading, a petition to determine capacity of petitioner's brother and for appointment of emergency temporary guardian is denied—Petitioner has pled claims with sufficient specificity—Claim that court lacks in personam jurisdiction over allegedly incapacitated brother because of failure of Office of Regional Counsel to execute its duty as elisor to serve petition on brother requires evidentiary hearing, although court provisionally concludes that it is possessed of jurisdiction even if there was technical failure of service of process—Where petitioner and her siblings have conducted themselves in manner evidencing acknowledgment of court's jurisdiction, siblings cannot divest court of jurisdiction by their improper act of removing allegedly incapacitated brother from Florida

CLARA ROMERO, Plaintiff/Petitioner, v. FRANCISCO ROMERO, Defendant/Respondent. IN RE: FRANCISCO ROMERO, Alleged incapacitated person. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2021-6353-MH-02. March 10, 2022. Milton Hirsch, Judge.

ORDER ON MOTION TO DISMISS PETITION TO DETERMINE INCAPACITY

On October 22 of last year, Clara Romero petitioned the court to determine the incapacity of her brother Francisco, DE 2, and for the appointment of an emergency temporary guardian, DE 1. The case then proceeded in the customary fashion: On October 25 the form order appointing the Office of Regional Counsel ("RC") to represent the alleged incapacitated person issued, DE 4; as did the form "Notice and Order Regarding Petition to Determine Incapacity," DE 6. As all such orders do in the countless cases in which RC represents allegedly incapacitated people, the latter order provided that RC:

> is also appointed elisor in this matter. The elisor shall personally serve this notice and the petitions filed herein on, and read the notice to, the AIP [*i.e*., Francisco, the alleged incapacitated person]. The elisor shall file a return of service, no later than 15 days from the date of this order, certifying that the notice and petitions have been served [on], and that the notice has been read to, the AIP.

The order having been entered on October 25, the return of service that it called for was due on or before November 9.

On November 16, the Office of the Clerk of Court issued yet another form order of the sort routinely—invariably—entered in cases of this kind. Entitled, "Amended Formal Notice per Section 744.331(1), Florida Statutes, of Petition to Determine Incapacity and/or for the Appointment of Guardianship," DE 29, it purported to advise Francisco of his upcoming hearing date; of his rights in connection with that hearing; and of the possible consequences of that hearing. In language clearly directed to RC in its capacity as elisor, the form provided, in capitals and italicized, that "This notice must be read" (the word "read" is underlined) "to the respondent." The certificate of service, signed by a deputy clerk of court, recites in relevant part, "I hereby certify that on November 16, 2021, a copy of this notice was . . . given to Regional Counsel, Esq., the Respondent's counsel."

From the outset, this case was litigated actively, even energetically. CourtMap reflects that by November 1—scarcely more than a week after the case was opened—a dozen-and-a-half pleadings had been filed, and the case was sufficiently developed that the parties felt prepared to seek referral to mediation, *see* DE 17. The mental-health professionals who constituted the examining committee had undertaken their court-ordered assessments of Francisco and were submitting their reports. *See, e.g.*, DE 20 (report of Dr. Ansley, filed November 3); DE 22 (report of Dr. Toomer, filed November 7).

On November 17, however, a pleading was filed, DE 31, making allegations which, if true, must be profoundly troubling to this court. In that pleading, Clara Romero asserted that two other siblings, Santiago and Juan Jose, in a willful effort to divest the court of jurisdiction in the midst of ongoing proceedings, spirited Francisco out of the country. My predecessor, the judge then having charge of this case, entered an order finding that Francisco had been removed to Spain. DE 38.

And yet the physical absence of Francisco notwithstanding, the parties continued to litigate this matter. CourtMap reflects two-dozen docket entries in December, another half-dozen in January.

Among the January submissions was DE 63, captioned, "Motion to Dismiss Petition to Determine Incapacity." It was filed by RC, Francisco's attorney and the court's elisor. Apart from formal language appearing in the introduction and the conclusion, it recites, in its entirety, nothing more than that "there has been no service upon the AIP in this cause;" and on that basis, with nothing more, moves for dismissal. It was denied in a very terse order entered January 31, *see* DE 65, but forms the predicate for a more comprehensively-pleaded motion to dismiss that has now been filed by counsel for Santiago Romero. *See* DE 90.

It is to the latter motion that the present order is directed. The motion seeks dismissal on two grounds: that Clara's petitions initiating this litigation are "sham pleadings," and that the court lacks *in personam* jurisdiction over Francisco. I consider those grounds in turn.

1. The assertion that Clara's petitions are "sham pleadings"

Although couched as a motion to strike, Santiago's pleading is in substance a motion to dismiss, asserting the inadequacy or inaccuracy of Clara's petitions. Santiago alleges, for example, that, "Clara's Petition for Emergency Temporary Guardian and Petition to Determine Incapacity make a series of misleading and inaccurate statements." *Verified Motion to Dismiss* ("Mtn") p. 2 ¶6. He protests that "Clara blatantly misrepresents" certain facts, *id*. p. 3 ¶6b; that she "misstat[es] facts," *id*. p. 3 ¶7; that both her petitions "are without a scintilla of evidence," *id*.; that she "knew good and well that" Francisco "was not in any eminent [*sic*; imminent] danger" at the time she filed her petitions, *id*. p. 8 ¶27; and so on.

It is apodictic that the purpose of a motion to dismiss is to test the sufficiency of the pleading to which it is directed—typically a complaint, or answer and affirmative defenses, but in this case, petitions for emergency temporary guardianship and to determine capacity. "[A] motion to dismiss examines the legal sufficiency of the complaint, not factual determinations." *Howard v. Greenwich Insurance Co.*, 307 So. 3d 844, 847 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2108b] (citing *Llanso v. WNF Law, P.L.*, 305 So. 3d 221 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1401b]; *Brooke v. Shumaker*, 828 So. 2d 1078, 1080 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2323d]). I am, for purposes of the analysis, to accept all properly pleaded allegations as true, and to concern myself solely with whether such allegations as pleaded state a sufficient claim or defense.

Thus whether Clara has misrepresented facts, blatantly or otherwise, is more than I know and more than I am allowed to know at this stage of the proceedings. Perhaps Santiago is entirely correct when he insists that Clara's claims are unsupported by "a scintilla of evidence" and will be impossible to prove. But proof is not our topic at this point in this litigation. Pleading is. My concern is whether Clara has

sufficiently pleaded a case for relief, not whether she will be able to prove that case at a trial or hearing. Clara is not called upon to provide evidence, not even a scintilla of it, to render her petitions facially adequate. She is called upon to plead her claims with sufficient specificity, and that she has done. Counsel for Santiago takes the position that Clara's narrative is hard to believe, and suspects that it will turn out to be impossible to prove.

And he may—or may not—be right. But that is something we cannot and will not know till time of trial. For present purposes, Clara has done all that the law requires of her. Her petitions are adequately pleaded. The motion to dismiss them as "sham pleadings" is, at least for now, denied.

2. The assertion of lack of *in personam* jurisdiction

Impliedly if not expressly, Santiago makes two arguments as to jurisdiction: first, he alleges that jurisdiction never existed because the RC as elisor failed in its fiduciary duty to serve pleadings on Francisco; second, he alleges that even if jurisdiction existed at the outset of this litigation, he and his brother Juan Jose successfully deracinated this court's jurisdiction by shanghaiing Francisco out of the country. I consider these arguments in turn.

a. Did the court ever have *in personam* jurisdiction?

Santiago quite properly notes that Fla. Stat. § 744.331 provides that petitions to determine capacity and for the appointment of a guardian must be served on the alleged incapacitated person. He also notes, again quite properly, that Florida Probate Rule 5.550(b)(2) offers some specifics as to the service required by the statute. It provides that the petitions and any accompanying notice are to "be personally served by an elisor appointed by the court, who may be the court-appointed counsel for the alleged incapacitated person." The elisor is then obliged to file a return of service.

As discussed *supra* the court complied, to the last dotted i and crossed t, with the procedures set forth under the statute and rule. The court's form "Notice and Order Regarding Petition to Determine Incapacity," DE 6, appointed RC as counsel and elisor, and ordered RC to comply with the obligations set forth in the statute and rule. RC's obligations in this and countless like-kind cases are well known to it. RC should have filed a return of service on or before November 9. It failed to do so. It gave no reason for its failure to do so. If RC could not locate Francisco, or believed him to be out of the jurisdiction, it is unimaginable that RC would have failed to alert the court immediately. Such conduct would have been in gross derogation of both RC's ethical obligations and its obligations as an officer of the court. Nor is it remotely conceivable that RC, having located and communicated with Francisco, simply refused to perform its fiduciary duty as elisor by serving and reading the pleadings. Such conduct, too, would have been in gross derogation of RC's ethical obligations and its obligations to this court. I have always had the highest regard for RC generally and the assistant regional counsel assigned to this case in particular. Unless and until the contrary were made to appear, and to appear irrefragably, I felt justified in assuming that RC simply neglected the merely clerical task of filing a return of service.

Regrettably, that neglect continued. On November 16, *see* DE 29, the Office of the Clerk of Court sent yet another very emphatically-worded form order to RC, instructing RC to discharge its functions as elisor and to file proof that it had done so. Again, RC failed to file a return of service. Again it gave no reason for its noncompliance. Reluctant as I was to believe that RC engaged in the willful, or flagrantly reckless, refusal to perform its duties, I continued to cling to the belief (or at least the hope) that this was all a misunderstanding—that the executed return of service had fallen behind a filing cabinet and would shortly be retrieved and presented at the clerk's office.

And then came DE 63, RC's motion to dismiss, which states in its entirety that there has been no service on Francisco. The court's elisor, laboring under a fiduciary duty to effect service on its client Francisco, informed the court *more than three full months after the fact* that it had not effected service on its client Francisco.

No reason was given. No explanation, justification, excuse, apology, was offered. Toward the end of October, 2021, RC was ordered to do what it does in all such cases, what it does in dozens and dozens of cases a month: read the petitions to, and serve them on, its client. Toward the end of January, 2022—as noted, more than three months after RC had been ordered to do so—RC informed the court that it had failed in the discharge of this basic fiduciary duty. The court was not informed of this breach of fiduciary duty on November 9, when a return of service was first due. The court was not informed of this breach of fiduciary duty on November 16, when a form for return of service was provided to RC. The court was never informed until three months after the fact when, in a single line, RC deigned to acknowledge its breach of fiduciary duty. To this day, no reason has been given. To this day, no explanation, justification, excuse, apology, has been offered.

Santiago urges me to accept RC at its word: to characterize RC's conduct as a dereliction of duty by an officer of the court and to conclude that, as a consequence of that dereliction, the court never had jurisdiction over Francisco at all. It is perfectly understandable that Santiago urges these conclusions on me. But the matter is not so simple. In *Sarfaty v. In Re M.S.*, 232 So. 3d 1074 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2337c], on what was admittedly a very different set of facts, the court was presented, as I am now, with a naked allegation of failure of service of petitions and notice on an AIP. The appellate court declined to accept those naked allegations. "As no evidentiary hearing has been held on this point . . . the record does not establish that the notice was not read to M.S. as provided by Florida Probate Rule 5.550(b)(2)." *Sarfaty*, 232 So. 3d at 1080. "The issue of the sufficiency of service in the present case is readily resolved through an evidentiary hearing, if truly in doubt." *Id*. at 1082.[1] *Sarfaty's* teaching is merely an expression of the broader principle that "In any case where jurisdiction is a question, the court must have an opportunity to rule on the jurisdictional question, and thus all rules of jurisdiction inherently provide authority for the court to assume jurisdiction for the limited purpose of determining whether a basis exists for the court to proceed further." *Miller v. Fortune Ins. Co.*, 484 So. 2d 122, 1223-24 (Fla. 1986). *See also Al-Fassi v. Al-Fassi*, 433 So. 2d 664, 665 n. 1 (Fla. 3d DCA 1983) ("Of course, it is elemental in American jurisprudence . . . that a court has jurisdiction to determine its own jurisdiction") (citing *Sun Insurance Co. v. Boyd*, 105 So. 2d 574 (Fla. 1958); *Department of Business Regulation v. Provende, Inc.*, 399 So. 2d 1038 (Fla. 3d DCA 1981)).

I am, therefore, obliged to conduct an evidentiary hearing. It is not a hearing I am eager to conduct. Among the witnesses, no doubt the principal witness will be the assistant regional counsel to whom this case is assigned. As noted *supra*, I have the highest regard for that assistant regional counsel. But if any litigant in this case, any interested person in this case, even any lawyer in this case, acted to obstruct, delay, or hinder RC in the discharge of its duty as the court's elisor, then absent an evidentiary privilege, any witness with knowledge of that obstruction, delay, or hindrance is obliged to tell the truth, the whole truth, and nothing but the truth about it.

As discussed *infra*, I am likely bound to conclude, and do provisionally conclude, that I am possessed of jurisdiction herein even if there was a technical failure of service of process. But that does not end the matter. I am also bound to ferret out the truth behind that alleged technical failure of service of process. The regularity, good order, and even the honor of the court's procedures are at issue.

Santiago's motion makes extended reference to Shakespeare's *Julius Caesar*. The reference is apt. There, as here, "honour is the subject of my story." Wm. Shakespeare, *Julius Caesar* Act I, sc. 2.

A separate order will be forthcoming setting a date and time for a hearing. The order may name an attorney *ad litem* to participate in witness examination at the hearing.

b. Assuming jurisdiction existed, was it defeated by taking the AIP to Spain?

It is settled law that litigants cannot, by stipulation or conduct, vest a court with a jurisdiction it lacks. But it is equally settled law that litigants can, by stipulation or conduct, demonstrate that a court does not lack jurisdiction. Particularly but not exclusively in equity proceedings, a litigant may not subject himself to the court's jurisdiction when it suits his purposes and then assert the court's failure of jurisdiction when it does not. *See, e.g., Glass v. Layton*, 192 So. 330 (1937); *Palm Beach Towers, Inc. v. Korn*, 400 So. 2d 110 (Fla. 4th DCA 1981); *Brasch v. Brasch*, 109 So. 2d 584 (Fla. 3d DCA), *cert.* dismissed *sub nom. High v. Brasch*, 114 So. 2d 796 (Fla. 1959).

At least until Francisco was bootlegged out of the country, and to a considerable extent even afterwards, all interested parties to this suit conducted themselves in a manner evidencing their acknowledgment of the court's jurisdiction. Clara's initial petitions were filed on October 22 of last year, DE 1 and 2. RC was appointed counsel and elisor on October 25, DE 4, 5, and 6. A notice of appearance was filed on behalf of Santiago by very experienced and competent counsel on October 27, DE 8, along with an *Answer and Objection to Petition for Appointment of Emergency Temporary Guardian*, DE 12. The latter pleading was then joined in by Juan Jose, DE 11. The court entered additional orders on October 28, DE 10, 14; and entered an order referring the matter to mediation—an agreed order, proposed by all interested persons—on November 3. Juan Jose filed a statement dated November 17, DE 30, in which he admitted that he had removed Francisco to Madrid, "until his future care is decided"—decided, presumably, by this court. In all this flurry of filings there is not a word, not a hint, calling into question the court's *in personam* jurisdiction. On the contrary: all interested persons conducted themselves, and conducted this litigation, in such a way as to recognize and endorse, at least by implication, the court's proper exercise of its jurisdiction. Certainly this characterization applies to RC, which speaks and acts on behalf of its client Francisco. When RC was appointed in October, it did not challenge the court's jurisdiction as to Francisco. When the court entered routine orders in October, setting hearings and directing mental-health professionals to examine Francisco and submit reports, RC did not challenge the court's jurisdiction as to Francisco. When mediation was proposed by the parties and ordered by the court, RC did not challenge the court's jurisdiction as to Francisco. Even when Juan Jose filed a statement confessing that he had spirited Francisco off to Spain, RC did not challenge the court's jurisdiction as to Francisco. If, as the old saw teaches, actions speak louder than words, RC was shouting from the rooftops that this court had, and was lawfully exercising, jurisdiction over Francisco.[2]

Most nearly on point is *In Re Guardianship of Graham*, 963 So. 2d 275 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1832b]. Betty Graham was an elderly widow as to whom petitions to determine incapacity and for temporary emergency guardianship were filed. *In Re Guardianship of Graham*, 963 So. 2d at 277. The probate court duly entered an order appointing an emergency temporary guardian. *Id.* (It is unclear whether an order determining incapacity was also entered, although it would be unlikely that the one order would be entered without the other.)

No sooner had the probate court done so than Larry, the black-sheep son, "surreptitiously took Betty from the residence where she had been placed by the guardian and moved her to California without giving notice to the court or any of the parties. The [probate] court held Larry in indirect criminal contempt for removing Betty from Florida . . . . Larry has refused to reveal . . . the whereabouts of his mother." *Id.*

Larry's attorney thereafter argued "that the guardianship proceedings must be dismissed because Betty is no longer in Florida." *Id.* at 278. His "attorney argued . . . that Betty's right to due process is being violated by the continued Florida guardianship proceedings. [He further] argue[d] that Florida has lost jurisdiction over Betty because she is now in California and that the Florida guardianship proceedings must be terminated." *Id.*

The appellate court emphatically "reject[ed] the attorney's improper attempts to circumvent the [probate] court's authority by raising jurisdictional issues." *Id.* at 279. The probate court had "entered the guardianship order when Betty was residing in Florida and when Florida clearly had jurisdiction over Betty's person." Perhaps most importantly, "The [probate] court acquired jurisdiction over Betty when the guardianship proceedings were *initiated*." *Id.* (emphasis added). So, too, this court "acquired jurisdiction" over Francisco when the guardianship proceedings were initiated by the filing of Clara's petitions. True, the return of service that RC was obliged to provide would have *evidenced* the acquisition of that jurisdiction. But it is certainly not the case that the court was without jurisdiction and helpless to act on behalf of an allegedly incapacitated person until that return of service was duly tucked into the Clerk's file. Indeed the parties, by their conduct, have acknowledged as much. Without waiting for RC to file a return of service, the parties filed pleadings, submitted Francisco to mental-health evaluations, mediated—engaged in a host of activities that were entirely consistent with, in the words of the Fourth District, the notion that this "court acquired jurisdiction over [Francisco] when the guardianship proceedings were initiated," and entirely inconsistent with any contrary notion.

"Larry's improper act of subsequently removing Betty from Florida . . . cannot divest the Florida court of jurisdiction." *Id.* So, too, Santiago's and Juan Jose's improper act[3] in removing Francisco from Florida cannot divest this court of jurisdiction. The *Graham* court cited then-Fla. Stat. § 744.2025(1)[4] for the proposition that even a lawfully-appointed guardian must "obtain prior court approval before removing [a] ward from the state." *Id.* But Larry—like Santiago and Juan Jose—had not been appointed guardian.

> Larry . . . did not obtain prior court approval and did not notify anyone that he had taken Betty to California. If a guardian cannot remove the ward from the state without prior court approval, surely Larry cannot do so under these circumstances. Termination of the guardianship on the ground that Betty was no longer located in Florida would permit Larry to benefit from his misdeed of illegally removing Betty from the jurisdiction. *The lower court in this case has jurisdiction to continue with the guardianship proceedings.*
>
> . . .
>
> If a person could secret the incapacitated ward away to another state and thereby cause termination of the guardianship, the entire purpose of having a guardianship procedure would be nullified. *The equities in this case strongly call for the circuit court's continued exercise of its jurisdiction.*

Id. (emphasis added).

I recognize that in *Graham*, a guardianship had already been established, whereas in the case at bar, guardianship proceedings were ongoing but a final order of guardianship had yet to be entered. For present purposes this is a gossamer distinction. If, as *Graham* teaches, an intermeddler cannot dispossess the court of the lawful and ongoing

exercise of its jurisdiction over one who has been formally determined to be incapacitated, it must surely be the case that an intermeddler cannot dispossess the court of the lawful and ongoing exercise of its jurisdiction over one who is in the process of being determined to be incapacitated; and as to whom, based on the reports of the mental-health professionals, there is a colorable basis to believe that guardianship may be necessary. To conclude otherwise is to invite, in the words of the appellate court, "the entire purpose of having a guardianship procedure [to] be nullified."

As courts of equity, guardianship courts are "charged with the responsibility of protecting an incompetent and his property." *Cohen v. Cohen*, 346 So. 2d 1047, 1048 (Fla. 2d DCA 1977) (citing *Am. Surety Co. v. Andrews*, 12 So. 2d 599 (1943)); *see also In Re Nussbaum's Guardianship*, 10 So. 2d 661 (1942); *In Re Estate of Howard*, 542 So. 2d 395 (Fla. 1st DCA 1989). In the discharge of that responsibility, a chancellor in equity is not to take a stinting view of his jurisdictional or remedial authority. On the contrary: "in any guardianship proceeding, the public policy and purpose is the protection of the ward." *Ash v. In Re Guardianship of Ash*, ___ So. 3d ___, ___ (Fla. 3d DCA Dec. 15, 2021) [46 Fla. L. Weekly D2658a] (citing *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006) [31 Fla. L. Weekly S763a]). The court must exercise its equitable powers in the ward's best interests. *Ash*, ___ So. 3d at ___ (citing *In Re Guardianship of Stephens*, 965 So.2d 847 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2350a]). For that purpose, guardianship courts are imbued with "wide discretion in fashioning remedies to satisfy the exigencies of the circumstances." *Schroeder v. Gebhart*, 825 So. 2d 442, 446 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1652a].

3. Conclusion

Provisionally, and absent something profoundly untoward coming to light at the hearing referenced above, the motion to dismiss is respectfully DENIED.

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[1]There is, not surprisingly, a paucity of case law in this area. Santiago's citation of choice is *In Re Fey v. Curtis*, 624 So. 2d 770 (Fla. 4th DCA 1993). But *Sarfaty* itself readily confined *Fey* to its facts. "Although *In Re Fey* holds that 'compliance with section 744.331 and Rule 5.550 is mandatory,' 624 So. 2d at 772, the non-compliance in that case involved the failure to appoint independent counsel for the AIP until 'the commencement of the final hearing,' 'long past the pleadings and trial preparation stage.' *Id*. No such failure occurred in the present case." And no such failure occurred in the case at bar. Our problem is not the court's failure to do its duty by appointing RC. Our problem may be RC's failure to do its duty by serving the notice and petitions on Francisco.

[2]The same could be said of Santiago, who has participated actively in this suit and only now, for the first time months after the fact, suggests a failure of the court's jurisdiction. Santiago filed an *Answer* in October of last year, DE 12, making no reference whatever to the issue of jurisdiction. Although a lack of *in personam* jurisdiction can be raised as a defense at any time, *see* Fla. R. Civ. P. 1.140(b), query whether Santiago may now find himself lumped with those litigants in cases cited *supra* at 9 who avail themselves of the court's jurisdiction when it suits their purposes, and deny the existence of that jurisdiction when it no longer does.

[3]In fairness to Juan Jose, I note that, on the record presently before me, I cannot determine that his decision to whisk Francisco off to Madrid was done expressly for the purpose of frustrating this court's jurisdictional power. As referenced *supra*, the written statement that he signed and submitted can be read to suggest the contrary. *See* DE 30.

[4]*See* Fla. Stat. § 744.524, "Termination of guardianship on change of domicile of resident ward."

* * *

Consumer law—Florida Deceptive and Unfair Trade Practices Act—Class action arising from plaintiff's unsuccessful participation in vehicle giveaway that required him to follow 100 Instagram accounts, alleging violation of FDUTPA, violation of gambling and RICO statutes, unjust enrichment, and negligent misrepresentation—Standing—Self-imposed injuries, including alleged wasted time spent by plaintiff in reviewing giveaway rules and list of celebrities promoting contest, complying with rules by following 100 accounts, and scrolling through his own account's feed that is populated with posting of accounts he voluntarily followed, are insufficient to confer standing on plaintiff—Further, wasted time is not causally connected to alleged deceptive conduct, but rather to fact that plaintiff did not win prize—Fact that plaintiff alleged per se violations does not provide requisite injury for standing purposes—Plaintiff has failed to establish standing under FDUTPA where he was aggrieved, if at all, by outcome of giveaway, not by any alleged deceptive acts—Plaintiff is also unable to establish standing because his claims cannot be redressed by relief sought—Motion to dismiss is granted

ALEXANDRU CHIHAIA, Plaintiff, v. GO GIVEAWAYS, LLC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-009231-CA-01, Section CA43. February 17, 2022. Michael A. Hanzman, Judge. Counsel: Bogdan Enica, Miami, for Plaintiff. Joshua Truppman, Brodsky Fotiu-Wojtowicz, PLLC, Miami, for Defendants.

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

This matter came before the Court on January 25, 2022, upon Defendants' Renewed Motion to Dismiss Amended Complaint and Incorporated Memorandum of Law filed on November 4, 2021. (D.E. 42) ("Motion"). After reviewing the Motion, Response and pertinent portions of the court file, hearing argument of counsel, and being otherwise fully advised in the premises, the Court grants the Motion and enters this Final Judgment of Dismissal.

I. **FACTS AS PLED**

Plaintiff's complaint arises from his unsuccessful participation in a Mercedes Benz giveaway that required him to follow no less than a hundred Instagram accounts. He brings this putative class action on his behalf and those alleged to be similarly situated. Plaintiff alleges that Defendant Go Giveaways, LLC ("Go Giveaways") organizes events where it offers "attractive prizes as incentives," and asks Instagram "users to follow a plethora of [other] unrelated [Instagram] accounts in order to enter in a game of chance and win valuable prizes." *See* First Amended Complaint ("AC"), ¶ 30. (D.E. 37).[1] Defendants Omar del Villar ("Villar") and Liad Biran ("Biran") allegedly "advertised and were otherwise personally involved in organizing and promoting [these giveaways] in at least two instances." *Id.*, ¶ 62.

Defendants claim that these giveaways provide a way for micro-influencers and bloggers to grow their "business or personal brand quickly and effortlessly."[2] *Id.*, ¶ 55. Most micro-influencers "spend considerable time and effort trying to gain as many followers as possible." *Id.*, ¶ 23. The larger the number of followers, the greater viewership of any content. This is because when a micro-influencer (or anyone with an account) posts a picture, video, or a story in his or her Instagram account, "the posts appear in the feed of everyone following the account." *Id.*, ¶ 12. And "by following any particular profile or account, a user allows such an account or profile to send updates, posts or stories directly into the user's Instagram feed" and permits "direct messages from that profile to appear directly in the user's inbox." *Id.*, ¶¶ 9-10.

Users with large number of followers who regularly generate content in their respective profile/account can be perceived to influence consumer behavior ("influencers"). *Id.*, ¶ 12. Influencers can "monetize their status and large number of followers by charging a fee to create and place advertisements on their posts and stories," all of which will appear in the feed of every Instagram follower's account. *Id.*, ¶ 13. Thus, the "number of followers has a direct correlation to the amount an advertiser is willing to pay for content and partnership" with the influencers. *Id.*, ¶ 23.

Plaintiff complains that Defendants' giveaways are "unscrupulous" means of gaining followers. *Id.*, ¶ 28. Moreover, Plaintiff alleges he did not know micro-influencers and bloggers ("Sponsors") pay Go

Giveaways a fee to be in the list of Instagram accounts to be followed. *Id.,* ¶ 74. In turn, "Go Giveaways pays the [promoting celebrity] a small portion of the money received from the [Sponsors], buys the prize, and pockets most of the remaining money." *Id.,* ¶ 59. The fee, however, is paid by the Sponsors, not Plaintiff or any putative class member.

Plaintiff also claims that this "business model" allows Defendants' clients to "mislead advertisers by adding additional passive followers to the account," *Id.,* ¶ 56, describing these passive followers as fake (even though they actually are following the Sponsors' Instagram accounts and must continue to do so until the conclusion of the giveaway in order to continue qualifying), because they are choosing to follow said accounts only to gain entry to the giveaway. Plaintiff further alleges that oftentimes, some of these same micro-influencers would "promote any product or service without much sapience, if they are offered enough money." *Id.,* ¶ 15. Plaintiff, however, is not one of these "misled advertisers".

As for Plaintiff himself, he alleges that he "participated in one these games of chance without receiving any basic information like the odds of winning, how and when the drawing is done, who provides the prize, who won, etc." *Id.,* ¶ 34. "Before entering the giveaway, . . . Plaintiff reviewed [the rules] in Go Giveaway's Instagram account and learned that many celebrities and Influencers advertised or endorsed the giveaways organized by Go Giveaways." *Id.,* ¶ 36. The alleged "celebrities that convinced [Plaintiff], as well as many others, to enter the giveaway" include Nicki "Minaj, Jason Derulo, Floyd Mayweather, Alexandra Hatcu, and Jordin Woods, just to name a few." *Id.* ¶ 38. After conducting his research, Plaintiff chose to participate in the giveaway of a brand-new Mercedes Benz car, valued at approximately $36,000.00. *Id.*, ¶ 64. Plaintiff proceeded to follow the listed hundred Instagram accounts, with each followed account earning him a chance of winning the prize. *Id.*, ¶ 75.

Plaintiff did not win the car, and subsequently filed the instant action alleging that the Defendants misrepresented the nature of the giveaways. *Id.*, ¶ 28. Plaintiff alleges that generally when advertisers enter a "paid partnership" with Instagram users by "sponsoring independent content generated by the influencers themselves," the influencer is advised to place a "paid partnership" tag to the post "as a step toward maintaining compliance with the Federal Trade Commission's ("FTC") rules and disclosure guidelines" for social media influencers. *Id.*, ¶¶ 18-19; *see also* AC's Exhibit 1. Plaintiff further alleges that, "despite their obligation of insuring compliance with the law, the Defendants are doing quite the opposite, as they advise the Influencers promoting their [giveaways] to use confusing and inaccurate statements like 'I am giving away a car,' or to use extra spacing in their post, so the fact that the post is a paid advertising shows only after the reader has to click 'more', if it shows at all." *Id.*, ¶ 29.

According to Plaintiff, Defendants failed to disclose that: (1) the giveaways were funded with money collected from hundreds of Sponsors; and (2) from those funds Go Giveaways paid celebrities to promote the giveaways (giving Plaintiff the impression that these "affluent celebrities" were somehow offering these prizes as "acts of kindness") and placing the Sponsors in a "list of people to follow by the celebrity influencer's audience." Plaintiff admits, however, that he followed the identified Instagram accounts to earn a chance of winning the car. Plaintiff also pleads in his Complaint that Go Giveaways purchased the prize for the contest. Thus, Plaintiff—by following the Instagram accounts—had a chance to win the "prize" being offered.

II. **PROCEDURAL HISTORY**

On May 27, 2021, Defendants filed a motion to dismiss Plaintiff's original complaint (D.E. 19). At the hearing on the motion, the Court explained that, as pled, it could not ascertain how Plaintiff had been harmed by the alleged activity in this case. The Court was concerned whether Plaintiff had standing since the only injury appeared to be going online and participating in a free giveaway that he did not win. On October 11, 2021, the Court dismissed the Complaint without prejudice, with instructions for Plaintiff to allege with greater specificity: the amount of influencers that he would not have followed but for the prospect of this "lottery"; how Plaintiff in this putative class conferred a "direct benefit" (or any benefit) on Go Giveaways; and all the reasons supporting the claim that this giveaway or lottery violated the law. *See* Oct. 11, 2021 Order. (D.E. 36).

On October 18, 2021, Plaintiff filed his AC, (D.E. 37), modifying the first count to assert a violation of Florida's gambling statue (Count I). Plaintiff's claim is brought under Fla. Stat. §849.094, even though Chapter 849 does not grant a private right of action to enforce the gambling regulations. *See* Op.Att'y Gen. Fla. 2007-48, 2007 WL 3357167, at *1 (2007) ("Florida's gambling laws, contained in Chapter 849, Florida Statutes, are criminal in nature and therefore, must be enforced by local law enforcement agencies and prosecuted by the State Attorney's Office in the appropriate judicial circuit"). The AC also contains the following claims: violations of Florida's Civil RICO Statute (Count II), Unjust Enrichment (Count III), negligent misrepresentations (Count IV), and violations of the gambling statute and 15 U.S.C. § 45 (titled "Federal Unfair Competition Unlawful") as *per se* FDUTPA violations.[3]

The factual allegations contained in the AC remain practically identical to the original pleading, save the added details on the time Plaintiff allegedly spent because of his participation in the giveaway. Plaintiff claims he was injured by Go Giveaways' conduct because he not only spent time reviewing the postings by the celebrities endorsing the giveaway, but he also spent time and mental energy in reviewing the giveaway's entry rules published in Instagram. *See* AC, ¶ 69. He had to take approximately ten (10) minutes to review the promoting celebrities' accounts and two (2) minutes to follow all the listed Instagram accounts. *Id.*, ¶¶ 36, 68. Plaintiff also complains that by clicking the "follow" button, he gave the Instagram accounts access to his "Instagram data." Moreover, since following all these accounts, Plaintiff's feed has been flooded with the followed accounts' postings, requiring him to spend "at least 20% more time on Instagram to be able to review the content he was interested in." *Id.*, ¶ 73. "This translated in at least an additional 30 (thirty) minutes spent daily on Instagram due to his participation in this lottery." *Id.*

On November 4, 2021, Defendants filed a renewed Motion arguing that the case should dismissed with prejudice for at least three reasons: (1) Plaintiff failed to show he had standing because he cannot manufacture the injury through self-inflicted injury by way of voluntary waste of time; (2) Plaintiff failed to sufficiently plead any of his claims; and (3) he has failed to plead a claim for vicarious liability against Defendants Villar and Biran.

III. **STANDARD**

"For purposes of a motion to dismiss, the Court must accept any well-pled facts of the plaintiff's complaint as true." *Ins. Concepts and Design, Inc. v. Healthplan Svc., Inc.*, 785 So. 2d 1232, 1333 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1316a]. The Court should look only to the four corners of the pleading. *Sovran Bank, N.A. v. Parsons*, 547 So.2d 1044 (Fla. 4th DCA 1989). Nevertheless, in order to state a proper cause of action, a "[c]omplaint must allege *ultimate facts establishing each and every essential element of a cause of action* in order to entitle the pleader to the relief sought." *See Sanderson v. Eckerd Corp.*, 780 So. 2d 930, 933 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D425a]. "[W]here the elements of a cause of action are not

pled in the complaint, they may not be inferred by the context of the allegation." *Id.* Moreover, "*a pleading is deemed insufficient if it contains mere statements of opinion or conclusions unsupported by specific, ultimate facts*." *Turnberry Village N. Tower Condo. Ass'n, Inc. v. Turnberry S. Tower Condo. Ass'n, Inc.*, 224 So. 3d 266, 267 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1567a] (conclusory allegations are insufficient to withstand a motion to dismiss).

IV. **STANDING REQUIREMENT**

An issue a court must always consider is whether the plaintiff has a legal standing to bring the lawsuit. "The issue of standing is a threshold inquiry which must be made at the outset of the case before addressing whether the case is properly maintainable as a class action." *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So. 2d 374, 376 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D719a]. In order to have standing, "a plaintiff first must identify an actual or imminent injury that is concrete, distinct, and palpable. Next, a plaintiff must establish 'a causal connection' linking the injury to the conduct being challenged. Finally, a plaintiff must show a 'substantial likelihood' that the relief sought will remedy the alleged injury." *See Community Power Network Corp. v. JEA*, 327 So. 3d 412, 415 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D2002a]. The claimed injury cannot be abstract or hypothetical. *Id.*; *McCall v. Scott*, 199 So. 3d 359, 366 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1889c] (trial court was not required "to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party," and properly determined injury claimed was conclusory and speculative); *Daisy v. Mobile Mini, Inc.*, 489 F.Supp. 3d 1287, 1295 (M.D.Fla. (Sept. 24, 2020) ("[t]here must be 'a concrete injury even in the context of a statutory cause of action"); *Fla. Home Builders Ass'n, Inc. v. City of Tallahassee*, 15 So. 3d 612, 613 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1096b] (holding that speculative possibilities do not create the necessary standing for declaratory or injunctive relief).

V. ANALYSIS

a. No Legal Standing Absent Injury and Causation—Both of Which are Absent Here

A review of the AC shows Plaintiff's only alleged "injury" is having wasted time in reviewing the giveaway rules and the list of celebrities promoting the contest. Plaintiff also wasted time complying with the rules of the contest (following a hundred Instagram accounts) and scrolling through his own account's feed which is populated with the postings of the Instagram accounts he voluntarily and willingly followed. These self-imposed "injuries" are insufficient for standing purposes. *Colceriu v. Barbary*, No. 8:20-cv-1425-MSS-AAS, 2021WL 5707491, at *2 (M.D.Fla. Nov. 29, 2021) ("[n]one of Plaintiff's time spent deciding whether to enter a lottery and none of her time voluntarily clicking on an influencer's page to 'follow' him or her constitutes cognizable injury") (citing *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) [28 Fla. L. Weekly Fed. C217a]; *Perez v. Golden Trust Ins., Inc.*, 470 F.Supp. 3d 1327, 1328 (S.D.Fla. July 6, 2020)).

Plaintiff also cannot claim injury by voluntarily clicking "follow" in each of the Instagram accounts in order to participate in the giveaway, essentially consenting and requesting that postings from those accounts be included in his Instagram feed. *Eldridge v. Pet Supermarket, Inc.*, 446 F.Supp. 3d 1063, 1068 (S.D.Fla. March 10, 2020) (no injury where texts were sent to plaintiff in direct response to plaintiff's voluntary registration in raffle and expressly provided written consent); *In re Equifax, Inc., Customer Date Security Breach Litigation*, No. 1:17-md-2800-TWT, 2019 WL 926999, at *5 (N.D.Ga. Jan. 8, 2019) ("Plaintiffs cannot 'manufacture' standing by taking on voluntary costs").

Even if the Court were to find that Plaintiff's alleged wasted time was sufficiently concrete, distinct or palpable (which it does not), there also is an absence of any "causal connection" between the wasted time and the alleged illegal conduct. *Discount Sleep of Ocala, LLC v. City of Ocala*, 245 So. 3d 842, 850 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D123a] (to meet standing requirements "injury must be fairly traceable to the challenged action"). Plaintiff's alleged injuries were not caused because the giveaway never happened, because no prize was actually given out, or because Sponsors or advertisers were misled. Rather, it is the fact that he did not win the prize that turned his efforts into a loss. *In re Crown Auto Dealership, Inc.*, 187 B.R. 1009, 1018 (M.D.Fla. Aug. 16, 1995) (finding claimants received what they bargained for, claimants' "subjective feelings of disappointment are insufficient to form the basis of an award of actual damages"). This, however, is not a loss proximately caused by the alleged deceptive conduct.

Additionally, Plaintiff's claim that he has asserted *per se* statutory violations does not provide him with the required injury for standing purposes. Merely claiming a statutory violation is insufficient to plead a concrete injury. *Muranski v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 924 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C2065a] (plaintiff does not automatically satisfy "the injury-in-fact requirement whenever a statute grants a person statutory right and purports to authorize that person to sue to vindicate that right"). "[S]tatutory violations do not—cannot—give [the court] permission to offer plaintiffs a wink and a nod on concreteness." *Id.* at 925; *DeJesus v. Seaboard Coast Line R. Co.,* 281 So. 2d 198, 201 (Fla. 1973) (when claiming a violation of a statute, even if a *per se* violation, a plaintiff must establish "that he is of the class the statute was intended to protect, that he suffered injury of the type the statute was designed to prevent, and that the violation of the statute was the proximate cause of his injury").

b. Plaintiff is not Aggrieved under FDUTPA

With respect to the FDUTPA claims, Section 501.204 provides that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Fla. Stat. §501.204(1). The purpose of the Statute is to "[p]rotect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. §501.202(2). "The concept of 'unfair or deceptive acts' is not clearly defined, but some cases have suggested that the conduct must offend established public policy and be 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumer.' " *In re Crown Auto Dealership, Inc.*, 187 B.R. 1009, 1018 (M.D.Fla. Aug. 16, 1995) (citing *Urling v. Helms Exterminators, Inc.,* 468 So.2d 451, 453 (Fla. 1st DCA 1985). For those injured by these "unfair or deceptive acts", Section 501.211 provides the following remedies:

> (1) Without regard to any other remedy or relief to which a person is entitled, **anyone aggrieved by a violation** of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.
>
> (2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105. However, damages, fees, or costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

Fla. Stat. §501.211 (emphasis added).

Plaintiff insists that Subpart (1) allows him, as an aggrieved person, to assert claims for declaratory and injunctive relief regardless of whether he has suffered injuries. While FDUTPA does not define the term "aggrieved", the First District Court of Appeals has adopted *Black's Law Dictionary's* broad definition of "feeling resentment at having been unfairly treated." *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 172 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2502d]. So, "regardless of whether an aggrieved party can recover 'actual damages' under section 501.211(2), it may obtain injunctive relief under section 501.211(1)." *Id.; Davis v. Powertel, Inc.*, 776 So. 2d 971, 975 (Fla. 1st DCA 2000) [26 Fla. L. Weekly D146a] (an "aggrieved party may pursue a claim for declaratory relief or injunctive relief under the Act, even if the effect of those remedies would be limited to the protection of consumers who have not yet been harmed by the unlawful trade practice").

This broad interpretation of the term "aggrieved" does not change the fact that Plaintiff must still "not only plead and prove that the conduct complained of was unfair and deceptive but [plaintiff] must also plead and prove that he or she was **aggrieved by** the unfair and deceptive act." *Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1014c] (emphasis added); Fla. Stat. §501.211(1); *Berenguer v. Warner-Lambert Co.*, No. 02-05242, 2003 WL 24299241, *2 (Fla. 13th Cir. Court, July 31, 2003) ("FDUTPA requires proof of causation" and a plaintiff "must plead 'sufficient facts to show that [he has] been actually aggrieved by the unfair or deceptive act committed by the [defendant] in the course of trade or commerce' "). As discussed above, Plaintiff was "aggrieved", if at all, by the outcome of the giveaway; not by any of the alleged "deceptive acts."

Finally, Plaintiff is also unable to establish the third Standing requirement because his claims cannot be redressed by the relief sought. Having not incurred any actual loss or injury, Plaintiff cannot claim monetary damages. Plaintiff also is not able to seek equitable relief because he cannot establish that he was aggrieved by the alleged deceptive conduct. Further, Plaintiff may not rely on a general interest in curbing the alleged wrongful conduct to gain standing under FDUTPA. *Superior Consulting Svc., Inc. v. Shaklee Corp*., No. 6:16-cv-2001-Orl-31GJK, 2017 WL 2834783, at *7 (M.D.Fla. June 30, 2017) (applying the *Ahearn* holding, court explained that "a plaintiff is 'aggrieved' under FDUTPA when the deceptive conduct alleged has caused a non-speculative injury that has affected the plaintiff beyond a general interest in curbing deceptive or unfair conduct").

VI. CONCLUSION

Plaintiff is obviously annoyed that he wasted time reviewing Go Giveaways' rules, the celebrities' promotions, and following the hundred accounts, in the hope of winning a Mercedes Benz, only to come up empty handed. But courts, whether they be state or federal, are charged with adjudicating actual cases and controversies involving real or threatened injury. Courts are not a forum to be used by piqued citizens who wish to air grievances they have over an unsuccessful endeavor. *Ferreiro*, 928 So. 2d at 377 ("if none of the named plaintiffs purporting to represent a class establishes a requisite of a case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class"). And this Court will not "waste" anymore of its limited judicial time with this putative class action, brought by a class representative who suffered no tangible harm whatsoever.[4]

For the foregoing reasons, Defendants' Renewed Motion to Dismiss Amended Complaint is **GRANTED**, and Final Judgment is hereby entered in favor of Defendants Go Giveaways, LLC, Omar Del Villar, and Liad Biram. Plaintiff shall take nothing from this action against said Defendants, and Defendants shall go hence without day.

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[1]Generally, "Instagram allows users to create profiles that can be unilaterally 'followed' by other users . . . without having to actively accept or acknowledge each follower." *Id.*, ¶ 7.

[2]Plaintiff defines "micro-influencers" as "[u]sers with a relatively limited number of followers who are willing to increase their presence and are constantly advertising products and services." *Id.*, ¶ 15.

[3]Plaintiff's method of "incorporating all of the preceding allegations, including those of each preceding count(s)" to plead each of his causes of action, violates Florida's procedural requirement that complaints "provide short and plain statement of ultimate facts." *See* Fla.R.Civ.P. 1.110(b)(2); *Gerentine v. Coastal Sec. Systems,* 529 So. 2d 1191, 1194 (Fla. 5th DCA 1988). This type of pleading is condemned by the courts. *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1212 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1244c].

[4]Because the Court concludes that Plaintiff lacks standing to pursue this case, it need not address whether the claims pled actually state viable causes of action.

* * *

Attorney's fees—Defendant is not entitled to attorney's fees under rule 1.380(a)(4) following denial of plaintiff's motion to compel discovery where motion was substantially justified and award of expenses would be unjust—Section 57.105(2) does not provide for award of damages to non-moving party

SUZANNE GIOVINAZZO and AUSTIN GULASH, Individuals, Plaintiffs, v. SRQ AUTO LLC, a Florida Limited Liability Company, WELLS FARGO BANK, N.A., d/b/a WELLS FARGO DEALER SERVICES, a Foreign Corporation; and, HUDSON INSURANCE COMPANY, a Foreign Corporation. Defendants. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2020CC006253AX. March 11, 2022. Melissa Gould, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hallandale; and Darren Newhart, Newhart Legal, P.A., Loxahatchee, for Plaintiffs. John P. Fleck, Jr., Bradenton, for SRQ Auto LLC and Wells Fargo Bank, N.A., Defendants. James S. Myers, McElroy, Deutsch, Mulvaney & Carpenter, LLP, Tampa, for Hudson Insurance Company, Defendant.

ORDER DENYING DEFENDANT SRQ AUTO LLC'S MOTION FOR ATTORNEY'S FEES

THIS CAUSE having come to be heard by the Court on March 04, 2022, on the Defendant, SRQ AUTO, LLC's Motion for An Award of Attorney's fees and Plaintiffs, SUZANNE GIOVINAZZO and AUSTIN GULASH ("Plaintiffs") Response in Opposition. Joshua Feygin, Esq. of Joshua Feygin P.L.L.C. represented Plaintiffs at the hearing. John Paul Fleck Jr., Esq. of the Law Office of John Paul Fleck Jr. represented the Defendant, SRQ AUTO LLC. Having heard the argument of Counsel, reviewed the record, relevant legal authority, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED**:

1. The Defendant has moved this Court for attorney's fees pursuant to Rule 1.380(a)(4) and Fla. Stat. § 57.105(2) following the entry of an order denying the Plaintiffs' Motion to Compel and For Sanctions.

2. Rule 1.380(a)(4) provides in pertinent part:

If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, ***unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust****. (emphasis supplied).*

3. This Court finds that the Plaintiffs' Motion was substantially justified and the circumstances are such that the award of expenses against the Plaintiffs would be unjust.

4. Fla. Stat. § 57.105(2) provides:

At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of

unreasonable delay, the court shall award damages ***to the moving party*** *for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.*
(emphasis supplied).

5. This Court finds the statute is clear and unambiguous. Fla. Stat. § 57.105(2) provides for an award of damages to the moving party and is not a prevailing party statute.

Based on the forgoing Defendant's Motion is **DENIED**.

* * *

Dissolution of marriage—Marriage is dissolved and rulings on alimony and equitable distribution are made—Child custody—Rulings on timesharing and child support are deferred until progress has been made in reunification therapy

IN RE: THE MATTER OF: RENEE BOUER, Petitioner, and ELIZABETH BOUER, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE 19-012590 (36). February 11, 2022. Susan F. Greenhawt, Sr. Judge. Counsel: Harry Hipler, Dania Beach, for Petitioner. Jim Gitkin, Hollywood, for Respondent. Jessica Brito, Assistant AG, Ft. Lauderdale, for Child Support Enforcement.

FINAL JUDGMENT
FOR DISSOLUTION OF MARRIAGE

THIS CAUSE came to be heard for a trial on January 4, 2022, before the Honorable Susan F. Greenhawt, upon the Petitioner's Petition for Dissolution of Marriage filed on November 5, 2019, and the Respondent's Amended Answer and Counter-Petition for Dissolution of Marriage filed on September 12, 2020. The trial was held via Zoom. The Court listened to the testimony of the parties, received evidence, and reviewed the Court file. After considering the evidence, including the testimony of witnesses, the argument presented by counsel, the Court hereby makes findings of fact and conclusions of law as follows:

Marital Statistics

1. RENEE BOUER, (Petitioner) and ELIZABETH BOUER, (Respondent) were legally married on December 9, 2013, in New York. The *Petition for Dissolution of Marriage* was filed by the Petitioner on November 5, 2019.

Background

2. ELIZABETH BOUER testified that the parties met when they were 11 years old and began dating in their late teens. She testified the parties began living together in the mid 1990s at which time ELIZABETH changed her last name to BOUER. In June 2005, the parties executed a Declaration of Domestic Partnership pursuant to the Broward County Partnership Act of 1999. In July 2005, they traveled to Cancun, Mexico with friends and family for a "wedding" officiated by Rabbi Bennett Greenspon of Temple Beth Emet, at which time they signed a Jewish marriage contract (Ketubah). In September 2005, the parties purchased a home in anticipation of starting a family (titled in RENEE's name alone). RENEE BOUER disagreed with much of ELIZABETH BOUER'S testimony and instead painted a picture of a more casual, less committed, intermittent friendship/relationship. RENEE BOUER's testimony on the subject of the parties' relationship was disingenuous and not credible.

Grounds for Dissolution of Marriage

3. Irreconcilable differences exist and have caused the irretrievable breakdown of the marriage, and all efforts and hope of reconciliation would be impracticable and not in the best interests of the parties. The marriage of the parties is irretrievably broken. The marriage between the parties is dissolved, and the parties are restored to the status of being single.

Children

4. There have been two children born of this marriage, to wit: Liam J. Bouer born February 2, 2006, and Marty L. Bouer born September 6, 2008. The parties' minor son was carried by ELIZABETH and their minor daughter was carried by RENEE. The same sperm donor was used to conceive both children. The parties traveled to Georgia for both births to ensure that they were utilizing more progressive adoption laws. The parties' legal marriage in New York in 2013, legitimized the parties' two minor children as though they were born during the parties' intact marriage. The parties cohabitated with their children as a family until separating prior to the initiation of these proceedings. No other children are contemplated or expected, and neither party is currently pregnant.

Jurisdiction

5. The Court has jurisdiction of the parties and the subject matter herein. The parties have both been residents of the State of Florida for at least six (6) months prior to the filing their respective pleadings.

Timesharing/Reunification Therapy/Child Support

6. RENEE is currently estranged from both children and based on her own testimony she is currently using medical marijuana and Zoloft to deal with anxiety, stress and depression. It is unlikely that reunification therapy will be productive until RENEE deals with some of her own psychological issues. She is insured by Primary, an insurance plan through the Memorial Hospital System. The children are seeing a therapist and are insured by Medicaid. Based on the "scorch the earth" behavior exhibited during this litigation, by both parents, they are both in need of the services of a psychotherapist and co-parent training such as the course offered by f.a.c.e.s. Once RENEE has gained insight into how her own behavior has impacted her estrangement from the children, she and the children, with ELIZABETH'S cooperation, should seek reunification therapy with Lillian Pfeiffer at RENEE'S expense.

7. Once progress has been made in reunification therapy, the parties should return to mediation and attempt to work out a timesharing schedule. The Court reserves jurisdiction as to timesharing, if the parties are unable to agree. In the interim, the minor children shall reside with ELIZABETH on a full-time basis.

8. A "No Contact" order has been in place between the parties since July 10, 2020.

9. The Court also reserves jurisdiction as to the determination of child support.

Equitable Distribution of Assets and Liabilities.

Home:

10. RENEE purchased real property, titled solely in her name, prior to the marriage. Subsequently, the property was lost in foreclosure. Any liabilities arising from the ownership or foreclosure of this property shall be the sole responsibility of RENEE.

Retirement Accounts:

11. Neither party has a retirement account.

Other Assets:

12. Both parties testified they have no significant money in bank accounts.

13. RENEE testified she does not have an automobile; her Cadillac was repossessed. ELIZABETH stated on her Financial Affidavit she has a 2015 Buick Enclave. There was no testimony from either party about the Buick Enclave. If the Buick Enclave is still owned by ELIZABETH it shall become her sole and separate property and she shall be responsible for any liabilities connected with the ownership and operation of the vehicle.

14. The parties testified that they own a timeshare, however, there was no further testimony regarding the financial status, ownership or

use of the timeshare. If possible, the timeshare should be sold and any proceeds be shared equally.

15. ELIZABETH settled a lawsuit for approximately $100,000.00, about $45,000 was used to pay her divorce attorney's fees. There was no testimony as to any entitlement to a portion of those funds by RENEE. Therefore, any funds that remain shall be the separate property of ELIZABETH.

Debt:

16. Each party shall keep any credit card debt or other debt in their own name. RENEE testified she has over $900,000. in debt. ELIZABETH testified that RENEE was the breadwinner and handled all financial matters during the relationship and there are many financial details that ELIZABETH is not aware of.

Renee's Non-Marital Business:

17. Prior to the parties' marriage, RENEE acquired a catering business, Haute Cuisine, with the help of her father, who had also been in the catering business. RENEE borrowed approximately $200,000. from her father, he testified she must repay the money because he borrowed the money himself. RENEE testified that Haute Cuisine currently has a negative value since the majority of the revenue came from her catering contract with Temple Beth Emet. The business has been basically inoperable since Covid began in March 2020.

Alimony

Findings Relative to Alimony

18. This is a short-term marriage of approximately six (6) years.

19. RENEE'S Financial Affidavit filed on December 8, 2021, indicates a gross monthly income of $2,458.00. Her monthly expenses exceed her net monthly income. ELIZABETH contends RENEE has spent $11,000. on medical marijuana between October 2020 and December 2021. RENEE testified she suffers from anxiety, stress and depression and she is now on Zoloft and trying to cut down on her medical marijuana use.

20. ELIZABETH'S Financial Affidavit filed on February 24, 2020, indicated that she was unemployed, at the time of final hearing she testified she was employed by a law firm doing debt litigation, however, on January 7, 2021, she filed a Motion to Inform Court of Change in Employment Status indicating she is again unemployed. Her total monthly expenses indicated on her Financial Affidavit were $7,840.00. ELIZABETH testified that her father was providing some financial support for her and the children.

21. After considering the factors in FL Stat 61.08, in this short-term marriage, although ELIZABETH has the need for alimony, RENEE does not have the ability to pay alimony.

Attorney's Fees and Costs

22. After considering the factors in FL Stat 61.16, the parties shall each pay their own attorney's fees and costs.

Other

23. The Court reserves jurisdiction to adjudicate any properly filed charging liens.

IT IS, therefore, **ORDERED** and **ADJUDGED** as follows:

A. Therefore, the parties are awarded a Final Judgment of Dissolution of Marriage, *a vinculo matrimonii,* and the bonds of matrimony heretofore existing between RENEE BOUER and ELIZABETH BOUER are hereby DISSOLVED.

B. RENEE is currently estranged from both children and based on her own testimony. It is unlikely that reunification therapy will be productive until RENEE deals with some of her own psychological issues. She is insured by Primary, an insurance plan through the Memorial Hospital System. The children are seeing a therapist and are insured by Medicaid. Both parents are in need of the services of a psychotherapist and co-parent training such as the course offered by f.a.c.e.s. Once RENEE has gained insight into how her own behavior has impacted her estrangement from the children, she and the children, with ELIZABETH'S cooperation, should seek reunification therapy with Lillian Pfeiffer at RENEE'S expense.

C. Once progress has been made in reunification therapy, the parties should return to mediation and attempt to work out a timesharing schedule. The Court reserves jurisdiction as to timesharing, if the parties are unable to agree.

D. In the interim, the minor children shall reside with ELIZABETH on a full-time basis.

E. A "No Contact" order has been in place between the parties since July 10, 2020 and shall remain in effect until there is a written agreement of the parties or order of the Court.

F. The Court also reserves jurisdiction as to the determination of child support.

G. RENEE purchased real property, titled solely in her name, prior to the marriage. Subsequently, the property was lost in foreclose. Any liabilities arising from the ownership or foreclosure of this property shall be the sole responsibility of RENEE.

H. If the Buick Enclave is still owned by ELIZABETH it shall become her sole and separate property and she shall be responsible for any liabilities connected with the ownership and operation of the vehicle.

I. The parties testified that they own a timeshare, however, there was no further testimony regarding the financial status, ownership or use of the timeshare. If possible, the timeshare should be sold and any proceeds be shared equally.

J. ELIZABETH settled a lawsuit for approximately $100,000.00, (much of which went toward payment of attorney's fees) any funds that remain shall be the separate property of ELIZABETH.

K. Each party shall keep any credit card debt or other debt in their own name. RENEE testified she has over $900,000. in debt.

L. Prior to the parties' marriage, RENEE acquired a catering business, Haute Cuisine, with the help of her father, who had also been in the catering business. RENEE borrowed approximately $200,000. from her father, he testified she must repay the money because he borrowed the money himself. RENEE testified that Haute Cuisine currently has a negative value since the majority of the revenue came from her catering contract with Temple Beth Emet. The business has been basically inoperable since Covid began in March 2020. This business and any assets or liabilities associated with Haute Cuisine shall be the separate non-marital property of RENEE.

M. Although ELIZABETH has the need for alimony, RENEE does not have the ability to pay alimony.

N. Each party shall pay their own attorney's fees and costs.

O. The Court expressly retains jurisdiction of this cause for the purposes of entering further orders, enforcing, construing, interpreting, or modifying the terms of this Final Judgment.

* * *

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COUNTY COURTS

Insurance—Venue—Venue selection clause

STEVEN J. MELILLI D.C., P.A., a/a/o Shannon Johnson, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 21-005011-CO. February 23, 2022. Edwin Jagger, Judge. Counsel: Michael Skirvin, for Plaintiff. Marsha Moses and Teodora Siderova, Kubicki Draper, Tampa; and Norma Kassner, 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 OR IN THE ALTERNATIVE, DEFENDANT'S MOTION TO TRANSFER VENUE

THIS CAUSE, having come before the Court on February 11, 2022 at 10:30 A.M. on Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 or in the Alternative, Defendant's Motion to Transfer Venue, having heard the parties' arguments, 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, or in the Alternative, Defendant's Motion to Transfer Venue is hereby **GRANTED.**

2. Said action shall be moved from Pinellas County, Florida to Miami-Dade County, Florida.

3. The Plaintiff shall bear the fees and costs associated with transferring this case to Miami-Dade County, Florida.

* * *

Insurance—Personal injury protection—Declaratory judgments—Dismissal—Medical provider seeking determination that denial of PIP benefits for failure to attend examination under oath is improper failed to state cause of action for declaratory relief where legal issue of obligation to submit to EUO has already been resolved, and provider is seeking resolution of purely factual issues

RADIOLOGY REGIONAL CENTER, P.A., (Patient: Princess Gonzales), Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2021 17810 CODL. March 10, 2022. Robert A. Sanders, Jr., Judge. Counsel: William Michael A. Skirvin, Ged Lawyers, LLP, Boca Raton, for Plaintiff. Tiffany V. Colbert, Andrews Biernacki Davis, Orlando, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION FOR PROTECTIVE ORDER

THIS MATTER came before the Court for hearing on February 3, 2022 upon Defendant's Motion to Dismiss Plaintiff's Complaint for Declaratory Relief filed. July 15, 2021. Having reviewed and considered Defendant's Motion, Plaintiff's Complaint, the argument of the parties, relevant case law, and being otherwise fully advised, the Court finds as follows:

1. Plaintiff requests the court to enter a declaration against Defendant to: a) Declare the Plaintiff is entitled to $10,000 in PIP Coverage; b) Declare that Defendant's denial of PIP benefits for failure to attend an EUO is improper; c) Award Plaintiff's reasonable attorney's fees and costs pursuant to Section 627.428, Florida Statues, and/or Section 627. 736(8), Florida Statutes, for the necessity of this action; and d) Grant any other relief this Court deems just and appropriate.

2. Defendant argues that Plaintiff's Complaint for Declaratory Relief fails to state a cause of action for declaratory judgment because the Plaintiff fails to assert any facts or allegations to show that a bona fide, actual, present practical need for the declaration requested from the court exists.

3. Plaintiff must meet the following elements for declaratory relief: (i) a bona fide, actual, present practical need for declaration; (ii) dealing with present, ascertained or ascertainable state of facts or present controversy as to a state of facts; (iii) some immunity, power, privilege or right of the complaining party is dependent on fact or law applicable to facts; (iv) that there is some person or persons who have, or reasonably may have actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; (v) that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. *See May v. Holley,* 59 So. 2d 636, 639 (Fla. 1952); *Meadows Community Association, Inc. v. Russell-Tutty,* 928 So. 2d 1276, 1280 (Fla. 2nd DCA 2006) [31 Fla. L. Weekly D1495a]; *Guernsey v. Haley,* 107 So. 2d 184, 186 (Fla. 2nd DCA 1958).Questions of fact and disagreements concerning coverage under insurance policies are proper subjects for a declaratory judgment if necessary to a construction of legal rights. See *Travelers Ins. Co. v. Emery,* 579 So.2d 798, 801 (Fla. 1st DCA 1991). The requirement for a declaratory action is that there must be some doubt as to the proper interpretation of the contract and that construction is necessary in order to determine the rights of the party having doubt as to the meaning of the contract. See *Argus Photonics Group, Inc. v. Dickenson,* 841 So.2d 598, 600 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D859a].

4. Upon consideration of the relevant pleadings, argument of counsel and being otherwise advised in the premises, the Court finds that Plaintiff's request for the court to "Declare that Defendant's denial of PIP benefits for failure to attend an EUO is improper" does not present an ascertainable statement of facts or a specific policy provision upon which the Court may properly make a declaration.

5. Plaintiff's inquiry has already been answered by the Third District Court of Appeals in *Miracle Health Servs. v. Progressive Select Ins. Co.,* 326 So. 3d 109 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1608a], finding the plain language of Fla. Stat. § 627.736(6)(g) (2013), and the Progressive insurance policy clearly and unambiguously require compliance with the policy provision of submitting to an examination under oath as a condition precedent to receiving PIP benefits. *See also Cent. Therapy Ctr., Inc. v. Progressive Select Ins. Co.,* 47 Fla. L. Weekly D297b (Fla. 3d DCA January 26, 2022); *Healthy Body Medical Center, a/a/o Yassan U. Hernandez, Plaintiff, v. Progressive Express Insurance Company,* 29 Fla. L. Weekly Supp. 679a (November 15, 2021).

6. While facts can be determined in a declaratory judgment action if necessary to make the legal declaration sought, see section 86.011(2), such an action is not meant to resolve purely factual issues. As the legal determinations sought in the Complaint, as pled, have been resolved, Plaintiff is seeking resolutions of factual issues within the scope of a breach of contract action, not in conjunction with a need for a declaration of its rights, and therefore Plaintiff has not sufficiently pled a cause of action showing entitlement to a declaration of rights.

Based on the foregoing, it is ORDERED AND ADJUDGED

A. Defendant's Motion to Dismiss Plaintiff's Complaint filed July 15, 2021 is hereby GRANTED;

B. Plaintiff's Complaint is hereby dismissed without prejudice;

* * *

Consumer law—Debt collection—Account stated—Interest—Because bank did not attach written agreement to support claimed rate of interest that exceeded the interest rate set by section 55.03, complaint failed to sufficiently state cause of action—Motion to dismiss is granted

CITIBANK, N.A., Plaintiff, v. LYNN S. WILSON, Defendant. County Court, 10th Judicial Circuit in and for Polk County, Civil Division. Case No. 2019CC-006810, Section M9. February 15, 2022. Kevin Kohl, Judge. Counsel: Daphne Ganthier, RAS Lavrar, Plantation, for Plaintiff. Arthur Rubin, We Protect Consumers, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

This matter came before the Court on January 11, 2022. Present before the Court was Arthur Drew Rubin, Esq., on behalf of the Defendant, and Daphne Ganthier, Esq, on behalf of the Plaintiff. The Court having reviewed the Defendant's Motion to Dismiss Plaintiff's Complaint, considered the arguments of the parties, and being otherwise advised on the matter, hereby FINDS:

1. The Defendant's Motion to Dismiss sets forth three arguments for dismissal of the Plaintiff's Complaint in separate paragraphs numbered 1, 2, and 3 (hereafter "Complaint").

2. The Court denies the requests for dismissal set forth in paragraphs 1 and 2 without further discussion.

3. Paragraph 3 of the Defendant's Motion to Dismiss seeks dismissal of the Complaint based upon the rate of interest set forth in the statements attached to the Complaint.

4. The Complaint seeks relief under a single count for account stated in the amount of $6,888.20 due on a Citi Mastercard credit account. The face of the complaint establishes the total amount claimed to be due without further detail as to what comprises the balance.

5. The Defendant argues that the amount sought by the Plaintiff contains a claim for interest at a usurious rate[1] and therefore must be supported by a written agreement which is required to be attached to Complaint.

6. The Plaintiff argues that the Complaint does not contain a demand for interest, let alone interest at a usurious rate, and therefore the Motion to Dismiss should be denied.

THE COMPLAINT'S CLAIM FOR INTEREST

7. The Complaint attaches two separate monthly statements[2] directed to Lynn S. Wilson related to a Citi Simplicity Card. The statements provide additional details as to the calculation of the total amount due. At issue is an entry on the July Statement showing interest in the amount of $126.86 which was calculated at the rate of 24.24% per annum.

8. In ruling on a motion to dismiss the trial court is confined to the allegations found within the four corners of the complaint. *Migliazzo v. Wells Fargo Bank, N.A.,* 290 So.3d 577, 578 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D203c].

9. When ruling on a motion to dismiss, the trial court must read all allegations of the complaint as true. However, "[a]ny exhibit attached to a pleading is part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis for a motion to dismiss." *Se. Med. Prod., Inc. v. Williams,* 718 So. 2d 306, 307 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D2102b] (Quoting *Franz Tractor Co. v. J.I. Case Co.,* 566 So.2d 524, 526 (Fla. 2d DCA 1990)).

10. Although the face of the Complaint is silent as to interest, the detail on the July Statement establishes that the Complaint seeks interest, which, to some degree, is calculated at 24.24% per annum.

AUTHORITY REGARDING THE INTEREST

11. § 687.02 (1), Florida Statutes states in pertinent part: "All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. . . . ."

12. § 655.954(1), Florida Statutes states in pertinent part:

> Notwithstanding any other provision of law, a financial institution shall have the power to make loans or extensions of credit to any person on a credit card or overdraft financing arrangement and to charge, in any billing cycle, interest on the outstanding amount at a rate that is specified in a ***written agreement,*** between the financial institution and borrower, governing the credit card account. . . . . (emphasis added).

13. § 687.01, Florida Statutes states: "In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in *s. 55.03*."

14. The interest rate authorized by § 55.03 was never higher than 6.89% during the applicable time frame encompassed by the Complaint. See § 55.03, Florida Statutes; *See also Florida Division of Accounting and Auditing Current Judgment Interest Rates* https://www.myfloridacfo.com/division/aa/localgovernments/current.htm.

FEDERAL PREEMPTION

15. The Plaintiff argues that it is not subject to Florida's usury laws because it is a national bank and therefore preempted by federal statutes. More specifically that the National Bank Act, 12 U.S.C. § 85, allows national banks to charge credit card customers the rate permitted by the bank's home state, even if higher than the state where the customer resides. However, the Complaint fails to allege that the Plaintiff is a national bank, that its home state is other than Florida, or that it is otherwise governed by the National Bank Act.

16. Because the allegations contained in the four corners of the Complaint fail to sufficiently allege facts which would establish the Plaintiff is entitled to federal preemption the Court gives no consideration to this argument.

ATTACHING A CONTRACT TO THE ACCOUNT STATED ACTION

17. The Plaintiff's primary contention is that because it chose to pursue this case under an account stated theory that it is not required to attach a written agreement.

18. An account stated claim exists independent of the underlying contract, requires no evidence of breach of the contract, and can exist in the absence of any contract at all. *Ham v. Portfolio Recovery Assocs., LLC,* 260 So.3d 450, 455 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2667b], quashed on other grounds, 308 So.3d 942 (Fla. 2020) [46 Fla. L. Weekly S9a].

19. The boiler plate language on the face of the Complaint sufficiently states a cause of action for account stated; however, it is the inclusion of the interest for which the Plaintiff fails to properly state a cause of action.

20. As set forth above, Florida Statutes require the interest being sought herein be supported by a written agreement.

21. Fla.R.Civ.P. 1.130 (a) requires:

> All bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, must be incorporated in or attached to the pleading. No documents shall be unnecessarily annexed as exhibits. The pleadings must contain no unnecessary recitals of deeds, documents, contracts, or other instru-

ments.

22. There is no written agreement attached to the Complaint[3].

23. While courts generally presume that the common law remains in effect when a statute is enacted in derogation of the common law, this presumption is inapplicable where the statute expressly says otherwise or "is so repugnant to the common law that the two cannot coexist. *Jax Utilities Mgmt., Inc. v. Hancock Bank,* 164 So. 3d 1266, 1271 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1381a] (quoting *Major League Baseball v. Morsani,* 790 So.2d 1071, 1078 (Fla. 2001) [26 Fla. L. Weekly S465a]).

24. If allowed, the Complaint would provide the Plaintiff the opportunity to seek interest in circumvention of Florida's statutory and procedural requirements.

25. As utilized in this instance, Florida's statutory scheme is so repugnant to the common law claim that the two cannot coexist.

26. Since the Plaintiff is required to attach a written agreement supporting the claimed rate of interest, and the Plaintiff has failed to do so, the Complaint fails to sufficiently state a cause of action.

IT IS THEREFORE ORDERED AND ADJUDGED:

A. Defendant's Motion to Dismiss Plaintiff's Complaint is ***GRANTED.***

B. The Plaintiff shall have twenty (20) days from the date of this Order to file an amended complaint.

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[1]More specifically, the Defendant argues that the interest sought is in violation of Florida Statutes.

[2]One statement identifies a billing period 11/21/18-12/20/18 (hereafter the "December Statement") the other statement identifies a billing period 6/21/19-07/18/19 (hereafter the "July Statement").

[3]Although there is no specific allegation in the Complaint regarding an underlying credit card contract, the Second District Court of Appeal has previously held that an account stated claim that did not rely on credit card contracts can still be inextricably intertwined with an underlying contract. *See Bushnell v. Portfolio Recovery Associates, LLC,* 255 So.3d 473 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2144a].

* * *

Insurance—Personal injury protection—Affirmative defenses—Amendment to assert material misrepresentation on application—Insurer's motion to amend its affirmative defenses is denied—Court has already entered final summary judgment ruling that insurer that did not refund all premiums to insured failed to perfect its rescission of PIP policy, insurer previously stipulated that material misrepresentation issue was sole remaining issue in case, proposed amendment to assert defense that policy allows insurer to deny benefits due to material misrepresentation irrespective of whether insurer fully refunded premiums is futile, and amendment would prejudice plaintiff medical provider

ALLIANCE CHIROPRACTIC GROUP, INC., Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001811-SP-21, Section HI01. February 25, 2022. Milena Abreu, Judge. Counsel: Coretta Anthony-Smith, Anthony-Smith, P.A., Orlando, for Plaintiff. William H. McFarlane, Coral Springs, for Defendant.

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

COMES NOW, the Court, after the hearing on February 25, 2022, and after hearing from both parties on Defendant's Motion for Leave to Amend Defendant's Answer and Affirmative Defenses, and after a review of the docket history, pleadings, statutory authority and applicable case law, the Court hereby rules as follows:

Over Defendant's objections, Defendant's Motion for Leave to Amend Defendant's Answer and Affirmative Defenses is hereby DENIED.

Introduction

Defendant Direct General Insurance Company ("Direct") after litigating this case for nearly four years, after making stipulations of facts, after the deposition of Direct's corporate representative, and after entry of final summary judgment in Plaintiff's favor on the defense of material misrepresentation, has moved to amend its affirmative defenses to attempt to include a defense that runs contrary to Florida law and is violative of well-established Florida jurisprudence.

Because the proposed amendment was presented in Direct's Counterclaim that Direct *voluntarily dismissed* on January 12, 2022, the proposed amendment violates stipulations made by Direct and its counsel, the proposed amendment is prejudicial, futile, and contrary to Florida law.

FACTUAL BACKGROUND

1. Nearly four years ago, on or about August 6, 2018, Plaintiff filed the instant action against Direct for unpaid personal injury protection benefits.

2. On or about October 18, 2018, Direct filed its Answer and Affirmative Defenses and Counterclaim claiming the policy was rescinded as a result of a material misrepresentation on the application for insurance.

3. The Parties engaged in discovery and Plaintiff requested the deposition of Defendant's corporate representative. In response, Defendant filed a Motion for Protective Order as to the deposition in this case, as well as in a companion cases, Case No. 2017-008786-SP-26 and 2018-1196-SP-26, requesting the deposition to be consolidated between three files.

4. The Motion went to hearing before this Court, wherein during the hearing, Direct stipulated that the services Alliance rendered to Jean Orelus, Jolene Orelus, and Rosebert Blanc were all related to the subject accident, medically necessary, and reasonable in price, but subject to the fee schedule election in the subject policy.

5. Defendant further stipulated that the *sole remaining issue* in these cases is Defendant's defense of material misrepresentation because it is common in all three files as this is the same policy, same subject accident, and same alleged material misrepresentation against the insured, Enock Orelus.

6. Based on these stipulations, this Court ordered a single deposition of Defendant's corporate representatives to be taken and apply to the three Miami-Dade files. *See id.*

7. Plaintiff took the deposition, wherein it was discovered that Defendant failed to properly rescind the subject policy because it failed to refund all premium paid by the named insured in contravention to Florida law.

8. Plaintiff thereafter filed a Motion for Summary Judgment which went to hearing before this Court wherein after argument of counsel, review of the evidence, and review of corresponding pleadings, executed an Order granting Plaintiff's Motion for Final Summary Judgment specifically ruling that Direct failed to perfect its rescission when it failed to refund all the premium as required by Florida law.

9. Despite this Court's entry of final judgment- wherein the Court used the language "for which let execution issue", a week later Direct filed its Motion for Leave to Amend its Affirmative Defenses.

10. Notably, the proposed amendment mirrors language that Direct previously asserted in its Counterclaim back in October of 2018, which was ***voluntarily dismissed*** by Direct on January 12, 2022.

11. Moreover, the proposed "defense" is merely a regurgitation of its prior material misrepresentation defense.

LEGAL ANALYSIS

Florida Rule of Civil Procedure 1.190(a), provides that leave to amend "shall be given freely when justice so requires." *Pangea Produce Distributors, Inc. v. Franco's Produce, Inc.*, 275 So. 3d 240, 242 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1723b] (quoting Fla. R. Civ. P 1.190(a)). However, a court may deny leave to amend when there is prejudice to a party, the amendment would be futile, or the privilege to amend has been abused. *Jain v. Buchanan Ingersoll & Rooney PC*, 322 So. 3d 1201, 1206 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1399a], reh'g denied (July 27, 2021) (citing *Vella v. Salaues*, 290 So. 3d 946, 949 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2553a]). Moreover, a trial judge in his or her discretion may deny further amendments where the amendments materially vary from the relief initially sought, or where "a case has progressed to a point that the liberality ordinarily to be indulged has diminished.' " *See id.* (citing *Vella*, 290 So. 3d at 949 (quoting *Alvarez v. DeAguirre*, 395 So. 2d 213, 216 (Fla. 3d DCA 1981)) (explaining in *Alvarez* that in addition to the desirability of allowing amendments to pleadings so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached).

Courts, including the Third District Court of Appeal, condemn practices where a party seeks leave to amend after entry of final summary judgment. S*ee Jain v. Buchanan Ingersoll & Rooney PC*, 322 So. 3d 1201, 1206 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1399a], reh'g denied (July 27, 2021) (affirming the denial of a motion to amend where the party sought to amend after the trial court's oral pronouncement granting summary judgment to opposing party); see also *Inman v. Club on Sailboat Key, Inc.*, 342 So. 2d 1069, 1070 (Fla. 3d DCA 1977) (affirming an order denying leave to amend where "Appellant was attempting to raise new issues for the first time in her motion for rehearing and for leave to amend; and summary judgment already having been entered.").

Thus, as the Third District has stated, "in addition to the desirability of allowing amendments to pleadings so that cases may be concluded on their merits, ***there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached***." *See id.* (citing *Vella*, 290 So. 3d at 949 (citing *Price v. Morgan*, 436 So. 2d 1116, 1122 (Fla. 5th DCA 1983)); s*ee also Toscano Condo. Ass'n v. DDA Eng'rs, P.A.*, 274 So. 3d 487, 489 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1389a] (affirming an order denying leave to amend where the plaintiff did not seek leave to amend "until more than two years after the filing of the complaint and more than six months after the trial court conducted its case management conference").

Florida law is also clear that a party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment. *Inman*, 342 So. 2d at 1070 (citing *Home Loan Co. Inc. of Boston v. Sloane Company of Sarasota*, 240 So. 2d 526 (Fla. 2d DCA 1970)); *MAWI Corp. v. Advance Mortg. Corp.*, 353 So. 2d 564, 565 (Fla. 3d DCA 1977).

Moreover, "[a] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court." *Delgado v. Agency for Health Care Admin.*, 237 So. 3d 432, 436-37 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D245b] (quoting *Gunn Plumbing, Inc. v. Dania*, 252 So. 2d 1, 4 (Fla. 1971)(accord, *Dortch v. State*, 137 So. 3d 1173, 1176 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D796a] (citing *Gunn* and adding that "[a] stipulation cannot be 'impeached or swept aside' merely by the 'bald statement' of a party desiring to renege" (quoting *State ex rel. Alfred E. Destin Co. v. Heffernan*, 47 So. 2d 15, 17 (Fla. 1950)); *Kone v. Robinson*, 937 So. 2d 238, 241 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2297a] (holding that the trial court erred in dismissing the third-party complaint against Humana Medical Plan, Inc., on the basis originally argued by Humana—that it was not a party to the contract—where Humana later stipulated it was a party to the contract, and emphasizing that Humana's stipulation to the effect that it was a party "is of some import," citing *Gunn*). In fact, " 'absent a showing of fraud, misrepresentation or mistake, stipulations are binding on . . . administrative agencies participating in administrative proceedings . . . .' " *Marion Cty. v. Dep't of Juvenile Justice*, 215 So. 3d 621, 626-27 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D765d] (citation omitted) (holding "[t]he parties were bound by the Joint Stipulations, and the fact that the Department [of Juvenile Justice] subsequently changed its interpretation of the law was not a valid basis for it to unilaterally reject the Joint Stipulations and 'correct' the appellants' overpayment amounts").

A stipulation that limits the issues to be tried "amounts to a binding waiver and elimination of all issues not included." *See id.* (quoting *Esch v. Forster*, 123 Fla. 905, 168 So. 229, 231 (Fla. 1936)). "Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." *Lotspeich Co. v. Neogard Corp.*, 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982) (citing *Gunn Plumbing, Inc. v. Dania Bank*, 252 So. 2d 1 (Fla. 1971)). Further, "[i]t is the policy of the law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes." *Spitzer v. Bartlett Bros. Roofing*, 437 So. 2d 758, 760 (Fla. 1st DCA 1983).

a. ***Direct's attempted amendment after entry of final summary judgment is improper.***

The Third District Court of Appeal most recently addressed this issue in June of 2021. In *Jain v. Buchanan Ingersoll & Rooney PC*, Jain sought leave to amend her pleading only after the trial court made an oral pronouncement granting summary judgment in the opposing party's favor. 322 So. 3d 1201 at 1206. The trial court denied Jain's motion. On appeal, the Third District Court of Appeal discussed this practice and how it is be condemned. *See id.* The Third District held that although there is a liberality of amending, there is an "*equally compelling obligation on the court to see to it that the end of all litigation is finally reached*". *See id.* (emphasis added). Moreover, the Third District noted an amendment should be denied where "a case has progressed to a point that the liberality ordinarily to be indulged has diminished.' " *See id.*

Here, this amendment comes after four years of litigation, after discovery has been taken and after this Court has already heard the evidence related to Direct's defense of material misrepresentation and entered an adverse ruling to Defendant. It was only after receipt of this Court's Order granting Plaintiff's Motion for Final Summary Judgment that Direct moved to amend its pleadings. As the Third District noted courts have condemned this practice and this Court is no exception. Therefore, in accordance with the Third District Court of Appeal in *Jain*, this Court relies upon its "equally compelling obligation" that the end of all litigation is finally reached. Direct had a full opportunity to litigate the merits of its claims. In fact, Direct had the same policy language as its proposed amended defenses in its Counterclaim that it filed back in October of 2018, which Direct *chose* to voluntarily dismiss on January 12, 2022. Therefore, the Court finds that the equally compelling obligation of finality of litigation outweighs the liberality ordinarily afforded to amendment of pleadings. Further, given the fact that this case has been litigated for four years, with discovery, and a hearing on a motion for final summary judgment, it is clear that the liberality ordinarily afforded has significantly diminished.

b. ***Direct's prior stipulations that the sole remaining issue in this case as well as the companion cases was the defense of material misrepresentation act as a bar to the proposed amendment.***

Here, in support of Direct's Motion for Protective Order Direct requested this Court to consolidate the deposition of Defendant's corporate representative in the three Miami-Dade cases. During hearing, Direct stipulated to RRN for all of the respective claimants in each lawsuit, as well as stipulated that the sole remaining issue was the plead defense of "material misrepresentation", which was memorialized in this Court's Order on same.

"A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court." *Delgado v. Agency for Health Care Admin.*, 237 So. 3d 432, 436-37 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D245b] (quoting *Gunn Plumbing, Inc. v. Dania*, 252 So. 2d 1, 4 (Fla. 1971)(; accord, *Dortch v. State*, 137 So. 3d 1173, 1176 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D796a] (citing *Gunn* and adding that "[a] stipulation cannot be 'impeached or swept aside' merely by the 'bald statement' of a party desiring to renege" (quoting *State ex rel. Alfred E. Destin Co. v. Heffernan*, 47 So. 2d 15, 17 (Fla. 1950)); *Kone v. Robinson*, 937 So. 2d 238, 241 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2297a] (holding that the trial court erred in dismissing the third-party complaint against Humana Medical Plan, Inc., on the basis originally argued by Humana—that it was not a party to the contract—where Humana later stipulated it was a party to the contract, and emphasizing that Humana's stipulation to the effect that it was a party "is of some import," citing *Gunn*). In fact, " 'absent a showing of fraud, misrepresentation or mistake, stipulations are binding on . . . administrative agencies participating in administrative proceedings . . . .' " *Marion Cty. v. Dep't of Juvenile Justice*, 215 So. 3d 621, 626-27 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D765d] (citation omitted) (holding "[t]he parties were bound by the Joint Stipulations, and the fact that the Department [of Juvenile Justice] subsequently changed its interpretation of the law was not a valid basis for it to unilaterally reject the Joint Stipulations and 'correct' the appellants' overpayment amounts"). Florida law is equally clear that a stipulation that limits the issues to be tried "***amounts to a binding waiver and elimination of all issues not included***". *See Esch v. Forster*, 123 Fla. 905, 168 So. 229, 231 (Fla. 1936).

Thus, Direct's prior stipulations it made across the three Miami-Dade cases in order to sway this Court into granting partial relief of its Motion for Protective Order is binding across all three files and Direct cannot now, a year after making said stipulation, come before the Court and attempt to amend and inject new issues into litigation as such amendments were expressly waived and eliminated by said stipulations. *See Esch v. Forster*, 123 Fla. 905, 168 So. 229, 231 (Fla. 1936).

c. ***The Court finds Direct's proposed amendment is futile as it violates well-established Florida jurisprudence.***

Florida courts have held proposed amendments are futile when they are "insufficient as a matter of law". *Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2536d]. Florida law is clear that an insurance policy cannot have provisions that run contrary to Florida law. *See Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Serv., Inc.*, 765 So. 2d 836, 839 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1956a] ("Generally, all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made ***become a part of it*** and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention.") (citation omitted). *See also Rando v. Gov't Employees Ins. Co.*, 39 So. 3d 244, 246 (Fla. 2010) [35 Fla. L. Weekly S201a] (holding that a Delaware insurance policy that was executed, issued, and delivered in Florida that contained an anti-stacking provision was unenforceable as violative of Florida law); *Weldon v. All American Life Ins. Co.*, 605 So. 2d 911, 914 (Fla. 2d DCA 1992) (Where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with the reference to the statute and the statutory provisions become a part of the contract); *United States Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 672, 673 (Fla. 4th DCA 1977) (Where the policy is not in conformance with the statute, ***the court writes into the policy a provision to comply with the law***); *Standard Marine Insurance Company v. Allyn*, 333 So. 2d 497 (Fla. 1st DCA 1976), cert. dism., 196 So. 2d 440 (Fla.1967); *Allison v. Imperial Casualty and Indemnity Company*, 222 So. 2d 254, 256 (Fla. 4th DCA 1969).

Here, Direct is attempting to amend its defenses to include a "policy defense" that states that Direct does not have to provide coverage if it believes there was a material misrepresentation on the application for insurance. It appears Direct is now attempting to circumvent this Court's ruling in favor of Plaintiff on Direct's defense of material misrepresentation finding Direct failed to fully refund the earned premium as required by Florida law, by now claiming that the subject policy allows it to deny benefits for material misrepresentation regardless of whether it fully refunded the insured's premium.

However, Florida law is clear that in order to perfect a rescission and deny coverage for material misrepresentation, the insurance company is required to fully refund the entirety of the premium. *See Gonzalez v. Eagle Ins. Co.*, 948 So. 2d 1, 3 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2287a] (holding the insurance company must refund all of the earned premiums because "[t]o hold otherwise would unjustly enrich the insurer at the expense of the insured."). Yet, that is exactly what Direct is trying to amend its defenses to include. Direct is trying to unjustly enrich itself by continuing to improperly deny coverage and benefits to its insured, while simultaneously keeping a portion of the premium. This position is without merit as it ignores the fact that the requirement for a full refund of premium is written into the insurance contract to conform with prevailing case law, is completely contradictory to Florida law, and is violative of the express holding of the Third District Court of Appeal. Therefore, because this Court has already ruled in its prior order granting summary judgment in Plaintiff's favor, the Court finds this conflicting defense futile.

d. ***Direct's amendment four years into litigation, after a stipulation of the sole remaining issue being the defense of material misrepresentation, after the deposition of its corporate representative, and after the award of final summary judgment in Plaintiff's favor in this case is prejudicial to Plaintiff.***

The law is clear that as time in a case progresses, the liberality of amending diminishes. *See Pangea Produce Distributors, Inc. v. Franco's Produce, Inc.*, 275 So. 3d 240, 242 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1723b]. Here, Direct is attempting to amend to include new defenses it knew about at the very beginning of litigation**.** Moreover, the timing of the amendment is especially spurious as it was filed only *after* Plaintiff has prevailed on summary judgment of its current defenses, deposed Defendant's corporate representative, and relied upon the stipulations Direct made at hearing on its Motion for Protective Order. The Court finds Direct's attempt to inject new issues into litigation at this juncture would be extremely prejudicial to Plaintiff. As such, the Motion is ***denied.***

* * *

Insurance—Personal injury protection—Coverage—Conditions precedent—Examination under oath—Motion for summary judgment in favor of insurer on EUO no-show defense is denied—Factual issues exist regarding whether insured, who submitted to two post-loss recorded statements, substantially complied with EUO provision of policy and whether EUO notices were sent to correct address

MANUEL V. FEIJOO, M.D., et al., a/a/o Yoanna Garcia, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-006005-SP-26, Section SD03. February 17, 2022. Gloria Gonzalez-Meyer, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Andrea Harris, for Defendant.

CORRECTED* ORDER ON DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT BASED ON THE EUO NO-SHOW DEFENSE

THIS CAUSE having come to before this Court on January 31, 2022, on Defendant's Motion for Final Summary Judgment as to the EUO No-Show Defense, and after reviewing the record, hearing argument of counsel, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** as follows:

BACKGROUND & UNDISPUTED FACTS

Plaintiff, Manual V. Feijoo, MD, PA, a/a/o Yoanna Garcia (hereinafter, "Plaintiff"), sued United Automobile Insurance Company for breach of an insurance contract seeking to recover unpaid personal injury protection ("PIP") benefits under Florida's No-Fault Law.

The undisputed facts are as follows. Yoanna Garcia was injured in an auto accident on July 24, 2018. After the accident, Garcia sought and received medical care at Plaintiff's medical facility. In August 2018, Plaintiff submitted its medical bills to Defendant. Defendant received timely notice of Garcia's PIP claim. The medical bills submitted to Defendant along with the new patient intake forms showed that Garcia was residing at 10010 SW 215 Street, Miami, FL. Additional medical bills were submitted by another unrelated medical provider, Rivero Diagnostic, in August 2018, which also showed Garcia's address as 10010 SW 215 Street, Miami, FL. After United Auto received those medical bills, it requested two recorded statements from Garcia, and Garcia cooperated by attending both recorded statements.

On October 9, 2018, United Auto requested that Garcia submit to an EUO by mailing an EUO notice to 11261 SW 226 Street, Miami, FL. setting the EUO for November 9, 2018. The EUO notice indicated that PIP benefits would be denied if Garcia did not appear for the EUO, unless a reasonable excuse was provided. Garcia apparently did not appear for the EUO on November 9, 2018. United Auto sent a second and identical EUO notice to Garcia again by mailing the notice to 11261 SW 226 Street, Miami, FL., setting the EUO for January 2, 2019. Garcia apparently did not appear. On March 6, 2019, Plaintiff served a pre-suit demand letter to United Auto seeking payment of policy benefits to avoid litigation. United Auto did not remit a payment and this action was then filed on April 25, 2019.

On July 3, 2019, United Auto filed its Answer and Affirmative Defenses claiming it owes nothing to Plaintiff because Garcia failed to submit to an EUO, and that Plaintiff's pre-suit demand letter is premature because the PIP benefits are not over-due until Garcia submits to an EUO. To the contrary, Plaintiff contends that the EUO was not properly noticed because Defendant mailed the EUO notices to the wrong address; that even if the EUO notice was properly mailed, the insured substantially complied with her post loss obligations by submitting to two recorded statements; and, that an EUO is a post-loss obligation and the failure to satisfy a post-loss obligation triggers a prejudice analysis and that Defendant was not prejudiced by the alleged EUO no-show because Defendant obtained all the information it needed via the two recorded statements it obtained from Garcia.

And, hence Plaintiff's pre-suit demand letter is not premature.

THE EUO REQUIREMENT

Defendant claims it is not responsible for the unpaid medical bills because the claimant, Yoanna Garcia, did not appear at an EUO.

Section 627.736(6)(g), Fla. Stat. (2013) states, in pertinent part:

> (g) An insured seeking benefits under ss. 627.730-627.7405, including an omnibus insured, must comply with the terms of the policy, which include, but are not limited to, submitting to an examination under oath. . . .
>
> Compliance with this paragraph is a condition precedent to receiving benefits. . . .

§627.736(6)(g), Fla. Stat. (2013).

UAIC's policy partially tracks the statute and it provides, in relevant part:

> *5. EXAMINATION UNDER OATH (EUO)*
>
> As a condition precedent to receiving personal injury protection benefits, any insured seeking benefits under section 627.730-627.7405, Florida Statutes, as amended, including an omnibus insured, must submit to an examination under oath by any person named by "us" when or as often as "we" may reasonable require. . . The scope of the questioning during the examination under oath is limited to relevant information or information that could reasonably be expected to lead to relevant information.
>
> (Policy at 11 of 13 of Policy Endorsement 01/13 attached to Defendant's Motion for Summary Judgment).

EUO IS A POST LOSS OBLIGATION

The obligation to submit to an Examination Under Oath is a post-loss obligation under the terms of the subject policy. In *Himmel v. Avatar Property & Cas.* the court stated: "[W]e begin our analysis by addressing the trial court's finding that Appellant breached the policy by failing to submit to an EUO. 'An insured's refusal to comply with a demand for an [EUO] is a willful and material breach of an insurance contract which precludes the insured from recovery under the policy.' *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300, 303 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a] "If, however, the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented for resolution by a jury. *" Haiman v. Fed. Ins. Co.*, 798 So.2d 811, 812 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a] (quoting *Diamonds & Denims, Inc. v. First of Ga. Ins. Co.*, 203 Ga.App. 681, 417 S.E.2d 440, 442 (Ga. Ct. App. 1992)

In *Whistler's Park, Inc. v. FIGA,* 90 So.3d 841 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1188a], the Fifth District discussed the current status of EUO insurance policy provisions and past decisions that have held that a failure to appear results in a forfeiture of benefits:

> These decisions have led to a cottage industry of EUO litigation. If an insurer can procure a failure to comply—or, even better, a refusal to comply—with the EUO requirement, they have a perfect defense to payment. Similarly, if counsel for the insured can bait the insurer into refusing payment without adequate justification, this may trigger a bad faith claim. The actual, if unglamorous, true purpose of the EUO—verification of the insured's loss—has been lost in this larger battle. No doubt there can be genuine instances of insurance fraud, but the recent and ever-escalating number of EUO cases that have arisen all over the state appear to be more about strategy than truth.

Whistler's Park, supra at 845.

Then, in *American Integrity Ins. Co. v. Estrada*, 276 So. 3d 905 (Fla. 3rd DCA 2019) [44 Fla. L. Weekly D1639a], the Third District Court of Appeal concluded that for an insurer to successfully establish a coverage defense based upon an insured's failure to satisfy a post-loss obligation such that an insured forfeits coverage under a policy,

the insurer must plead and prove that the insured has *materially* breached a post-loss policy provision, and an insurer must be prejudiced by the insured's noncompliance with the post-loss obligation in order for the insured to forfeit coverage. *Id.* The *Estrada* court went on to articulate a two-step, "if-then" framework for asserting post-loss obligation noncompliance as an affirmative defense: [W]hen an insurer has alleged, as an affirmative defense to coverage, and thereafter has subsequently established, that an insured has failed to *substantially comply* with a contractually mandated post-loss obligation, prejudice to the insurer from the insured's material breach is presumed, and the burden then shifts to the insured to show that any breach of post-loss obligation did not prejudice the insurer. *Estrada* at 916.

While the interpretation of the terms of an insurance contact normally presents and issue of law, the question of whether certain actions constitute compliance with the contract often presents an issue of fact. See *State Farm Fla. Ins. Co. v. Figueroa*, 218 So. 3d 886, 888 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D339a] ("Whether an insured substantially complied with policy obligations is a question of fact.") (Emphasis added); *Solano v. State Farm Fla. Ins. Co.*, 155 So. 3d 367, 371 (Fla 4th DCA 2014) [39 Fla. L. Weekly D993b] ("A question of fact remains as to whether there was sufficient compliance with the cooperation provisions of the policy to provide State Farm with adequate information to settle the loss claims or go to an appraisal, thus precluding a forfeiture of benefits owed to the insureds.") *Estrada* at 914.

Two years after the *Estrada* decision was issued, the Third District issued its opinion in *Nunez v. Universal Property* 325 So. 3d 267 (Fla 3rd DCA 2021) [46 Fla. L. Weekly D1747b], which relied heavily on *Estrada*, and reiterated that the "question of whether certain actions constitute compliance with the contract often presents an issue of fact." *Id*. In the instant case, unlike the facts in *Nunez*, the insured (Garcia), cooperated with the insurer and submitted to two separate recorded statements prior to the time suit was filed, and since a recorded statement is part of the post loss obligation to cooperate under the terms of the policy, the sufficiency of Garcia's post loss cooperation becomes an issue of fact for the jury to determine if her cooperation rises to the level of 'substantial compliance' sufficient to defeat United Auto's attempt to declare a forfeiture of coverage.

Also on point is *Shivdasani v. Universal Prop. & Cas. Ins. Co.*, 306 So. 3d 1156, 1160 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2044a] where the court found that "[I]t is unquestionable that in order for there to be substantial compliance, there must be evidence of some compliance." The record before this court in the instant case includes evidence of compliance (i.e., Garcia submitted to two post loss recorded statements). In contrast, *Edwards v. SafePoint Ins. Co.*, 318 So. 3d 13, 17 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1086a] involved a case where there was a "total failure" to comply with the proof-of-loss requirements, and as there was no evidence of substantial compliance and "[t]he insured never offered any legitimate explanation for her noncompliance"). See also, *Abdo v. Avatar Prop. & Cas. Ins. Co*., 302 So. 3d 926 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2124a] (the record did not demonstrate a "total failure" to comply with the EUO policy requirement where the insured provided a "reasonable explanation for nonattendance at the EUO, and his attorney attempted to reschedule the EUO on two occasions"). See also, *Himmel*, supra, (finding the record did not demonstrate a "total failure" to comply with the EUO policy requirement where the insured "repeatedly requested to reschedule the EUO to a mutually convenient date and time due to unavailability," the insurer refused, and the insured did not appear for the EUO). See also, *Lewis v. Liberty Mut. Ins. Co*., 121 So.3d 1136, 1136-37 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1928a] (whether insured's refusal to attend EUO unless it was via telephone or at her attorney's office constituted a willful and material breach was a fact issue precluding summary judgment based on insured's failure to cooperate); and *Haiman v. Federal Ins. Co.,* 798 So.2d 811 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a] (whether the failure to produce documents requested is a material breach would be a question for the jury).

Moreover, while United Auto's motion for final summary judgment seeks an order that would be tantamount to a total forfeiture of coverage and benefits based on the EUO no-show, defense counsel specifically advised this Court during the hearing that United Auto was *not* seeking a forfeiture of coverage or policy benefits.

The record before this court also contains conflicting evidence regarding whether or not the EUO notices were sent to the correct address, which itself creates a genuine issue of material fact. If the EUO notices were sent to the wrong address, then Garcia's alleged failure to appear for an EUO would be excused.

If Defendant had properly mailed the EUO notice to Garcia's correct address, then the issue of prejudice would become the focus and any perceived prejudiced suffered by Defendant would likely be tempered by the fact that Garcia cooperated by appearing for two recorded statements during which Defendant had ample opportunity to speak with Garcia and presumably obtain whatever information it needed to confirm or deny coverage. The jury would then be tasked with determining if Garcia's post loss cooperation was sufficient to override any prejudice claimed by Defendant.

Here, Garcia spoke to Defendant and submitted to two separate recorded statements. Whether Garcia's participation in two post loss recorded statements rises to the level of substantial compliance with the post loss obligations is a question of fact for the jury and therefore, Defendant's Motion for Summary Judgment must be denied.

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*Corrected to delete extraneous text at the bottom of th [Editor's note: Text is as it appears on court document]

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Insurance—Homeowners—Coverage—Burden is on homeowners to prove that damage to home interior caused by by rain entering home falls under exception to rain-damage exclusion applicable when rain enters property through opening in roof caused by covered peril—Summary judgment is entered in favor of insurer where homeowners' expert did not provide any admissible evidence proving existence of windstorm or hail event on date of loss

JORGE HERNANDEZ, et al., Plaintiffs, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-019380-CC-05, Section CC06. March 18, 2022. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE, having come before the Court for hearing on January 13, 2022, on Defendant's Motion for Summary Judgment, and the Court, having heard argument of counsel and having considered all of the evidence filed by the parties in support or opposition to the Motion, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

Defendant's Motion for Summary Judgment is **GRANTED**.

The over-arching issue addressed by this Court is whether Plaintiffs can prove the existence of a peril-created opening in Plaintiffs' roof which allowed water to enter the property. Defendant contends that Plaintiffs have neither provided evidence to support their initial burden of proof that a covered loss caused damage to their roof nor have they rebutted Defendant's evidence that the damage to the roof was caused by wear and tear. Plaintiffs argue that the affidavit

of their independent adjuster created a material factual dispute precluding the entry of summary judgment in favor of Defendant. This Court disagrees with Plaintiffs' assertion.

Undisputed Facts

The Court makes the following findings of facts:

1. The Plaintiffs, Jorge Hernandez and Nancy Oliva, were insured by a policy of insurance issued by the Defendant, Citizens Property Insurance Corporation.

2. On August 7, 2020, Plaintiffs filed a claim alleging that they had suffered property damage as a result of a roof leak on or about May 26, 2020.

3. On August 17, 2020, William G Akers, a licensed field adjuster retained by Defendant, inspected the property.

4. In his affidavit supporting Defendant's Motion, Mr. Akers determined that: There was no evidence of an opening caused by wind, hail or other outside source; weather data for rainfall and wind speed on the date of loss was insufficient to cause damage to the roof; evidence of water staining in the interior of the property pre-dated the date of loss and was consistent with age-related deterioration of the roof surface; and evidence of past roof repairs and patches to the roof that were made over a period of time.

5. Plaintiffs relied on the affidavit of Armando Abreu, a licensed independent loss consultant, to meet their burden and rebut Mr. Akers' findings.

6. On August 4, 2020, Armando Abreu, a licensed independent loss consultant hired on behalf of Plaintiffs, inspected and photographed the roof and the interior of the property.

7. In his affidavit opposing Defendant's Motion, Mr. Abreu found: evidence of "multiple storm-created openings" in the shingle roof "in the form of lifted and cracked shingles and wind impacted underlayment"; evidence of multiple "wind created penetration points in the shingled roof over two of the bedrooms"; roofing material opened by "wind driven rain and debris"; and no "convincing evidence of wear and tear or age related deterioration of the roof."

8. Mr. Abreu determined that the damage to the roof occurred on May 21, 2020 through May 27, 2020, based on Plaintiffs' statement to Mr. Abreu.

9. In the Deposition of Mr. Abreu, provided by Defendant for this hearing, Mr. Abreu testified that he "didn't do any research" as to the weather conditions on the date of loss. *Abreu Dep.* p. 11. According to his testimony, Mr. Abreu knew "there was constant rain for a period of time and, you know, that's going to affect roofs and wind and windstorm, it's going to damage roofs." *Id.* He testified that he "believed there was all kind of bad weather on the date of loss such as hail." *Id.* p. 23-24. He based this determination on what Plaintiffs told him and on the circular argument that since the roof had evidence of hail damage that meant that the hail occurred on the reported date of loss and not before. *Id.* He also determined that the repairs seen on the roof did not exist prior to the date of loss based on Plaintiffs' statement to him and the fact he "believed the [Plaintiffs]" since they had no reason to say otherwise. *Id.* p.24-25. Finally, Mr. Abreu testified that he had never been qualified as an expert to provide testimony in court but that he will be in the future. *Id.* p 12.

10. Defendant's Policy "insures against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." *Citizens Homeowners 3—Special Form Policy, CIT HO-3 02 19, Section I, A, 1* at 13. The Policy, however, does not insure for a loss, caused by:

> (b)(8) Rain, snow, sleet, sand or dust to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

Id. at 15.

Summary Judgment Standard

Florida Courts must follow the federal summary judgment standard which refers to the principles announced in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), "and more generally to case law interpreting Federal Rule of Civil Procedure 56." *In re Amends. to Fla. Rule of Civ. Proc. 1.510,* No. SC20-1490, 2021 WL 1684095, at 5 [317 So. 3d 72] (Fla. Apr. 29, 2021) [46 Fla. L. Weekly S95a].

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." *Fla. Rule of Civ. Proc. 1.510(a).* A party asserting that a fact cannot be or is genuinely disputed may support the assertion by "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." *Fla. Rule of Civ. Proc. 1.510(a)(c)(1)(B).* "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Fla. Rule of Civ. Proc. 1.510(a)(c)(2).* In addition, the court can consider other materials in the record even when they are not cited by the parties. *Fla. Rule of Civ. Proc. 1.510(a)(c)(3).* "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Fla. Rule of Civ. Proc. 1.510(a)(c)(4).*

When addressing a summary judgment motion, a court must decide "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." *Hickson Corp. v. N. Crossarm Co.,* 357 F.3d 1256, 1260 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C195a] (quoting *Anderson,* 477 U.S. at 251-52). At "the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S at 249. A "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry . . . asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . ." *Id.* at 252. In evaluating a summary judgment motion, all "justifiable inferences" must be resolved in the nonmoving party's favor so long as there is a genuine dispute as to those facts. *Beard v. Banks,* 548 U.S. 521, 529 (2006) [19 Fla. L. Weekly Fed. S402a]; *see Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. "In the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," the court remains free to grant summary judgment. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 596 (1993).

A "party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support its conclusory allegations." *Evers v. General Motors,* 770 F.2d 984, 986 (11th Cir. 1985); *see Weigel v. Target Stores,* 122 F.3d 461, 468 (7th Cir. 1997) (holding that the plaintiff failed to create a genuine issue for trial when her expert's affidavit provided "nothing more than a naked conclusion unsupported by any factual foundation"); *Vollmert v. Wisconsin Dep't of Transp.,* 197 F.3d 293, 298 (7th Cir. 1999) (holding that an expert opinion is insufficient "to preclude summary judgment where it offers nothing but naked conclusions.");

Hilburn v. Murata Elec. N. Am., Inc., 181 F.3d 1220, 1227-28 (11th Cir. 1999) (holding that a conclusory statement in an expert's affidavit "is insufficient to create a genuine issue of a material fact" when the "affidavit is devoid of any specific facts whatsoever which support the" expert's conclusion).

In "the context of a motion for summary judgment, an expert must back up his opinion with specific facts." *United States v. Various Slot Machs. on Guam,* 658 F.2d 697, 700 (9th Cir. 1981). When a purported expert presents "'nothing but conclusions—no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected,' such testimony will be insufficient to defeat a motion for summary judgment." *Hayes v. Douglas Dynamics, Inc.,* 8 F.3d 88, 92 (1st Cir. 1993) (quoting *Mid-State Fertilizer v. Exch. Nat'l. Bank,* 877 F.2d 1333, 1339 (7th Cir. 1989)). "For an expert report to create a genuine issue of fact, it must provide not merely the conclusions, but the basis for the conclusions." *Vollmert,* 197 F.3d 293, 299 (7th Cir. 1999). "[A] trial court may exclude expert testimony that is 'imprecise and unspecific,' or whose factual basis is not adequately explained." *Id.* (quoting *Cook ex rel. Est. of Tessier v. Sheriff of Monroe Cty., Fla.,* 402 F.3d 1092, 1111 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C298a]). To be appropriate, a "fit" must exist between the offered opinion and the facts of the case. *McDowell v. Brown,* 392 F.3d 1283, 1299 (11th Cir. 2004) [18 Fla. L. Weekly Fed. C92a] (citing *Daubert,* 509 U.S. at 591). "For example, there is no fit where a large analytical leap must be made between the facts and the opinion." *Id.* (citing *Gen. Elec. Co. v. Joiner,* 522 U.S. 136 (1997)); *see McDowell,* 392 F.3d at 1298 (when deciding the trustworthiness of an expert's report, the "court[s] should meticulously focus on the expert's principles and methodology, and not on the conclusions that they generate.").

When determining if expert testimony or any report prepared by an expert may be admitted, the Court engages in a three-part inquiry, which includes whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *See City of Tuscaloosa v. Harcros Chems., Inc.,* 158 F.3d 548, 562 (11th Cir. 1998) (citing *Daubert,* 509 U.S. at 589).

Analysis

The burdens of proof applicable to insurance coverage disputes are well-established under Florida Law. There are three burdens of proof applicable to a claimed loss under Florida law. Initially, the burden is on the insured to prove "that the insurance policy covers a claim against it." *E. Florida Hauling, Inc. v. Lexington Ins. Co.,* 913 So. 2d 673, 678 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2257a]. Once a loss within the terms of the policy is established, the burden shifts to the insurer to prove that the loss falls within an exclusionary provision. *Id.* Finally, "[i]f there is an exception to the exclusion, the burden once again is placed on the insured to demonstrate the exception to the exclusion." *Id.*; *see also Florida Windstorm Underwriting v. Gajwani,* 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a] ("the insured has the burden to prove an exception to an exclusion contained within an insurance policy").

Citizens' policy provides coverage for "direct loss to property described in Coverages A and B only if that loss is a physical loss to property." The policy excludes coverage for loss caused by "[r]ain, snow, sleet, sand or dust to the interior of a building." It is undisputed that the damage to the interior of Plaintiffs residence was caused by rain entering the property, which is excluded under the policy of insurance.

The policy provides an exception to that exclusion when "a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening." The existence of a peril-created opening is undoubtedly an exception to the exclusion that would otherwise exist for interior damage caused by rain. Plaintiffs, thus have the burden of proving that rain entered the property through an opening in the roof which was created by a covered peril. The affidavit of Armando Abreu does not provide such proof since his claim that water entered the property after a rainstorm merely reinforces the exclusion under the policy.

Other than the hearsay testimony of Plaintiffs, Mr. Abreu did not provide any admissible evidence proving the existence of a windstorm or hail event on the date of loss. Mr. Abreu testified that he did not research weather data on the date of loss. He made the causation determination on what Plaintiffs' hearsay statements which was offered for the truth of the matter asserted. He also based his determination on his belief that "there was all kind of bad weather on the date of loss such as hail." Such evidence is conclusory at best and lacks sufficient facts and scientific methodology to explain how the observed damage to the roof was actually caused by a windstorm or hail event on the reported date of loss. Based on Mr. Abreu's affidavit and deposition testimony this Court finds that Mr. Abreu would not qualify as an expert to testify as to causation in this case. Furthermore, even if he were qualified, his affidavit and testimony as to causation and damages is conclusory and fails to have sufficient supporting documentation to provide evidence for his conclusions. Thus, his testimony would not be helpful to the jury.

This Court finds that Plaintiffs are unable to meet their initial burden of proof as to causation. Therefore, Defendant properly denied Plaintiffs' request for payment and no breach of contract occurred. Defendant's expert affidavit that the damage to the roof was caused by wear and tear was not considered by this Court.

It is therefore ORDERED and ADJUDGED that:

1. Defendant's Motion for Summary Judgment is GRANTED.

2. Defendant may request a Final Judgment with a reservation as to attorney fees.

* * *

Insurance—Automobile—Windshield repair—Insured's post-loss policy obligations—Repair shop/assignee breached policy by replacing windshield without allowing insurer opportunity to have appraiser examine damage, and breach is not cured by shop taking photographs of damage and keeping damaged windshield—Emergency windshield repair or replacement was not necessary to minimize further damages or expenses to vehicle—Presumption of prejudice to insurer as result of failure to comply with post-loss obligations is not rebutted—Summary judgment entered in favor of insurer

JAGUAR GLASSWORKS PROS, LLC, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-019738-SP-05, Section CC06. August 27, 2021. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on Defendant's Motion for Final Summary Judgment on July 22, 2021, and the Court, after reviewing the filings by the parties, the applicable case law, after hearing argument of counsel, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

Defendant's Motion for Final Summary Judgment is GRANTED.

Undisputed Facts

Defendant, United Auto Insurance Company, issued a policy of insurance to Marco Estrada for a 2015 Dodge Challenger which sustained windshield damage on April 4, 2020. Searles Aff. ¶ 7. On April 7, 2020, Mr. Estrada executed an assignment of benefits in favor

of Plaintiff, Jaguar Glassworks Pros, LLC. Complaint, Exhibit A, p. 4. Plaintiff repaired the windshield at a cost of $1,904.34. Searles Aff. ¶ 31.

Plaintiff completed the glass replacement services and later faxed its work order, invoice, and assignment of benefits to Defendant on May 4, 2020. Searles Aff. ¶ 12, 13, 19, 28, 30. Defendant was not informed of the damage to the windshield before starting repairs and only learned of the repairs after it received an invoice for the completed work. Bello Aff. ¶ 8; Searles Aff. ¶ 12, 13, 19, 28, 30. While Plaintiff took photographs of the damaged glass, the vehicle's VIN, the vehicle's license plate, and the replaced windshield, it never sent those photographs to Defendant. Searles Aff. ¶ 9, 10, 11, 16, 17, 20. Defendant never inspected or appraised the vehicle after Plaintiff replaced the windshield. Searles Aff. ¶ 27. Defendant did not request copies of the photographs taken by Plaintiff. Searles Aff. ¶ 17.

Defendant's policy of insurance has two clauses limiting exposure to a loss if repairs to a vehicle begin before having an opportunity to inspect the damage. First, Defendant has the right to deny coverage if

> repairs are performed to, alterations made to, or evidence of physical damage is removed from [the] covered car by anyone prior to giving [Defendant] the opportunity to have an appraiser appointed by [Defendant] to examine the damage.

UAIC 200 (7/11), PART D, PAYMENT OF LOSS, p. 13 ¶ 7. Second, Defendant will only pay

> damages which [it is] able to inspect prior to repairs being commenced. . . . unless emergency repairs are necessary to minimize further damages and/or expenses. In the event emergency repairs are effected, [Defendant will] require photographs of the damaged area(s) along with a complete itemized estimate of repair and a payment receipt.

UAIC 200 (7/11), PART D, COVERAGE FOR DAMAGE TO YOUR CAR, p. 11.

In its Motion for Summary Judgment Defendant claims that it's not liable for the windshield damage to the Dodge Challenger since it was not allowed to inspect the damage before replacement and/or repairs began. Plaintiff counters that it was willing and able to cooperate with Defendant, including supplying photographs of the loss, if Defendant had made a request. Plaintiff also argues that Defendant must show prejudice before refusing to pay the windshield loss.

Summary Judgment Standard

"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." *Fla. Rule of Civ. Proc. 1.510(a).* A party asserting that a fact cannot be or is genuinely disputed may support the assertion by "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." *Fla. Rule of Civ. Proc. 1.510(a)(c)(1)(B).* "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Fla. Rule of Civ. Proc. 1.510(a)(c)(2).* In addition, the court can consider other materials in the record even when they are not cited by the parties. *Fla. Rule of Civ. Proc. 1.510(a)(c)(3).*

At "the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S at 249. A "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. "In the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," the court remains free to grant summary judgment. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 596 (1993).

Analysis

Where the insurer alleges failure by the insured to follow its post-loss obligations, the trial court must perform a two-prong analysis. First, the court must decide "whether the insured complied or substantially complied with the terms of the insurance policy." *Shivdasani v. Universal Prop. & Cas. Ins. Co.,* 306 So. 3d 1156, 1161 n7 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2044a]. Second, if a determination is made that the insured did not comply with its post-loss policy obligations, the "burden shift wherein prejudice to the insurer is presumed, and the insured then has an opportunity to rebut that presumption and prove that the insurer was not prejudiced. *Id.* (citing *Am. Integrity Ins. Co. v. Estrada,* 276 So. 3d 905, 916 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a]); *see Nunez v. Universal Prop. & Cas. Ins. Co.,* No. 3D19-1614, 2021 WL 3377526, at *4 [325 So. 3d 267] (Fla. 3d DCA Aug. 4, 2021) [46 Fla. L. Weekly D1747b] (when an insurer proves that the insured has materially breached a post-loss obligation, the burden shifts to the insured to "prove that any breach did not prejudice the insurer.").

"[A]ctual compliance with *other* policy requirements or conditions is not evidence of substantial compliance with the pertinent policy requirement or condition at issue". *Id.* at *6. (emphasis not added). Thus, cooperating with an insurer's investigation such as promptly reporting a claim, allowing the insurer to inspect the property, and sending a proof of loss, does not bear on whether the insured "substantially complied with the specific, pertinent policy provision." *Id*.

The purpose for requiring an inspection of a vehicle before repairs begin, among others, is for the insurer to examine the damage, prevent fraud, and minimizing the costs of repairs by deciding what can be repaired rather than replaced. The undisputed record clearly shows that Plaintiff replaced the insured's windshield without allowing Defendant to have an appraiser examine the damage to the vehicle, breaching the Policy's Part D—Payment of Loss Clause. While Plaintiff states that it was willing to cooperate with Defendant by taking photographs of the loss, keeping the damaged windshield, and being ready to cooperate, such cooperation does not cure Plaintiff's breach. *Nunez,* No. 3D19-1614, 2021 WL 3377526, at *6.

The record also shows that the emergency windshield repair and/or replacement was not necessary to minimize further damages and/or expenses to the vehicle. Plaintiff's conclusory allegation that emergency repairs were necessary to prevent a serious and dangerous condition while driving the vehicle, does not comport with the policy's emergency condition to prevent further damage to the vehicle. Thus, Plaintiff also breached Coverage D—Coverage for Damage to Your Car by not allowing Plaintiff to inspect the vehicle before repairs were made. Even if the emergency provision clause applied, Plaintiff still breached the Policy by not supplying the photographs of the damaged windshield together with the estimate and final bill as required by the Policy. Plaintiff did not explain why the photographs were not sent to Defendant on May 4, 2020, along with its other submissions.

Having concluded that Plaintiff breached the policy by not following the Policy's post-loss obligations, prejudice to Defendant is presumed. Plaintiff must, therefore, rebut that presumption. *Shivdasani* 306 So. 3d at 1161 n7. Plaintiff did not provide any admissible evidence to rebut Defendant's presumption of prejudice. Accordingly, it is ORDERED and ADJUDGED that:

1. Defendant's Motion for Final Summary Judgment is GRANTED.

2. Plaintiff's Case is Dismissed and Defendant shall go hence without day.

3. The Court retains Jurisdiction to address Defendant's 57.105 Motion for Sanctions and Attorney Fees.

* * *

Insurance—Discovery—Failure to comply—Sanctions

UNIVERSAL X RAYS CORP., a/a/o Pedro Careaga-Hernandez, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-022213-SP-23. Section ND01. March 14, 2022. Myriam Lehr, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Karen E. Trefzger, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JULY 6, 2021 DISCOVERY ORDER AND GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS CAUSE came before the court on March 11, 2022, upon Defendant's Motion to Grant Relief from Court Order dated July 6, 2021 and Plaintiff's Motion for Sanctions as a result of Defendant's having failed to comply with that order, and the Court having considered the motions, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Defendant's Motion to Grant Relief from Court Order dated July 6, 2021 is DENIED and Plaintiff's Motion for Sanctions is GRANTED, for the following reasons:

Plaintiff propounded its First Set of Interrogatories to Defendant on April 30, 2021 (the "Interrogatories"). As a result of Defendant's failure to respond, object or request an extension of time to respond to the Interrogatories, on June 23, 2021, Plaintiff filed its Ex Parte Motion to Compel Discovery. By Order dated July 6, 2021, this Court granted Plaintiff's Ex Parte Motion to Compel Discovery (the "Discovery Order"). The Discovery Order required Defendant to respond to the interrogatories no later than July 16, 2021. As a result of Defendant's failure to comply with the Discovery Order, on July 27, 2021, Plaintiff filed its Motion to Enforce the Discovery Order and for sanctions. Seven-and-a-half months later, on March 1, 2022, Defendant answered the interrogatories.

The Court finds the above-described timeline to be not excusable. Pursuant to Rule 1.380(b)(2), Fla.R.Civ.P., the Court awards sanctions against the Defendant in the amount of $750.00, representing the reasonable expenses caused by Defendant's failure to comply with the Discovery Order. Defendant shall pay the sanctions award within twenty (20) days from the date of the entry of this Order.

* * *

Torts—Interference with contractual relationship—Assignment—Plaintiff who is assignee of insured cannot sue insurer for tortious interference with assignment based on insurer's payment of claim to insured—Insurer was not stranger to relationship between plaintiff and insured, but was instead issuer of policy that would have funded relationship between plaintiff and insured

DRY MAX RESTORATION, INC., Plaintiff, v. HOMEOWNERS CHOICE PROPERTY & CASUALTY INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-016709-SP-05, Section CC06. January 31, 2021. Luis Perez-Medina, Judge.

ORDER DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT WITH PREJUDICE

This Cause, having come before the Court on December 1, 2020 on Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint and the Court, after hearing arguments of counsel, after reviewing the pleadings and the motion, and being otherwise fully advised,

It is Ordered and Adjudged:

That Plaintiff, Dry Max Restoration, Inc. ("Dry Max") failed to sufficiently state a claim for tortious interference with a contractual relationship and for declaratory action. This Court finds that allowing additional amendments by Dry Max would be an abuse of process since it is clear that the pleadings cannot be amended to state a cause of actions. *Gamma Dev. Corp. v. Steinberg,* 621 So. 2d 718, 719 (Fla. Dist. Ct. App. 1993). Accordingly, Plaintiff's cause of action is dismissed with prejudice.

Defendant, Homeowners Choice Property and Casualty Insurance Company, Inc. ("HCPCI"), seeks to dismiss Dry Max's second amended complaint arguing that Dry Max cannot sue HCPCI for tortious interference with a contract simply for paying a claim to its own insured, Marie Boisrond ("Boisrond"), for a loss covered under her insurance policy. In its Second Amended Complaint, Dry Max alleges that "in direct contravention" to the Assignment of Benefits that existed between Dry Max and Boisrond, HCPCI issued a payment to Boisrond, "on or about March 19, 2019." Dry Max cites to case number "2017-023760-CA-01" which was a lawsuit Boisrond filed against HCPCI. The case was voluntarily dismissed with prejudice on March 19, 2019 the date payment was made on the policy. Dry Max was not a party to the lawsuit between Boisrond and HCPCI.

Dry Max may not sue HCPCI for intentional interference with a contract since HCPCI is not a stranger to the relationship between Dry Max and Boisrond. Rather, HCPCI was the issuer of the insurance policy which would have funded the relationship between Dry Max and Boisrond. Under Florida law, the elements of tortious interference with a business relationship are: "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal rights; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the interference." *Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc.,* 13 So. 3d 1090, 1094 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1379a], citing *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 742 So.2d 381, 385 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1992a]. "For the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship." *Id.* "A defendant is not a 'stranger' to a business relationship if the defendant 'has any beneficial or economic interest in, or control over, that relationship.' " *Id.,* quoting *Nimbus Tech., Inc. v. SunnData Prods., Inc.,* 484 F.3d 1305, 1309 (11th Cir. 2007) [20 Fla. L. Weekly Fed. C550a]. "Tortious interference protects the interests of parties to an agreement against interference by outsiders, who would not be liable otherwise for breach." *Palm Beach County,* 13 So. 3d at 1095.

In its Second Amended Complaint, Dry Max alleges that the contractual or business relationship at issue arises out of services performed by Dry Max for Boisrond in connection with an insurance claim. Dry Max attached the contract for services to the Second Amended Complaint. HCPCI's name appears on the contract. The contract also purports to assign Dry Max the right to stand in the shoes of Boisrond and present a claim to HCPCI for insurance benefits. Thus Dry Max, as Boisrond's assignee, is in privity with HCPCI.

For purposes of this lawsuit, Dry Max is the equivalent of HCPCI's Insured, Boisrond, and could have brought suit directly against HCPCI for breach. Indeed, Dry Max initially sued HCPCI for breach of contract, claiming standing under an assignment of benefits from Boisrond. That claim was abandoned because it was barred by the statute of limitations. The fact that Dry Max's claim was time-barred does not change the nature of the parties' relationship. In fact, even in the Amended Complaint, Dry Max is suing under its capacity "as

assignee of" Boisrond and her ability to collect insurance benefits from HCPCI for an insurance loss under her policy. Thus, HCPCI is not a "stranger" to the insurance contract or the relationship between Dry Max and Boisrond, but rather the funding source for that relationship. As explained in *Palm Beach County,* a cause of action for interference cannot stand against an interested third party who would "fund" the business relationship between the contracting parties. *Palm Beach County,* 13 So. 3d at 1094. The rationale for tortious interference with a business relationship is to advance and protect the interest of parties to an agreement against interface in the contract by outsiders who could not be held liable for a breach of contract. *Id.* at 1095. "An interested third-party accused of tortious interference is essentially 'interfering' with its own interest." *Id.* To accept Dry Max's position, this Court must find that an insurance carrier's payment of benefits to its own insured constitutes an intentional tort. This Court is not inclined to make such a finding.

Given this Court's finding that HCPCI cannot interfere with the Assignment of Benefit's Contract between Dry Max and Boisrond, this Court dismisses, with prejudice, Dry Max's Second Amended Complaint for tortuous interference with a contractual relationship and for declaratory relief. The Court retains jurisdiction to address Defendant's claim for attorney fees pursuance to Florida Statute 57.105. [Editor's note: Order on motion for attorney's fees published below.]

* * *

Torts—Interference with contractual relationship—Attorney's fees—Claim or defense not supported by material facts or applicable law—Good faith exception—Where claim against insurer asserting tortious interference with assignment of benefits from insured to plaintiff was not supported by application of then-existing law to material facts and did not present good faith argument for modification or extension of existing law—Insurer is entitled to recover reasonable attorney's fees

DRY MAX RESTORATION, INC., Plaintiff, v. HOMEOWNERS CHOICE PROPERTY & CASUALTY INSURANCE CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-016709-SP-05, Section CC06. March 11, 2022. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTIONS FOR SANCTIONS PURSUANT TO SECTION 57.105, FLA. STAT.

THIS CAUSE having come before this Court for an evidentiary hearing on March 3, 2022, on Defendant's motions for sanctions pursuant to section 57.105, Florida Statutes, the Court having reviewed the file including defendant's billing records provided in compliance with this Court's January 5, 2022 order, having heard argument from counsel, having provided plaintiff's counsel with an opportunity to present evidence of the "good faith" exception in section 57.105(3)(a), Florida Statutes, and otherwise being fully advised in the premises, the Court finds as follows:

1. Plaintiff's claim for breach of contract was clearly barred by the statute of limitations set forth in section 95.11(2)(e), Florida Statutes.

2. Therefore, plaintiff filed an amended complaint, and later a second amended complaint, asserting claims tortious interference and related claims for declaratory relief.

2. The parties stipulate that defendant served a motion for sanctions directed to the amended complaint on October 7, 2019, and plaintiff did not dismiss or otherwise correct the challenged claims within twenty-one days. The parties further stipulate that defendant served a motion for sanctions directed to the amended complaint on June 12, 2020, and plaintiff did not dismiss or otherwise correct the challenged claims within twenty-one days. Both motions were timely filed with the Court.

4. Florida law is clear that a claim of tortious interference may only be asserted against a "third party" who is a "stranger" to the business relationship. *Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc.,* 13 So. 3d 1090, 1094 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1379a], citing *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 742 So.2d 381, 385 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1992a]. A claim of tortious interference cannot stand against a third-party, like defendant, who would "fund" the business relationship between the contracting parties. *Id.* at 1095.

5. In this case, the contract or relationship with which plaintiff claimed defendant interfered was an assignment of benefits ("AOB") relating to insurance proceeds allegedly due under a homeowners insurance policy issued by the defendant. Defendant's name appeared on the AOB and the entire purpose of the AOB was to transfer to plaintiff the right to make a claim under defendant's insurance policy.

6. Plaintiff's counsel knew or should have known that any claim for tortious interference (or any related declaratory action) against defendant, the party who would fund the business relationship between plaintiff and the insured, would not be supported by the application of then-existing law to the material facts.

7. Plaintiff's counsel has not presented evidence sufficient to satisfy its burden to establish the "good faith" exception in section 57.105(3)(a), Florida Statutes, and this Court rejects plaintiff's argument that *Geico Ins. Co. v. Steinger, Iscoe & Green-II, P.A.,* 275 So. 3d 775 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1656d] presents a good faith argument for modification or extension of existing law.

8. Defendant served plaintiff with records of its attorney's fees pursuant to this Court's January 5, 2022, order, and plaintiff did not object. Plaintiff stipulated on the record to the amount and reasonableness of defendant's attorney fees (but not to entitlement), which total $9,874.50, and the Court has independently reviewed defendant's billing records and determined the amount of defendant's attorney's fees to be reasonable. Defendant's reasonable attorney fees consist of the following:

Name	Position	Rate	Time	Total
Matthew C. Scarfone	Partner	$185.00	37.1	$6,863.50
Jonathan Rodriguez	Sr. Assoc.	$165.00	6.8	$1,122.00
Mark Costello	Associate	$155.00	3.8	$589.00
Cesar Millan	Paralegal	$85.00	2.3	$195.50
Rachel Bell-Borgman	Paralegal	$85.00	7.7	$654.50
Niurka Palomino	Paralegal	$90.00	5.0	$450.00
Total				**$9,874.50**

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's motions are **GRANTED.**

2. The Court finds that defendant is entitled to recover its reasonable attorney fees incurred in this case, in the amount of $9,874.50, which shall be paid by plaintiff's counsel, Font & Nelson, PLLC, pursuant to section 57.105(1)(b) and (c), Florida Statutes. *See Davis v. Bailynson,* 268 So. 3d 762 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D328d].

3. This Court will enter a separate final judgment for attorney fees based upon this order, however, plaintiff's counsel has stipulated to the amount and reasonableness of defendant's attorney fees (but not to entitlement, which was awarded over plaintiff's opposition), therefore, plaintiff waived any evidentiary hearing on the amount or reasonableness of defendant's attorney fees.

* * *

Insurance—Venue—Venue selection clause

PHYSICIANS GROUP, LLC, a/a/o Bethany Mauldin, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2020 SC 2598 NC. January 4, 2022. Maryann Olson Boehm, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Marsha Moses and Teodora Siderova, Kubicki Draper, Tampa; and Norma Kassner, for Defendant.

ORDER TRANSFERRING VENUE

THIS CAUSE came to be heard on the Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.015 filed on August 29, 2020. The Defendant's motion requests either dismissal or transfer of this action. On October 26, 2021, the Court considered the motion and heard argument of counsel, and hereby finds as follows:

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.015 is **GRANTED**.

This action shall be transferred to Miami-Dade County. The Plaintiff shall pay any filing fee or other costs necessary to effectuate the transfer as required.

* * *

Insurance—Personal injury protection—Limitation of actions—Res judicata—Attorney's fees—Sanctions—Plaintiff's motion to strike defendant's affirmative defenses and counterclaim asserting res judicata and collateral estoppel is granted—Default summary judgment against insured patient, which was entered in separate lawsuit filed by defendant without notice to plaintiff in instant action while instant action was pending, has no res judicata or collateral estoppel effect against plaintiff—Court will not allow defendant to weaponize a separate lawsuit by intentionally preventing plaintiff from having any notice of, and from participating in, that separate lawsuit which was intentionally filed against the wrong party in order to circumvent or impede PIP claim asserted in plaintiff's earlier filed lawsuit—Plaintiff's motion for attorney's fees as a sanction pursuant to section 57.105 is also granted

FLORES MEDICAL CENTER, INC., a/a/o Ada Paz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-006605, Division S. April 13, 2022. Jack Gutman, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Alex Avarello, McFarlane Dolan and Prince, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AND GRANTING PLAINTIFF'S MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES PURSUANT TO F.S. SECTION 57.105

THIS CAUSE came before this Court on April 7, 2022, on Plaintiff's Verified Motion to Strike as Sham Pleading Defendant's Amended Answer, Affirmative Defenses and Counterclaim and Plaintiff's Motion for Entitlement to Attorney's Fees Pursuant to Florida Statutes Section 57.105. The Court having reviewed the file, considered the motions, the arguments presented by counsel, the undisputed evidence, the applicable law, and being otherwise fully advised, makes the following findings of fact and conclusions of law:

Defendant's two (2) Requests for Judicial notice are hereby **GRANTED**. The two (2) Requests for Judicial Notice filed on September 22, 2021, are judicially noticed by this Court.

To the extent that Plaintiff requests to strike the Defendant's answer, affirmative defenses and counterclaim as a "sham pleading" pursuant to Florida Rule of Civil Procedure 1.150, the Court finds that rule to be inapplicable. Nonetheless, this Court concludes that the factual and legal basis of the Plaintiff's request to strike is authorized and supported by Florida Rule of Civil Procedure 1.140(f), which states, "A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Accordingly, the Plaintiff's motion to strike is **GRANTED**, to the extent set forth herein.

This case turns on the application of Section 86.091, Florida Statutes, which plainly states:

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

Thus, it is clear that a non-party to a declaratory action is not bound by any judgement rendered in that action.

The undisputed facts clearly demonstrate that while the instant lawsuit was already pending, the Defendant and Defendant's counsel, Alex Avarello, Esquire, filed a separate declaratory judgment action against Ada Paz (the "Insured Patient") concerning the same PIP claim at issue in this pre-existing lawsuit. In the subsequent lawsuit, the Defendant sued the Insured Patient, even though the Defendant was fully advised and aware that the Insured Patient had previously executed an assignment of benefits, which assigned and transferred the PIP claim to the Plaintiff. Nonetheless, the Defendant's subsequent and separate declaratory judgment action against the Insured Patient did not name the Plaintiff as a co-defendant—even though the Defendant and its attorneys were fully advised and aware that the Plaintiff owns the assignment of benefits and would, therefore, be an indispensable party in any lawsuit involving the PIP claim. The Defendant then obtained a default summary judgment and final judgment against the disinterested Insured Patient (who no longer had any legal ownership interest in subject PIP claim), filed its "Amended Answer, Affirmative Defenses, and Counterclaim" in the instant lawsuit, and asserted therein that its default summary judgement and final judgment against the Insured Patient
now bars the Plaintiff's claims pursuant the doctrines of "res judicata" and "collateral estoppel."

This Court will not allow the Defendant and Defendant's counsel to weaponize a separate lawsuit as both a saber and a shield against the Plaintiff by intentionally preventing the Plaintiff from having any notice of, or from participating in, that separate lawsuit, which was intentionally filed against the wrong party in order to circumvent or impede the PIP claim asserted in the Plaintiff's previously filed lawsuit. As such, the default summary judgement and final judgment entered against the Insured Patient in the Defendant's subsequently filed lawsuit have no "res judicata" or "collateral estoppel" effect against the Plaintiff in the instant lawsuit.

Based on the foregoing, the Defendant's 24th, 25th, 26th, and 27th affirmative defenses (all of which address or reply upon the Defendant's subsequent declaratory judgment action against the Insured Patient) are hereby stricken. For the same reasons, paragraphs 1 (except for the last sentence) and paragraphs 26, 27, 28, 29, 30, 31, 32, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52 of Defendant's counterclaim are also stricken. Defendant shall file a second amended answer, affirmative defenses, and counterclaim which complies with this ruling within ten (10) days of this order.

With respect to the Plaintiff's claim for attorneys' fees as a sanction pursuant to Section 57.105, this Court finds, based on the undisputed and incontrovertible facts as stated above, Plaintiff's Motion for Entitlement to Attorney's Fees Pursuant to Florida Statutes Section 57.105 is **HEREBY GRANTED**.

Based on the foregoing, the Court hereby imposes sanctions in the form of attorney's fees, which shall be paid to Plaintiff's attorney, Timothy A. Patrick, Esquire, in equal amounts by Defendant and

Defendant's counsel, respectively. Alex Avarello, Esquire and his law firm, Mcfarlane Dolan and Prince, shall be jointly and severally liable for defense counsel's share of the attorneys' fees awarded. The Court will limit said sanctions to a reasonable amount of time for filing a response to a Motion for Leave to Amend and preparing for and attending a hearing on same. Plaintiff's counsel is not entitled to all of its time spent preparing Plaintiff's Verified Motion to Strike as Sham Pleading. If within 20 days of the date of this order, the parties have not reached an agreement on a reasonable amount of attorney's fees to be awarded, the Plaintiff shall schedule a status conference for the purpose of scheduling an evidentiary hearing to determine same.

* * *

Insurance—Personal injury protection—Discovery—Depositions—Corporate representatives—Sanctions—Failure to produce proper claims handling representative pursuant to notice of taking deposition duces tecum

AJ THERAPY CENTER, INC., a/a/o Jose Martinez Ramos, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-049134. April 13, 2022. Leslie Schultz-Kin, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Alex Avarello, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER having come before the court on January 18, 2022 and February 17, 2022 on Plaintiff's Motion for Sanctions and Defendant's Opposition to Motion for Sanctions and For Sanctions. . The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. On September 21, 2021, Plaintiff filed an Amended Notice of Taking Deposition Duces Tecum for January 13, 2022 at 10:00 am which stated:

> Deponent: Designated Corporate Representative of Defendant Pursuant to Rule 1.310(b)(6).

2. Said Notice required the deponent to bring the following items:

> The entire Personal Injury Protection (PIP) claim file (pre-litigation and post litigation) maintained by Defendant.

3. On January 13, 2022, Defendant produced an underwriter named Rose Chrustic for deposition. The Court finds it is undisputed that Defendant did not produce the correct claims handling corporate representative pursuant to the aforementioned Notice of Taking Deposition Duces Tecum. Ms. Chrustic did not have the required PIP claim file with her and she admitted she could not answer any questions regarding the handling of the PIP claim and that she was only there to discuss underwriting. As such, Plaintiff's counsel terminated this deposition to go before the Court to seek immediate redress.

4. The Defendant must produce for deposition the proper claims handling corporate representative who can properly answer questions with the required PIP claim file. Said deposition shall be limited to one (1) hour.

5. The Defendant must produce for deposition the proper underwriting corporate representative who can properly answer questions with the required underwriting file. Said deposition shall be limited to one (1) hour.

6. Plaintiff's request for sanctions is reserved as is Defendant's request for sanctions.

* * *

Insurance—Discovery—Depositions—Counsel instructing deponent not to answer questions without asserting proper grounds or privilege—Sanctions

TORRI FITZPATRICK, Plaintiff, v. CENTURY-NATIONAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 20CC087391. March 16, 2022. Jack Gutman, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Philip L. Colesanti II, Tampa, for Defendant.

ORDER ON MOTIONS FROM MARCH 9, 2022 HEARING

THIS CAUSE having come before the Court on four motions and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon,

ORDERED AND ADJUDGED that said motions be, and the same is hereby:

1. Plaintiff's Motion to Compel Discovery is WITHDRAWN. Plaintiff requested said motion not be heard during the March 9, 2022 hearing.

2. Plaintiff's Motion Compel and Motion for Sanctions is GRANTED.

a. The deposition of Maribel Lopez shall recommence within forty-five days of the hearing date.

b. Defendant's Counsel instructed a witness not to testify without asserting proper grounds or privilege.

c. Plaintiff's Counsel shall not ask questions previously answered.

d. Defendant shall be responsible for paying the court report appearance fee for the recommenced depositions.

e. The Court reserves as to monetary sanctions pending a hearing on the time spent prepare and litigating said motion.

3. Plaintiff's Third Motion for Leave to Amend Complaint is DENIED.

4. Defendant's Request for Judicial Notice is GRANTED.

a. The Court shall take judicial notice of the records of the State of Florida pursuant to § 90.202, Fla. Stat.

b. Specifically, the Court takes judicial notice of the business identities for Century-National Insurance Company and Peachtree Casualty Insurance Company.

* * *

Insurance—Personal injury protection—Coverage—Pre-suit requirements—Declaratory judgment—Because complaint is seeking a declaration regarding coverage only, and no damages are being sought, the No-Fault Act does not require compliance with pre-suit notice requirements

FLORIDA WELLNESS CENTER, INC., a/a/o Luis Ramirez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-003026. March 30, 2022. Leslie Schultz-Kin, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Roy A. Kielich, for Defendant.

ORDER DENYING DEFENDANT'S FIRST MOTION FOR SUMMARY FINAL JUDGMENT

THIS CAUSE, having come on to be heard on March 21, 2022 upon Defendant's First Motion for Summary Final Judgment, filed on September 30, 2021, and the Court, having reviewed the Court file, the Motion, heard argument of the parties, and being otherwise advised in the premises, the court finds:

1. Plaintiff has filed the instant action as a Petition for Declaratory Judgment, seeking a declaration regarding Personal Injury Protection ("PIP") coverage to the assignor, Luis Ramirez, pertaining to an automobile accident which occurred on or about September 11, 2020.

2. It is undisputed that Plaintiff did not serve/send Defendant a "Pre-Suit Demand Letter" or any similar correspondence that conforms with the requirements of Fla. Stat. § 627.736(10) for the subject claim prior to the initiation of the subject lawsuit.

3. In its First Motion for Summary Final Judgment, Defendant

argues that compliance with the pre-suit notice requirements of Fla. Stat. § 627.736(10) is a condition precedent to bringing the instant action given that the payment of monetary benefits would necessarily be incidental to any declaration of coverage.

4. While the Court is mindful of the Defendant's argument that coverage and benefits go hand-in hand, the instant Petition is framed as an action pertaining to coverage only and does not seek the payment of any benefits or monetary damages. Therefore, because the instant Complaint seeks a declaration regarding coverage only, and no money damages are being sought, the court finds that the No-Fault Act does not require compliance with the pre-suit notice requirements of Fla. Stat. § 627.736(10) as a condition precedent to bringing the instant action, and the law allows the Plaintiff to choose its chosen cause of action.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Defendant's First Motion for Summary Final Judgment, filed on September 30, 2021, is **DENIED**.

* * *

Insurance—Personal injury protection—Declaratory action seeking coverage declaration based on insurer's failure to timely investigate and afford PIP coverage states cause of action for declaratory judgment

FLORIDA WELLNESS CENTER, INC., a/a/o Sulema Diaz, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-097184. March 11, 2022. Michael J. Hooi, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S AMENDED MOTIION FOR PROTECTIVE ORDER

THIS MATTER having come before the court on January 27, 2022 on Defendant's Motion to Dismiss and Amended Motion for Protective Order. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, concludes as follows:

1. Plaintiff filed this Declaratory action seeking a coverage declaration based upon Defendant's failure to timely investigate and afford PIP coverage.

2. Defendant contends that Plaintiff's Declaratory action is better addressed by way of a breach of contract action.

3. In resolving Defendant's Motion to Dismiss, the Court's applies the four corners of rule. "Under this rule, the court's review is limited to an examination solely under the complaint and its attachments." *Santiago v. Mauna Loa Invs., v. LLC*, 189 So. 3d 752, 755 (Fla. 2016) [41 Fla. L. Weekly S91a]. "If the factual allegations of the complaint are established by proof or otherwise, "rule 1.110's pleadings requirements are met, and "the plaintiff will be legally or equitably entitled to the claimed relief against the defendant." *Id*. (citations omitted).

4. Defendant's Motion to Dismiss is **HEREBY DENIED**.

5. Defendant shall have 20 days to file an answer to Plaintiff's petition.

6. Defendant's Amended Motion for Protective Order is **HEREBY DENIED** without prejudice.

* * *

Insurance—Discovery—Motion to compel better responses to request for production is granted where medical provider failed to state reasons for objections and made only boilerplate objections

HESS SPINAL & MEDICAL CENTERS OF LAKELAND LLC, a/a/o Kinsley Durant, Plaintiff, v. PEAK PROPERTY & CASUALTY INSURANCE CORPORATION, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-029469, Division J. February 28, 2022. J. Logan Murphy, Judge. Counsel: C. Spencer Petty, for Plaintiff. Philip L. Colesanti II, Roig Lawyers, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL

BEFORE THE COURT without a hearing is Defendant's Motion to Compel Better Responses to Defendant's Request to Produce and for Production of Documents, filed November 5, 2021.

In response to Defendant's request for production, Plaintiff failed to state "the reasons for the objection." Fla. R. Civ. P. 1.350(b). Instead, Plaintiff interposed the same boilerplate objection to each request for production.[1] This is clearly improper, especially given the apparent relevance of the requests to Defendant's affirmative defenses. *See* FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE 62-63 (2021 ed.) ("Boilerplate objections . . . are insufficient without a full, fair explanation particular to the facts of the case."); *Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 371 (11th Cir. 2009) ("We have noted that boilerplate objections may border on a frivolous response to discovery requests."); *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) ("[T]he mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection to an interrogatory."); *Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 688 (S.D. Fla. 2011) ("Judges in this District typically condemn boilerplate objections as legally inadequate or 'meaningless.' "); *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 400 (S.D. Fla. Apr. 10, 2008) ("Objections which state that a discovery request is 'vague, overly broad, or unduly burdensome' are, by themselves, meaningless, and are deemed without merit by this Court."); *Heckenberg v. Artemis Lifestyles Servs., Inc.*, No. 6:20-cv-96-GAP-GJK, 2021 WL 2939949, at *2 (M.D. Fla. June 1, 2021) (holding boilerplate objections to have waived any objections asserted by the responding party); *Rivera v. 2K Clevelander, LLC*, No. 16-21437-Civ-KING/TORRES, 2017 WL 5496158, at *2 (S.D. Fla. Feb. 22, 2017) ("Boilerplate objections and generalized responses are improper."); *Alhassid v. Bank of Am., N.A.*, No. 14-20484, 2015 WL 1120273, at *2 (S.D. Fla. Mar. 12, 2015) ("Indeed, boilerplate objections may also border on a frivolous response to discovery requests.").[2]

Accordingly,

1. Defendant's Motion to Compel Better Responses to Defendant's Request to Produce and for Production of Documents is GRANTED.

2. Within ***20 days*** of the date of this order, Plaintiff shall serve amended responses to Defendant's Request to Produce to Plaintiff (Sep. 2, 2021). Any objections must be stated with particularity and fairly explain the circumstances and facts justifying the objection. Failure to comply with this obligation will result in a waiver of the objection and the imposition of costs and fees against Plaintiff.

3. The Court retains jurisdiction to address Defendant's request for attorney fees incurred in bringing this motion. After Plaintiff serves amended responses, Defendant may set the issue for hearing to determine whether fees should be imposed. *See* Fla. R. Civ. P. 1.380(a)(4) ("If the motion is granted *and after opportunity for hearing* . . . .") (emphasis added). The Court will accommodate the parties on an expedited basis.

4. The May 12, 2022 hearing is CANCELLED.

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[1]"Objection. Irrelevant, the request is not likely to lead to the discovery of admissible evidence, the request is vague and ambiguous, the request is overly broad and unduly burdensome, and the request seeks documents that are covered by the work produce [*sic*] privilege." The Court notes that Plaintiff's counsel has used the identical boilerplate objection in other litigation, down to the misspelling of the second-to-last word.

[2]Rule 1.350 is derived from Federal Rule of Civil Procedure 34. Fla. R. Civ. P. 1.350 *committee note* (1972). *See also Am. Honda Motor Co., Inc. v. Votour*, 435 So. 2d 368, 369 (Fla. 4th DCA 1983) ("The cases involve application of Rule 34(a) of the Federal Rules of Civil procedure, analogous to Rule 1.350(a), Florida Rules of Civil Procedure.").

* * *

Insurance—Venue—Venue selection clause

HESS SPINAL & MEDICAL CENTERS OF NEW PORT RICHEY LLC., a/a/o Richard Brakens, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, a Florida corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-020169, Division I. March 9, 2022. Leslie K. Schultz-Kin, Judge. Counsel: C. Spencer Petty, for Plaintiff. Marsha Moses and Teodora Siderova, Kubicki Draper, Tampa; and Norma Kassner, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS RE: IMPROPER VENUE PURSUANT TO VENUE SELECTION CLAUSE & FLORIDA DOMESTIC CORPORATION STATUS VIA FLA. STAT. 47.051 OR IN THE ALTERNATIVE, DEFENDANT'S MOTION TO TRANSFER VENUE

THIS CAUSE, having come before the Court for a hearing on Wednesday, February 23, 2022 at 3 P.M. upon Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 or in the Alternative, Defendant's Motion To Transfer Venue, and the Court having reviewed the filings and the Court docket, having heard the parties' arguments, and being otherwise advised in the premises, it is:

ORDERED AND ADJUDGED as follows:

1. Defendant's, UNITED AUTOMOBILE INSURANCE COMPANY, Motion to Transfer Venue is **GRANTED.**

2. Pursuant to the Defendant's policy, the Defendant's affidavit, and the case law presented by the Defendant, said action shall be transferred from Hillsborough County, Florida to Miami-Dade County, Florida.

3. The Plaintiff shall bear the cost to transfer the case to Miami-Dade County, Florida to be paid within 30 days of the date of this order.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where PIP statute provides that charge submitted for amount less than 200% of allowable amount under Medicare Part B fee schedule may be paid in amount of charge submitted, and PIP policy at issue does not require insurer to pay full amount of such charges, insurer was entitled to pay only 80% of those charges

DAN A. LEWIS, D.C., a/a/o Reynaldo Garcia, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil. Case No. 19-CC-038964, Division K. March 3, 2022. Jessica Costello, Judge. Counsel: Matthew Emanuel, Landau & Associates, P.A., for Plaintiff. Marsha M. Moses, Kubicki Draper, P.A., Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE was before the Court on Plaintiff's Motion for Summary Judgement filed on April 2, 2021, Defendant's Motion to Strike and/or Exclude Issues Not Plead by the Plaintiff or in the Alternative Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment as to Billed Amount with the Court conducting a hearing on December 7, 2021, and Defendants' Motion for Summary Judgment filed on January 21, 2021. The Court, being otherwise fully advised in the premises and considering the affidavits, memorandum, exhibits, and argument of counsel, finds as follows:

I. RELEVANT PLEADINGS AND UNDISPUTED FACTS

1. Provider Plaintiff ("Clinic") filed this lawsuit to recover personal injury protection ("PIP") benefits allegedly due for medical services provided to the Claimant, REYNALDO GARCIA (hereinafter referred to as the "Claimant"), under an automobile insurance policy by State Farm Mutual Automobile Insurance Company ("State Farm") and governed by the Florida No-Fault ("PIP") Statute, section 627.736, Florida Statutes (2012) ("§ 627.736").

2. On May 22, 2014, the Claimant allegedly sustained injuries in an automobile accident. Pursuant to an assignment of benefits provided by the Claimant, the Plaintiff submitted bills to State Farm totaling $1,270.30 (the "Bills") for medical services/treatment allegedly rendered to the Claimant for date of service June 6, 2014, June 9, 2014, June 11, 2014, June 13, 2014, June 16, 2014, June 20, 2014, and June 23, 2014.

3. State Farm allowed $1,114.58 and paid the Plaintiff $891.65 for the amounts billed by the Clinic in the Bills pursuant to its 9810A policy and the PIP statute. This amount equals eighty percent (80%) of the total allowable medical expenses calculated pursuant to the schedule of maximum charges set forth in § 627.736 (5)(a)1 (2013) (the "Schedule of Maximum Charges") plus medical payments coverage (20%) as evidenced by Defendant's Affidavit of its Claim's Specialist.

4. The parties stipulated at the hearing that State Farm's 9810A Policy provided proper notice and proper election of the schedule of maximum charges and the Policy at issue is before the Court under Plaintiff's Notice of Filing Insurance Policy in Support of Motion for Summary Judgment on April 2, 2021.

5. The Clinic now seeks additional PIP benefits from State Farm claiming, for the first time in its Motion for Summary Judgment, a figure equal to 100% of the amount billed less the amount paid by State Farm **or** 80% of 200% of the applicable Medicare fee schedule ("fee schedule") for those codes billed below the fee schedule, specifically codes 97032, 97110, 98940, 99212, and 99214.

6. Defendant contends it properly paid all bills either at 80% of the applicable fee schedule or at 80% of the billed amount for codes 97032, 97110, 98940, 98941, 99212, and 99214, and pursuant to its 9810A Policy and Florida Statutes § 627.736. As stipulated by the parties, no other codes are at issue.

A. Standard for Summary Judgment and Issue Presented.

7. Florida Rule of Civil Procedure 1.510(a) states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

8. Summary judgment is appropriate where, as here, the lawsuit depends on the legal effect of a written instrument. *See Ball v. Fla. Podiatrist Trust,* 620 So.2d 1018, 1022 (Fla. 1st DCA 1993); *Angell v. Don Jones Ins. Agency, Inc.,* 620 So.2d 1012, 1014 (Fla. 2d DCA 1993). An insurance policy must be enforced as written and terms given their plain meaning. *See, e.g., Gen. Star Indem. Co. v. West Fla. Village Inn, Inc.,* 874 So.2d 26, 29-30 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1070b]. Further, when called upon to interpret a statute central to a summary judgment the issue is one of law. *See e.g., Fitzgerald v. S. Broward Hosp. Dist.,* 840 So. 2d 460, 461 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D813b]. "A court's determination of the meaning of a statute begins with the language of the statute. If that language is clear, the statute is given its plain meaning, and the court does not 'look behind the statute's plain language for legislative intent or resort to rules of statutory construction.' " *Lieupo v. Simon's Trucking, Inc.,* 286 So. 3d 143, 145 (Fla. 2019) [44 Fla. L. Weekly S298a] (internal citations omitted) (quoting *City of Parker v. State,* 992 So. 2d 171, 176 (Fla. 2008) [33 Fla. L. Weekly S671a]).

9. Here the issue presented is one of law and the reading of State Farm's 9810A Policy and Florida's No-Fault Statute.

B. Application of Controlling Precedent to the Issue Presented.

10. The parties appeared before the Court on December 7, 2021, presenting opposing arguments, generally, on the application of the Second District Court of Appeal's opinion in *State Farm Mutual Automobile Insurance Co. v. MRI Associates of Tampa, Inc. d/b/a Park Place MRI,* 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a] versus the Fifth and Fourth District Courts of Appeal opinions in *Geico Indem. Co. v. Accident & Injury Clinic, Inc. (a/a/o Frank Irizarry,* 290 So. 3d 980 (Fla. 5th DCA 2020) [44 Fla. L. Weekly D3045b]; *Hands On Chiropractic PL (a/a/o Justin Wick) v. GEICO Gen. Ins. Co.,* 327 So. 3d 439 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a]; and *Geico Indem. Co. v. Muransky Chiropractic P.A.,* 323 So. 3d 742 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a], respectively.

11. Since the December 7, 2021 hearing the Court has been made aware of the Florida Supreme Court's opinion in *MRI Associates of Tampa, Inc. v. State Farm Mut. Automobile Ins. Co.,* SC18-1390, 2021 WL 5832298 (Fla. Dec. 9, 2021) [46 Fla. L. Weekly S379a], which has been filed by State Farm as supplemental authority in this proceeding. Accordingly, the Court considers the Florida Supreme Court's opinion in determining the merits of Clinic's motion.

12. In *Pardo v. State,* the Florida Supreme Court explained the hierarchy of authority within the Florida court system as follows:

> The [d]istrict [c]ourts of [a]ppeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts—[d]istrict [c]ourts of [a]ppeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between [d]istrict [c]ourts of [a]ppeal, a sister district's opinion is merely persuasive.

Id at 667.

13. Given the hierarchy articulated in *Pardo,* this Court considers the Florida Supreme Court and Second District opinions as controlling to the issue presented.

14. Here, on stipulated fact the pure questions of law presented by State Farm's 9810A Policy language and Florida No-Fault Statute, concerns whether State Farm's payments at the schedule of maximum charges at 80% or at 80% of the billed amount as presented were proper. The Court finds the payments were proper and, therefore, denies the Clinic's Motion for Summary Judgment.

II. FINDINGS

A. State Farm's Payment of PIP Benefits was Proper Pursuant to its 9810A Policy and §§ 627.736, 627.736(5)(a); and 627.736(5)(a)5., Fla. Stat.

15. The PIP Statute requires that automobile insurance policies issued in Florida must provide coverage only for "reasonable" medical expenses stating:

> 627.736 Required personal injury protection benefits; exclusions; priority; claims.—
>
> (1) Required Benefits.—An insurance policy complying with the security requirements of s. 627.733 must provide personal injury protection to the named insured,. . .as follows:
>
> (a) Medical benefits.—Eighty percent of all **reasonable expenses** for medically necessary medical, surgical, X-ray, dental, and rehabilitative services . . . if the individual receives initial services and care pursuant to subparagraph 1, within 14 days after the motor vehicle accident. . . .

16. Further, Fla. Stat. §627.736(5)(a) (2012) (emphasis added), specifies, in relevant part:

> (5) CHARGES FOR TREATMENT OF INJURED PERSONS.—
>
> (a) A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge the insurer and injured party **only a reasonable amount** pursuant to this section for the services and supplies rendered . . . . However, such a charge may not exceed the amount the person or institution customarily charges for like services or supplies. In determining whether a charge for a particular service, treatment, or otherwise is reasonable, consideration may be given to evidence of usual and customary charges and payments accepted by the provider involved in the dispute, reimbursement levels in the community and various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages, **and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply. 1. The insurer may limit reimbursement to 80 percent of the following schedule of maximum charges:**
>
> a. For emergency transport and treatment by providers licensed under chapter 401, 200 percent of Medicare.
>
> b. For emergency services and care provided by a hospital licensed under chapter 395, 75 percent of the hospital's usual and customary charges.
>
> c. For emergency services and care as defined by s. 395.002 provided in a facility licensed under chapter 395 rendered by a physician or dentist, and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community.
>
> d. For hospital inpatient services, other than emergency services and care, 200 percent of the Medicare Part A prospective payment applicable to the specific hospital providing the inpatient services.
>
> e. For hospital outpatient services, other than emergency services and care, 200 percent of the Medicare Part A Ambulatory Payment Classification for the specific hospital providing the outpatient services.
>
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:
>
> (I) The participating physicians fee schedule of Medicare Part B, except as provided in sub-sub-subparagraphs (II) and (III).
>
> (II) Medicare Part B, in the case of services, supplies, and care provided by ambulatory surgical centers and clinical laboratories.
>
> (III) The Durable Medical Equipment Prosthetics/Orthotics and Supplies fee schedule of Medicare Part B, in the case of durable medical equipment.
>
> However, if such services, supplies, or care is not reimbursable under Medicare Part B, as provided in this sub-subparagraph, the insurer may limit reimbursement to 80 percent of the maximum reimbursable allowance under workers' compensation, as determined under s. 440.13 and rules adopted thereunder which are in effect at the time such services, supplies, or care is provided. Services, supplies, or care that is not reimbursable under Medicare or workers' compensation is not required to be reimbursed by the insurer.
>
> . . . .
>
> 5. An insurer may limit payment as authorized by this paragraph only if the insurance policy includes a notice at the time of issuance or renewal that the insurer may limit payment pursuant to the schedule of charges specified in this paragraph. A policy form approved by the office satisfies this requirement. **If a provider submits a charge for an amount less than the amount allowed under subparagraph 1., the insurer may pay the amount of the charge submitted.**

(emphasis added).

17. A plain reading of State Farm's Policy Form 9810A policy makes it clear that they will only pay 80% of a "reasonable charge" and "in no event will" they pay more "than 80% of the following No-Fault schedule of maximum charges. . ." *See* Notice of Filing Supplemental Case Law, December 10, 2021, State Farm Policy Form 9810A at p. 16. Thus, as noted by the Florida Supreme Court, the Policy at issue can only be read as "setting a ceiling but not a floor" to determine a reasonable charge. *MRI Associates of Tampa, Inc. v. State Farm Mut. Automobile Ins. Co.,* SC18-1390, 2021 WL 5832298 (Fla. Dec. 9, 2021) [46 Fla. L. Weekly S379a].

18. In *State Farm Mut. Auto. Ins. Co. v. MRI Associates of Tampa, Inc. d/b/a Park Place MRI,* 252 So. 3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a], the Second DCA considered the same 9810A policy, which is before the Court in the present matter. The Second District found that the 9810A policy provided legally sufficient notice to limit the charges to the schedule of maximum charges pursuant to F.S. 627.736(5)(a)1., as well as make payments according to a reasonable amount.

19. Within the binding Second DCA opinion, the Second District described how the Florida Supreme Court in *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So. 3d 973, 975 (Fla. 2017) [42 Fla. L. Weekly S38a]—expressly rejected the argument that an insurer's policy must completely disclaim the reasonable charge methodology to elect the schedule of maximum charges, specifically stating: "Accordingly, we reject Park Place's argument that State Farm's policy contains an 'unlawful hybrid method' of reimbursement calculation and is therefore impermissibly vague." *Id.* at 778.

20. In F.S. 627.736(1)(a), the Legislature mandated that an insurer is obligated to pay "**(e)ighty percent of all reasonable expenses** for medically necessary" services (Emphasis added). The remaining 20 percent is charged to the Insured as a co-payment, or may be covered by Medical Payments Coverage, if the insured purchased such coverage.

21. The No-Fault Act prohibits providers from billing Insureds more than a "reasonable charge," which the Act delineates according to both a fact-dependent inquiry, and a schedule of maximum charges. Where a provider charges less than the scheduled *maximum,* the No-Fault Act neither excuses such charge from being otherwise reasonable, nor precludes an insurer from reimbursing 80% of the billed amount as a reasonable charge: "If a provider submits a charge for an amount less than the amount allowed in subparagraph 1., the insurer ***may*** pay the amount of the charge submitted." F.S. 627.736(5)(a)5.

22. The No-Fault Act has requires PIP insurers pay 80% of reasonable medical expenses. This 80% reimbursement requirement is found in § 627.736(1):

> 627.736(1) REQUIRED BENEFITS.
>
> An insurance policy complying with the security requirements of s. 627.733 **must provide personal injury protection** to the named insured. . . **to a limit of $10,000 in medical** and disability **benefits**. . . (Emphasis added).
>
> Medical benefits is then defined as:
>
> 627.736(1)(a) Medical benefits.— **Eighty percent of all reasonable expenses** for medically necessary medical, surgical, X-ray, dental, and rehabilitative services. . .

(Emphasis added).

23. As explained by the Florida Supreme Court, this 80% payment by insurers is the No-Fault Act's "basic coverage mandate":

> [T]he PIP statute sets forth a *basic coverage mandate:* every PIP insurer is required to—this is, the insurer "shall"—**reimburse eighty percent of reasonable expenses for medically necessary services.** *This provision is the heart of the PIP statute's coverage requirements. See Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147, 155 (Fla. 2013) [38 Fla. L. Weekly S517a] (Emphasis added).

24. So fundamental is the 80% provision the Florida Supreme Court has emphatically held that a "PIP policy cannot contain a statement that the insurer will not pay eighty percent of reasonable charges because no insurer can disclaim the PIP statute's reasonable medical expenses coverage mandate." *Allstate Ins. v. Orthopedic Specialists,* 212 So. 3d 973, 977 (Fla. 2017) [42 Fla. L. Weekly S38a]. Section 627.736(5)(a) dictates that "any [provider] lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge only a reasonable amount for the products, services, and accommodations rendered." § 627.736(5)(a).

25. If a "reasonable charge" may not exceed the amount that the provider actually charges, pursuant to Section (5)(a)5., then an insurer is never statutorily obligated to pay more than 80% of the face amount of a bill. Any other interpretation would be at odds with The No-Fault Act coverage mandate of Section (1)(a) and provisions of Section (5)(a).

26. The Florida Supreme Court agreed with this interpretation of the coverage mandate of Section (1)(a) and provision of (5)(a), stating that:

> "The permissive nature of the statutory notice language [in (5)(a)5.] does not in any way signal that the insurer will be so constrained by such an election. On the contrary, the language signals that the insurer is given an option that may be used in addition to other options that are authorized. This notice language echoes the underlying authorization to limit reimbursements under the schedule of maximum charges: 'The insurer *may limit* reimbursement to 80 percent of the [listed] schedule of maximum charges.' § 627.736(5)(a)1., Fla. Stat. (emphasis added). Given the full context of these provisions, a reasonable reading of the statutory text requires that reimbursement *limitations* based on the schedule of maximum charges be understood—as State Farm contends—simply as an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates.
>
> *MRI Associates of Tampa, Inc. v. State Farm Mut. Automobile Ins. Co.,* SC18-1390, 2021 WL 5832298 (Fla. Dec. 9, 2021) [46 Fla. L. Weekly S379a]

27. State Farm's 9810A Policy complies with the basic coverage mandate:

> *We* will pay in accordance with the *No-Fault Act* properly billed and documented reasonable charges for bodily injury to an insured caused by and accident resulting from the ownership, maintenance, or use of a motor vehicle as follows:
>
> 1. Medical Expenses—**We will pay 80% of properly billed and documented medical expenses** . . .
>
> (Emphasis added).

28. State Farm's 9810A Policy also provides notice that it will utilize the schedule of maximum charges and reasonableness factors of section 627.736(5)(a) as warranted by the charge presented for reimbursement:

> ***We* will limit payment of Medical Expenses described in the Insuring Agreement of this policy's No-Fault Coverage to 80% of a properly billed and documented reasonable charges, but in no event will we**
>
> **pay more than 80% of the following No-Fault Act "schedule of maximum charges**" including the use of Medicare coding polices and payment methodology of the federal Centers for Medicare and Medicaid Services, included applicable modifiers:
>
> * * *
>
> f. For all other medical services, supplies, and care, 200 percent of the allowable amount under:
>
> (I) The participating physicians fee schedule of Medicare Part B,

except as provided in sub-sub-subparagraphs (II) and (III) . . .

29. The Policy also defines a "Reasonable Charge" as:

> *Reasonable Charge,* which includes reasonable expense, means an amount determined by *us* to be reasonable in accordance with the No-Fault Act, considering one or more of the following:
>
> 1. usual and customary charges;
>
> 2. payments accepted by the provider;
>
> 3. reimbursement levels in the community;
>
> 4. various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages,
>
> 5. the schedule of maximum charges in the *No-Fault Act,*
>
> 6. other information relevant to the reasonableness of the charge for the service, treatment, or supply; or
>
> 7. Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers, if the coding policy or payment methodology does not constitute a utilization limit.

30. The above language shows State Farm's Policy provides clear and unambiguous notice of utilizing the schedule of maximum charges. Thus, as a matter of law, State Farm may properly reimburse at 80% of the schedule of maximum charges for charges exceeding the schedule amount.

31. Further, State Farm's 9810A Policy also provides clear and unambiguous notice that it will pay only 80% of properly billed medical expenses and that it would limit payment of expenses to 80% of properly billed reasonable charges. Accordingly, as a matter of law, State Farm did not violate the No-Fault Act where it paid the Clinic's charges for the codes at issue. State Farm, in application of the holdings of the Florida Supreme Court and Second District in *MRI Associates,* had the ability to pay 80% of the billed amount.

32. Again, the final sentence of section (5)(a)5. uses "may" in its permissive sense and cannot be construed as requiring an insurer to pay 100% of a provider's reasonable charges. State Farm was not *required* to pay provider's charges at 100%—when those charges are less that the schedule of maximum charges—State Farm could not have violated the No-Fault Act by promising to pay 80% of reasonable charges in accordance with the basic coverage mandate.

33. Therefore, in this case, State Farm accepted the charges for the codes at issue as reasonable, as allowed by controlling precedent and pursuant to (1)(a): paid "**(e)ighty percent of all reasonable expenses. . .**". Any other interpretation would be at odds with the PIP coverage mandate of Section (1)(a), provisions of Section (5)(a), and the State Farm Policy Form 9810A, as well as eradicating the insured's statutory and contractual obligation under the policy to be responsible for the 20% co-payment.

34. In support of its argument, the Clinic substantially relies on the decision of *GEICO Indemnity Company v. Accident & Injury Clinic, Inc. a/a/o Frank Irizarry,* 290 So. 3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b], and the more recent opinion in *Hands On Chiropractic PL (a/a/o Justin Wick) v. GEICO Gen. Ins. Co.,* 327 So. 3d 439 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D2023a].

35. In both *GEICO* cases, GEICO paid 80% of the charges, which were billed at less than 200 percent of the Medicare Fee Schedules. *Id.* at 2. The medical provider argued that GEICO was required to pay 100% of any charges that were billed at less than 200% of the applicable Medicare fee schedule. *Id.* Importantly, the applicable GEICO insurance policy specifically provided: "A charge submitted by a provider, for an amount less than the allowed amount above, ***shall*** be paid in the amount of the charge submitted." *Id.* (Emphasis added).

36. But, again, State Farm's policy language is different, the 9810A Policy form states:

> **We will limit payment of Medical Expenses** described in the Insuring Agreement of this policy's No-Fault Coverage to **80% of a properly billed** and documented **reasonable charge, *but in no event will we pay more than 80% of the following No-Fault Act "schedule of maximum charges"*** including the use of Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers. . .

(Emphasis added).

37. The Clinic's reliance on the *GEICO* decisions are misplaced as GEICO's policy language specifically stated that it ***shall*** pay 100% of the amount of the charge submitted, in contravention of the very language of the PIP statute. It is undisputed that there is no such language in State Farm's 9810A Policy. Thus, unlike the policy language at issue in GEICO, which changed the sentence in the statute from "the insurer **may** pay," GEICO's policy stated that "a provider . . . **shall** be paid." No such statutory change exists in State Farm's 9810A Policy as it mirrors the statute.

38. Specifically, footnote three to *Hands On Chiropractic* states: "[i]n Geico's Florida Policy Amendment FLPIP 01-13, Geico contractually elected to always pay the billed amount in full where the billed amount was less than 80 percent of the 200 percent of the applicable fee schedule." **There is no such language in the State Farm 9810A Policy, and no such finding by any appellate court in the State of Florida in reviewing the State Farm 9810A Policy requires that State Farm pay in excess of 80% of the billed amount**.

39. The Fifth District in *Hands On Chiropractic* stated that:

> "There is nothing in the applicable statute or Geico's policy that allows it to pay 80 percent of the billed amount. It must either pay the amount allowed based on the applicable fee schedule (80 percent of 200 percent) or, if the billed is less than the amount allowed, it is to be paid in full. Therefore, **Geico's hybrid payment** to Hands On at 80 percent of the billed amount **is impermissible**."

(Emphasis added).

40. However, the only district court opinion prior to the Florida Supreme Court analyzing the 9810A Policy at issue is *State Farm Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc., d/b/a Park Place MRI,* 252 So.3d 773 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a], which "reject[s] Park Place's argument that State Farm's policy contains an **'unlawful hybrid method' of reimbursement calculation** and is therefore impermissibly vague." Thus, the Second District and Florida Supreme Court explicitly allow the two methodologies.

41. Additionally, the Fifth District in *Hands On Chiropractic* stated:

> "We hold that when an insurer chooses to reimburse according to schedule rates, it **must** pay 80 percent of 200 percent of the statutorily adopted applicable fee schedule. There is nothing in the statutory scheme that permits a PIP insurer to limit reimbursements to 80 percent of the billed amount."

42. This is in direct conflict with the Second District and recent Florida Supreme Court ruling that makes it crystal clear that State Farm is allowed to both utilize the cap at fee schedule while also being allowed to pay 80% of reasonable when the charge is less than the fee schedule cap. It is also in direct conflict with F.S. 627.736 (5)(a)(5) which clearly states "may" not "shall."

43. Likewise, this Court is not persuaded by *GEICO Indemnity Co., Muranksy Chiropractic, P.A. a/a/o Carlos Dieste,* No. 4D21-457 [323 So. 3d 742] (Fla. 4th DCA June 24, 2021) [46 Fla. L. Weekly D1513a] as the Fourth District relies on the Third District opinion in *GEICO Indem. Co. v. Accident & Inj. Clinic. Inc. a/a/o Frank Irizarry,* 290 So. 3d 980, (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b. Again, these cases misinterpret the statute in direct contradiction to the Florida Supreme Court's opinion in *MRI Assocs.* by which this Court is now bound.

44. The Fourth and Fifth District opinions are not binding opinions on this Court and are also distinguishable as the outcome turns on the very specific language of the GEICO policy. This Court instead relies on the Florida Supreme Court and Second District opinions, which reviewed the same Policy before the Court in this matter.

WHEREFORE, Plaintiff's Motion for Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgment is **GRANTED**. The Court (including successor Civil Division P) reserves jurisdiction to consider any claims for attorney's fees and costs, if applicable.

* * *

Insurance—Motion to dismiss based on choice of law was rendered moot when complaint at which it is directed was amended prior to hearing on motion—Additionally, procedural motion is improper vehicle to seek ruling on affirmative defense

MRI ASSOCIATES OF LAKELAND LLC, a/a/o Hannah Franciose, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Small Claims Division. Case No. 21-CC-029679, Division K. January 25, 2022. Jessica G. Costello, Judge. Counsel: James R. Collins, Jr., FL Legal Group, Tampa, for Plaintiff. Calvin Fox, Kubicki Draper, Fort Lauderdale, for Defendant.

ORDER ON THE DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the Court upon the Defendant's Motion to Dismiss, having heard the arguments of the parties, and considered the law on this matter, finds the following:

1. Due to the pending motion to dismiss in this case, Plaintiff had the right to amend the complaint and did so properly before the Defendant's Motion to Dismiss was heard. *Boca Burger, Inc. v. Forum,* 912 So.2d 561 (Fla. 2005) [30 Fla. L. Weekly S649a]

2. The Defendant's procedural motion to dismiss based on choice of law was moot as it was directed at a pleading that was ***amended prior*** to the hearing date.

3. When ruling on a procedural motion, all allegations in the amended complaint must be taken as true and consideration of the motion cannot go outside of the four corners of the complaint; Since the amended complaint alleges the elements of breach of contract and that Florida law should apply based upon *Fla. Stat.* §§ 627.733, 627.736, and *Jiminez v. Faccone* 98 So.3d 621 (Fla. 2d DCA) [37 Fla. L. Weekly D1918a] this must be taken as true.

4. The attached certified policy did not contradict, nor repugnant to the allegations contained in the Amended Complaint. *See Fladell v. Palm Beach County Canvassing Bd.,* 772 So.2d 1240, 1242 (Fla. 2000) [25 Fla. L. Weekly S1102b] (For proposition that an exhibit can only warrant the dismissal of a complaint where it FACIALLY NEGATES an allegation contained within the complaint).

5. Additionally, Defendant's procedural motion is the improper vehicle to raise ask for a ruling on an affirmative defense. *See Julian v. Johnson,* 438 So.2d 503 (Fla. 3d. DCA 1983) (*for proposition* that *stipulated fact and/or admissible evidence regarding elements of Fla. Stat.* § *627.733 is required to make a ruling on a choice of law matter*.)

It is therefore ORDERED AND ADJUDGED:

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

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where charges submitted were greater than 80% of 200% of allowable amount under Medicare fee schedule, but less than 200% of allowable amount under fee schedule, insurer that adopted statutory fee schedule was required to pay 80% of 200% of fee schedule amount, not 80% of billed amount—Finding that treatment was related and necessary is only reasonable inference that can be drawn from fact that insurer claims to have reimbursed bills in accordance with policy that only permits payment when treatment is related and necessary—Reasonableness of charges is not issue where policy adopts fee schedule—Deductible—Insurer improperly applied deductible after reducing bills through application of fee schedule rather than applying deductible to 100% of billed expenses

WITHERELL CHIROPRACTIC CENTER, a/a/o Tacarra Stubbs, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 20-006708 COSO (60). February 10, 2022. Allison Gilman, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Sean Sweeney, for Defendant.

ORDER ON

1) Plaintiff's Motion for Partial Summary Judgment

2) Plaintiff's Motion for Summary Judgment as to the Application of Deductible.

3) Plaintiff's Motion for Entitlement for Attorneys Fees and Costs Pursuant to 57.105 with Respect to Defendant's Affirmative Defense of Exhaustion.

4) Defendant's Motion for Summary Judgment and Request for 57.105 Sanctions.

1) Plaintiff's Motion for Partial Summary Judgment

This cause having come before the Court on Plaintiff's Motion for Summary Judgement regarding the reimbursement of CPT 98941, 97112 and 97110 which was filed on March 31, 2021. The motion addressed the issue presented in the declaratory count (Count II) in Plaintiff's Statement of Claim which asks the Court to determine if Florida Statute 627.736 permits the Defendant to remit payment for services billed below 200% of the applicable Medicare Part B fee schedule at 80% of the billed amount or if the Defendant is required to remit payment based upon 80% of 200% of the applicable Medicare Part B fee schedule and if the Court grants same then to the amount due and owing, the Court having heard argument of the parties and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is granted for the reasons set forth below.

The Plaintiff billed, in part, for CPT 98941, 97112 and 97110 from May 11, 2015-December 14, 2015. The amount charged for each code was greater than 80% of 200% of the Medicare Part B physician's fee schedule but less than 200% of the Medicare Part B participating physician's fee schedule. The Defendant remitted payment for said services at 80% of the billed amount.

The Defendant contends that their policy specifically elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1. The Plaintiff does not contest the Defendant's position that the at-issue policy elected the schedule of maximum charges as provided in Florida Statute 627.736(5)(a)1 for paying related and necessary bills.

The issue presented in the declaratory count (Count II) is whether Florida Statute 627.736 requires the Defendant to remit payment for charges that are less than 200% of the applicable Medicare Part B physician's fee schedule at 80% of 200% of the applicable Medicare Part B physician's fee schedule as a result of the Defendant's adoption of the fee schedule set forth in Florida Statute 627.736 or whether the Defendant is able to remit payment based upon 80% of the billed amount.

The Court finds that the fee schedule adopted by the Defendant into their policy does not permit an insurer to remit payment based upon 80% of the billed amount under the instant set of facts. The Court finds that said fee schedule compels an insurer, who has adopted same, to remit payment for amounts charged that are greater than 80% of 200% of the Medicare Part B physician's fee schedule but less than 200% of the Medicare Part B participating physician's fee

schedule at 80% of 200% of the Medicare Part B participating physician's fee schedule. See *Geico Ind. Co. v. Accident & Injury Clinic a/a/o Frank Irizarry,* 290 So.3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b] and *Geico Indemnity Company v. Muransky Chiropractic a/a/o Carlos Dieste,* 4D21-457, 2021 WL 2584107, (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a]. The *Irizarry* court in answering the certified question "Does the plain language of the PIP statute preclude an insurer from limiting its reimbursement to 80% of the total billed amount when the amount billed is less than the statutory fee schedule?" held that "as for payment of the charges, the statute authorizes insurers to limit reimbursement to 80% of an amount fixed through a fee schedule, see 627.736(5)(a)1.a-f" and that "80% of the fee schedule" is "the required amount an insurer must pay" if the insurer elected the fee schedule method. *Id*. The Fifth District held that the only exception is when a provider's charge is less than 80% of 200% of the Medicare Part B participating physician's fee schedule amount and in such a case an insurer would have the option of paying 80% of 200% of the Medicare Part B participating physician's fee schedule or 100% of the billed amount. *Id*. The Fourth District Court of Appeals in *Muransky* cited the *Irizarry* opinion with approval and held that "80% of the fee schedule [is] (the required amount an insurer must pay)." *Id*.

MRI Associates of Tampa, Inc. v. State Farm, 2021 WL 5832298, is not applicable. The Defendant's policy does not contain the same language as the State Farm policy. In addition, the Defendant, in this case, has taken a position that the fee schedule set forth in Florida Statute 627.736 governs the reimbursement of related and necessary services. Defendant's first affirmative defense, numerous answers to different interrogatories all assert that "the Defendant states that the subject policy and contract of insurance in this case properly elected the Medicare Fee Schedule methodology for reimbursements." See also Defendant's Motion for Summary Judgment where they assert in their Preliminary Statement "The insured's personal automobile insurance contract with United Auto specifically provides that United Auto will limit reimbursement under the personal injury protection section of the insurance policy to eighty percent of the schedule of maximum charges provided for under F.S. §627.736(5)(a)(1)(2013). United Auto reimbursed the Plaintiff accordingly . . . " In addition, the explanations of benefits for the subject codes reference X3043 which state that "the allowed amount for this procedure is based upon 200% of the Participating Level of Medicare Part B fee schedule for the region in which the services were rendered. (Reference: CMS Physician Fee Schedule File)." Lastly, and even the affidavit filed by Defendant of Lilian Menendez claims payment should be made pursuant to the foregoing fee schedule. The Defendant in this case, at no point, has ever asserted that payment should be made or even that their policy permits them to issue payment based upon 80% of a reasonable amount.

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment as to the declaratory count is granted. The Court finds that the Defendant, having adopted the fee schedule set forth in Florida Statute 627.736, is required to remit payment for charges that are greater than 80% of 200% of the applicable Medicare Part B participating physician's fee schedule but also less than 200% of the applicable Medicare Part B participating physician's fee schedule at 80% of 200% of the applicable Medicare Part B physician's fee schedule and that paying 80% of the billed amount is an improper underpayment.

Having found in favor of the Plaintiff on the declaratory count the Court addresses the breach of contract claim and further finds that the subject treatment is related and necessary. The Defendant claims to have processed and reimbursed the Plaintiff for the subject bills in accordance with the subject policy and Florida Statute 627.736 (See their first and second affirmative defenses, explanations of benefits and PIP log) and in response to Plaintiff's interrogatory #10 which asked the Defendant to provide their position on the relatedness and necessity of the subject treatment the Defendant referred the Plaintiff to Defendant's explanations of benefits and PIP log. Because the Defendant's policy and Florida Statute 627.736 only permit payment of PIP benefits when the service is related and necessary the only reasonable inference that can be drawn is that the subject treatment was related and necessary. The Defendant did not offer anything to rebut or dispute the relatedness and necessity of the subject treatment. The Plaintiff also filed the affidavit of Charles Witherell, DC which asserts that the treatment was related and necessary. Based on the evidence that was presented a reasonable jury would not return a verdict for the Defendant finding that the treatment was not related and / or not necessary.

Reasonableness is not an issue as the policy adopts the fee schedule and based on the policy all of the at-issue treatment should be paid based upon 80% of 200% of the Medicare Part B participating physician's fee schedule. The Court takes judicial notice of the print outs from CMS.gov, as attached to Plaintiff's Motion for Summary Judgment, which provide the Medicare Part B participating physician's fee schedule amounts for CPT 98941, 97112 and 97110. After plugging in said amounts to the reimbursement formula (80% of 200% of the Medicare Part B participating physician's fee schedule) and then subtracting the amount previously paid the Court finds that the Defendant owes an additional $203.94 plus interest.

2) Plaintiff's Motion for Summary Judgment as to the Application of Deductible.

The Court finds that the Defendant reduced Plaintiff's bills in accordance with the adopted fee schedule before applying the deductible. The Defendant did not properly apply the deductible. As the Florida Supreme Court stated in *Progressive Select Insurance Company v. Florida Hospital Medical Center,* 260 So.3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a] the deductible must be applied to 100% of the billed expenses:

> A plain reading of the statutory provisions makes clear that the deductible must be subtracted from the provider's charges before the reimbursement limitation is applied. In the context of section 627.736(1), "expenses and losses" refers to something different from "benefits." "Benefits" are the amount paid by the insurer—determined by the 60% and 80% methodologies, and governed by the fee schedule, when applicable. "Expenses and losses," on the other hand, refers to the total charges submitted to the insured—not only those which may be recovered as benefits. And section 627.739(2) provides that the deductible must be applied to 100% of such "expenses and losses." Subtracting the deductible from the reduced fee schedule amount would violate this requirement.

Based on the Florida Supreme Court's holding the deductible should be applied to G0283 $45.00; 97535 $60.00; 72052 $300.00; 72100 $180.00; 72070 $180.00; and $235.00 of the ($400.00 billed for) 99204 on 5/11/15. The remainder of 99204 - $165.00 (since it is less than 80% of 200% of the applicable Medicare Part B physician's fee schedule ($251.97)) should be paid in the full amount billed and all other codes that the Defendant applied to the deductible (98941 and 97010 on May 11, 2015; 98941, 97124, 97010, G0283 on May 13, 2015 and $ .90 of the $80.00 billed for 98941 on May 18, 2015) should be paid based upon the permissible fee schedule set forth in the policy and as noted in the covered amount section of the explanations of benefits. When the deductible is properly applied the Defendant owes an additional $365.26 in benefits for the codes that the Defendant improperly applied to the deductible.

The Court did not take testimony or evidence on the 57.105 motions filed for fees and Costs, as such the Court does not make a

finding at this time on those pending motions.

The Plaintiff is directed to submit a proposed Final Judgment consistent with this ruling.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Nothing in PIP statute or policy requires insurer to pay more than 80% of submitted charge that is less than allowable amount under schedule of maximum charges

PAUL S. GOODKIN, D.C., P.A., a/a/o Anthony Sibilio, Plaintiff, v. PERMANENT GENERAL ASSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO-20-000227, Division 73. March 15, 2022. Steven P. Deluca, Judge. Counsel: Thomas J. Wenzel, Steinger, Greene & Feiner, Fort Lauderdale, for Plaintiff. Melissa G. McDavitt, Conroy Simberg, West Palm Beach, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION AND GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGEMENT

THIS CAUSE having come before the Court upon Plaintiff's Motion for Summary Disposition Regarding Defendant's Failure to Adhere to its Requirements Under the Law When Processing Inexpensive Charges and Defendant's Motion for Final Summary Judgment regarding Billed Amount on March 1, 2022 and the Court being otherwise fully advised in the premises thereof, it is hereby

ORDERED and ADJUDGED, as follows:

1. The issue is whether the PIP Statute and the Policy requires an insurance company pay either 80% of the 200% of Medicare or the 100% of a submitted amount by a medical provider when the charge submitted is less than the allowable amounts under the Schedule of Maximum Charges as outlined by 627.736(5)(a). Stated otherwise, is an insurance company, when they have elected to utilize the Schedule of Maximum Charges for Reimbursement, required to pay in excess of 80% of a submitted[1] charge?

2. The Court finds *MRI Associates of Tampa, Inc., v. State Farm Mutual Automobile Insurance Company,* No. SC 18-1390 to be determinative of the issue. There is nothing in the PIP Statute or the subject policy of insurance that would require the insurer here to pay in excess of 80% of a submitted charge. As such, the Court rules in favor of the Defendant.

3. That judgment be and hereby is entered for Defendant, that Plaintiff take nothing by this action and that Defendant go hence without day.

4. The Court reserves jurisdiction to determine attorney's fees and costs.

[1]A reasonable charge may not exceed the amount the [provider] customarily charges for the like services or supplies.

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Insurance—Homeowners—Conditions precedent to suit—Ten-day notice—Retroactive application—Statute requiring that homeowners file ten-day notice of intent to initiate litigation under property insurance policy is not applicable retroactively to policy issued prior to statute's effective date where new statute is substantive and affects insured's vested rights—Motion to dismiss is denied

ENID DAWES, Plaintiff, v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21064542, Division 53. March 21, 2022. Robert W. Lee, Judge.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, WITH NOTICE OF IMPENDING DEFAULT

This cause came before the Court this day for hearing of the Defendant's Motion to Dismiss. The Defendant claims that the case should be dismissed because the Plaintiff failed to give the requisite pre-suit notice of intent to sue. The Plaintiff responds (setting aside the issue that the Defendant's claim is outside the four corners of the complaint) that the new law cannot be applied retroactively to this case. The Court agrees with Plaintiff.

In this case, the policy was issued on August 7, 2020, while the new statute went into effect on July 1, 2021, after the policy was issued but before this lawsuit was filed. In the context of an insurance policy, courts have held that "the statute in effect at the time the insurance contract is executed governs any issues arising under the contract." *See Glenn Corkins, D.C. v. GEICO Indemnity Co.*, 16 Fla. L. Weekly Supp. 1185a (Broward Cty. Ct. 2009), quoting *Lumbermens Mutual Cas. Co. v. Ceballos*, 440 So.2d 612 (Fla. 3d DCA 1983), citing to *Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788 (5th Cir. 1963); *Allison v. Imperial Cas. & Indemnity Co.*, 222 So.2d 254 (Fla. 4 DCA 1969); and *Poole v. Travelers Ins. Co.*, 130 Fla. 806, 179 So. 138 (1937). *See also Hassen v. State Farm Mutual Auto. Ins. Co.*, 674 So.2d 106, 108 (Fla. 1996) [21 Fla. L. Weekly S102c]; *MR Services LLC v. United Auto. Ins. Co.*, 16 Fla. L. Weekly Supp. 678a (Broward Cty. Ct. 2009).

In order to apply the statutory amendment dealing with the new notice requirement to the insurance policy at issue, which was issued prior to the effective date of the statute, the Court must first determine whether the statutory amendment is one that affects substantive rights. If so, the amendment can be applied to the insurance policy only if the insured holder expressly consented to the application of the amendment. However, in this case, the Defendant insurer has not suggested that the policyholder consented; therefore, the issue is solely one of whether the insured's substantive rights would be affected by application of the amendment.

In Florida, "*[a]ny* legislative action which diminishes the value of a contract is repugnant to and inhibited by the [Florida] Constitution." *In re Advisory Opinion*, 509 So.2d 292, 314 (Fla. 1987) (emphasis added). The test to determine whether a substantive right is affected is whether the amended or new "statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mutual Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995) [20 Fla. L. Weekly S173a]. *See also Menendez v. Progressive Express Ins. Co.*, 35 So.3d 873, 878-79 (Fla. 2010) [35 Fla. L. Weekly S222b]. Stated another way, "[a]n impairment occurs [. . .] when a contract is made worse or is diminished in quantity, value, excellence or strength." *Lawnwood Medical Center, Inc. v. Seeger*, 959 So.2d 1222, 1224 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1543a]. A substantive right is vested if it is an "immediate right to present enjoyment, or a present fixed right of future enjoyment." *See School Board of Miami-Dade County v. Carralero*, 992 So.2d 353, 355 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2329a].

In this case, the policyholder received a policy and paid a premium for an insurance policy that specifically provided certain benefits with no requirement that a pre-suit notice be provided to the insurer before a lawsuit may be filed against the insurer. After the policy was issued, but before the policy expired, the Florida Legislature enacted a statutory amendment which is more advantageous to the insurer and adds a new hurdle—referred to by the Legislature as a "condition precedent to filing suit"—before a lawsuit may be filed against the insurer. Fla. Stat. §627.70152 (2021). Now, a claimant must give a written notice of intent to initiate litigation to the department at least "10 business days" before the suit can be filed. *Id.* §627.70152(3)(a). However, the new statute does not merely delay the filing of the lawsuit by this 10-day period. To the contrary, this written notice may not be given until the "insurer has made a determination of coverage," *see id.*, which can significantly delay the filing of the lawsuit, as

Florida law does not clearly provide a timeframe for a property insurer to make a "determination of coverage." Indeed, it is not unusual for a claimant to file a lawsuit claiming that the insurer has not yet made a determination of coverage even months after a claim has been filed. Further, the new statute provides the insurer a statutory right to reinspect the damaged property before a coverage decision is made. *See id*. §627.70152(4)(a)(3). The statute makes it clear that the suit cannot be filed until <u>*any*</u> of the time periods provided by the new statute are complied with. *Id*. §627.70152(5). Further, the new statute requires the claimant to make a settlement demand before suit can be filed.

The Court does not question the wisdom or need for these new requirements. Nevertheless, the list of new requirements is lengthy, and as a whole, leads the Court to conclude under applicable case law that the new statute is substantive, that the policyholder's vested rights are affected by the change, and that the change cannot be applied retroactively. Accordingly, it is hereby

ORDERED that the Defedant's Motion to Dismiss is DENIED. Additionally, the Defendant is advised that the Court, on its own motion pursuant to Rule 1.500(b), shall enter a default against the Defendant without further notice or hearing unless within 10 days of the date of this Order, the Defendant shall FILE an ANSWER to the Complaint.

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