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FLORIDA LAW WEEKLY FLW SUPPLEMENT

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Pages 667-712

Reports of Decisions of:
THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **CRIMINAL LAW—DISCHARGING FIREARM IN PUBLIC—TIME AND LOCATION OF SHOT—NOVEL SCIENTIFIC EVIDENCE. A circuit court judge excluded evidence generated by ShotSpotter, a private company which purported to be able to establish whether a firearm was discharged as well as the time and location of the shot. In a detailed order, the court concluded that the evidence did not satisfy the *Daubert* test.** *STATE v. BULLARD. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. February 6, 2023. Full Text at Circuit Courts-Original Section, page 680a.*

- **INSURANCE—BAD FAITH—FIRST-PARTY ACTION AGAINST INSURER—CONDITIONS PRECEDENT. A Civil Remedy Notice that demanded attorney's fees and costs that the insurer was not obligated to pay under the policy at issue was defective and invalid. The complaint against the insurer was dismissed with prejudice.** *GARMAN v. STATE FARM FLORIDA INSURANCE COMPANY. Circuit Court, First Judicial Circuit in and for Escambia County. January 5, 2023. Full Text at Circuit Courts-Original Section, page 677a.*

- **INSURANCE—UNINSURED MOTORIST—REJECTION OF COVERAGE. There was no genuine issue of material fact as to whether an insured signed a UM selection/rejection form where the insured's electronic signature was typed out in a signature box that was logically associated with the form. The insured's contentions that the form, which was approved by the Office of Insurance Regulation, was not being used as intended by the OIR or that the OIR was wrong in approving the form were not considered by the court because administrative remedies had not been exhausted. The conclusive presumption that an insured who has signed an OIR-approved UM selection/rejection form made an informed, knowing choice cannot be rebutted by testimony that the insured did not read the form.** *HOLLEY v. GALVAN. Circuit Court, Tenth Judicial Circuit in and for Polk County. January 4, 2023. Full Text at Circuit Courts-Original Section, page 678a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

— continued

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REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

Florida Wellness Center, Inc. (Fernandez) v. Progressive American Insurance Company. County Court, Thirteenth Judicial Circuit, Hillsborough County, Case No. 20-CC-052807. Original Order at 30 Fla. L. Weekly Supp. 300a (September 30, 2022). Vacated on Motion for Rehearing CO 705a

* * *

DISPOSITION ON APPELLATE REVIEW

Disposition of cases previously reported in FLW Supplement on review by appellate courts. This is not a comprehensive listing.

Cornelio v. State, Department of Highway Safety and Motor Vehicles. Circuit Court, Sixth Judicial Circuit (Appellate), Pasco County, Case No. 2021-CA-000490. Circuit Court order at 30 Fla. L. Weekly Supp. 136a (July 29, 2022). Quashed at 48 Fla. L. Weekly D446a

* * *

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—No merit to argument that hearing officer did not find that officer had probable cause to believe that licensee was impaired by drugs, alcohol or chemical substances where hearing officer relied on reports stating that officer observed licensee driving erratically and noted that his eyes were bloodshot and watery and he was lethargic—Determination of probable cause for DUI does not require that the odor of alcohol be observed—No merit to argument that there is lack of evidence that licensee refused breath test since refusal affidavit does not indicate whether officer requested breath or urine sample where arrest affidavit states that officer asked licensee to submit to breath test twice and was twice refused

JUAN CARLOS OLASCOAGA-HERNANDEZ, Plaintiff, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 5th Judicial Circuit (Appellate) in and for Hernando County. Case No. 2022-CA-650. November 30, 2022. Counsel: Elana J. Jones, Former Assistant General Counsel, DHSMV, for Defendant.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(PAM VERGARA, J.) **THIS COURT** having considered Petitioner's Petition for Writ of Certiorari (filed pursuant to Fla. R. App. P. 9.100(f)), filed on July 6, 2022; Respondent's Response to Petition for Writ of Certiorari, filed on September 12, 2022; and Petitioner's Reply, filed on September 22, 2022, finds as follows:

1. Petitioner asserts the license suspension must be quashed since the Final Order does not find that the trooper had probable cause to believe Petitioner was impaired by drugs, alcohol, or chemical substances. Petitioner attached the Department's Findings of Fact, Conclusions of Law and Decision; Traffic Citation; Arrest Report; Department's Affidavit of Refusal to Submit to Breathe and/or Urine Test; Notification of Driver License Hearing; and Department's DUI Investigation Case Report.

2. Respondent maintains the Hearing Officer correctly sustained the suspension of Petitioner's driving privileges due to probable cause that Petitioner was in actual physical control of a motor vehicle and while under the influence of alcohol or a chemical or controlled substance.

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. Petitioner was afforded procedural due process by virtue of being granted a formal administrative review of his license suspension pursuant to section 322.2615, Florida Statutes.

5. Section 322.2615(7)(b), Florida Statutes provides as follows:

> In a formal review hearing under subsection (6) or an informal review hearing under subsection (4), the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension. The scope of the review shall be limited to the following issues:
>
> If the license was suspended for refusal to submit to a breath, blood, or urine test:
>
> 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.
>
> 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.

6. The Hearing Officer relied on documentary evidence submitted by law enforcement. The arrest report detailed the basis for the state trooper having probable cause for the arrest of Petitioner for DUI. The state trooper observed Petitioner driving erratically and after stopping Petitioner, the trooper noted that Petitioner's eyes were bloodshot and watery and Petitioner was lethargic. The Hearing Officer's findings were supported by competent substantial evidence since the documents relied upon were the arrest report and Department's Affidavit of Refusal to Submit to Breathe and/or Urine Test.

7. Petitioner's assertion that the trooper did not note the smell of alcohol from Petitioner is inapposite. Determination of probable cause for driving under the influence of alcohol does not require the odor of alcohol. *Dep't of Highway Safety and Motor Vehicles v. Rose,* 105 So.3d 22 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a]. Additionally, the Department's Affidavit of Refusal to Submit to Breathe and/or Urine Test is legally sufficient and complies with section 322.2615(2)(a), Florida Statutes. *See Dep't of Highway Safety and Motor Vehicles v. Perry,* 751 So.2d 1277 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D669a] (the only requirement is that the affidavit states that a request for breath, urine, or blood sample was made and refused). The arrest affidavit indicates the trooper asked Petitioner to submit to a breath test to determine his breath alcohol concentration and Petitioner refused; the trooper read the implied consent warning to Petitioner; trooper requested Petitioner to submit to a breath test a second time; and Petitioner again refused. Consequently, Petitioner's assertion there was a lack of evidence since the affidavit does not indicate whether the trooper requested a breath or urine sample is misplaced.

Based upon the foregoing, it is hereby;

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

* * *

Licensing—Driver's license—Hardship license—Denial—Hearings—Licensee was not denied due process by having brief telephonic hearing where licensee requested expedited review and waived hearing requirement—Hearing officer's determination that hardship license could not be recommended was supported by driving record showing that licensee continued to drive despite license revocation

ELIAKIM DEON REESE, Plaintiff, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Defendant. Circuit Court, 5th Judicial Circuit (Appellate) in and for Hernando County. Case No. 2022-CA-895. December 5, 2022. Counsel: Kathy A. Jimenez-Morales, Chief Counsel, DHSMV, for Defendant.

ORDER ON PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO AMEND

(PAM VERGARA, J.) **THIS COURT** having considered Petitioner's Petition for Writ of Certiorari and Motion for Leave to Amend, filed on September 9, 2022; Respondent's Response to Petition for Writ of Certiorari and Motion for Leave to Amend, filed on November 7, 2022; and having reviewed the records of this case, finds as follows:

1. Petitioner asserts Respondent departed from the essential requirements of law and failed to provide due process in his attempts to obtain a hardship license since Respondent only afforded an unscheduled brief telephone call from the hearing officer instead of a

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scheduled hearing and no substantial evidence is cited in the Department order. Petitioner also requests leave to amend to add transcripts and other documentation.

2. The transcripts of the DMV hearing and Appendix to Petition for Writ of Certiorari were filed on October 25, 2022. The DMV included Petitioner's driving record and application for reinstatement.

3. Respondent maintains the hearing officer properly denied Petitioner's request for a hardship license since Petitioner's driver license was revoked for 5 years effective March 7, 2021 as a result of 3 driving while license suspended (DWLS) convictions occurring on May 21, 2016; May 24, 2018; and March 13, 2020. Respondent maintains Petitioner was afforded procedural due process since he requested an expedited review of his application; Petitioner never asserted he was represented by counsel; and Petitioner was aware that when he took the phone call from the Department that it was a hearing for a restricted license. Petitioner never notified the Hearing Officer that the hearing needed to be rescheduled because he did not have sufficient notice or needed representation by counsel. Respondent notes Petitioner was denied a restricted license since he continued driving despite his revocation due to being designated a habitual traffic offender.

4. 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 of 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's application indicates Petitioner requested an expedited review, including Petitioner's waiver of the hearing requirement. Petitioner was afforded procedural due process by virtue of the expedited 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 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 and Motion for Leave to Amend is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Lawfulness of arrest—Fellow officer rule—No error in applying fellow officer rule to consider observations of off-duty officer outside of his jurisdiction in conjunction with arresting officer's observations to establish probable cause for DUI arrest

AIDAN LAWRENCE DOBBERFUHL, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 8th Judicial Circuit (Appellate) in and for Alachua County. Case No. 01-2021-AP-0004. December 21, 2022. Counsel: Elana J. Jones, Former Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(DONNA M. KEIM, J.) **THIS ACTION** came before the Court upon Petitioner's Petition for Writ of Certiorari concerning an administrative license suspension. Respondent filed a response in opposition, to which Petitioner filed a reply. The Court has considered the petition, response and reply thereto, and all exhibits contained in the Appendix, and concludes that Petitioner's petition for writ of certiorari should be denied.

In reviewing the decision of an administrative agency by certiorari, the circuit court must determine whether the administrative body: (1) accorded due process of law[1]; (2) met the essential requirements of law; and (3) supported its findings by competent substantial evidence. *See Broward County v. G.B.V. Int'l, Ltd*, 787 So. 2d 838 (Fla. 2001) [26 Fla. L. Weekly S463a]; *Florida Power & Light v. City of Dania*, 761 So. 2d 1089 (Fla. 2000) [25 Fla. L. Weekly S461a]; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

The legal analysis expressed by Respondent in the Findings of Fact, Conclusions of Law and Decision comported with the essential requirements of the law. A departure from the essential requirements of the law encompasses more than mere legal error, but is rather "a violation of a clearly established principle of law resulting in a miscarriage of justice." *Housing Authority of City of Tampa v. Burton*, 874 So.2d 6, 8 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1142a]. It was not clearly erroneous for Respondent to apply the fellow officer rule and consider Deputy Taylor's observations in conjunction with Deputy Litzkow's observations to establish probable cause for a lawful arrest of driving while impaired. *See Whitney v. Dep't of Highway Safety and Motor Vehicles*, 14 Fla. L. Weekly Supp. 811a (Fla. 6th Cir. Ct. March 30, 2007) (probable cause for lawful arrest established where an off-duty officer outside his jurisdiction detained the driver of a vehicle obstructing the roadway, even though the second officer called to the scene did not see the driver in the vehicle); *Brown v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 348 (Fla. 13th Cir. Ct. March 15, 2001) (probable cause for lawful arrest established where an off-duty officer outside his jurisdiction detained the driver of a vehicle that left the roadway, even though the second officer called to the scene did not see the driver in the vehicle). *See also Gouge v. Dep't of Highway Safety and Motor Vehicles*, 8 Fla. L. Weekly Supp. 683a (Fla. 10th Cir. Ct. August 22, 2001) ("[A]n off duty officer's observations could be considered by the arresting officer in determining whether to make an arrest despite the absence of fresh pursuit.")

As it was proper for Respondent to consider all of the exhibits referenced in the Findings of Fact, Conclusions of Law and Decision, it cannot be said that the record lacks competent substantial evidence supporting the license suspension.

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

ACCORDINGLY, IT IS ADJUDGED that the Petition for Writ of Certiorari is DENIED.

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[1]The petition does not contain any allegations that suggest Petitioner was not accorded due process of law.

* * *

Municipal corporations—Zoning—Variances—Denial—No error in denying variance from rear property setback to allow construction of swimming pool and canopy—Property owners were provided with due process, and denial of variance was supported by competent substantial evidence—Planning and zoning board did not depart from essential requirements of law by ruling that variance, which was sought to increase aesthetics and enjoyment of property, did not meet criteria of town ordinances—Moreover, absence of appendix or transcript of hearing before board requires affirmance

LAZARO TEJERA, Petitioner, v. TOWN OF MIAMI LAKES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-63-AP-01. December 28, 2022. On a Petition for Writ of Certiorari from a Final Order of Town of Miami Lakes denying zoning variance. Counsel: Lazaro and Reina Tejera, Pro se, Petitioners. Lorenzo Cobiella, Gastesi, Lopez, & Mestre, PLLC, for Respondent.

(Before WALSH, TRAWICK and SANTOVENIA, JJ.)

OPINION

(WALSH, J.) Petitioners Lazaro and Reina Tejera filed an appeal from an order denying a zoning variance by the Town of Miami Lakes Planning and Zoning Board. We treat this appeal as a petition for writ of certiorari and deny the Respondent's motion to dismiss this appeal for lack of jurisdiction. *See Villa Lyan, Inc. v. Perez,* 159 So. 3d 940, 942 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D630a] ("when a party improperly files a timely notice of appeal, the appellate court cannot dismiss for lack of jurisdiction, but rather must treat the appeal as a petition for writ of certiorari").

Background

Petitioners applied for a variance with the Town of Miami Lakes to decrease the required setback at the rear of their residence to install a swimming pool and attached canopy. According to the staff analysis report submitted to the Planning and Zoning Board, the reason for the request was: "due to the fact they additionally plan on building an attached canopy in their backyard; in their view the additional room provided by the proposed variance is necessary for aesthetic reasons and to increase their utility and enjoyment of the planned improvements." (Answer Brief at Exhibit A)[1]

The request for variance was scheduled for a hearing before the Planning and Zoning Board. Although not framed by their written request, Petitioners were permitted to orally make an additional request at the hearing for a second variance to decrease the side setback to 5 feet from 7.5 feet required by the zoning code. According to the parties, Reina Tejera's disabled mother visits the home occasionally, and the decreased side setback was needed to allow her wheelchair to maneuver through the doors to the outside patio. Following testimony and evidence presented by the parties at a hearing, the Board approved the request for a variance to decrease the side setback but denied the request to decrease the rear setback. Specifically, the order provided:

> 1. In accordance with Section 13-305(f)(1) of the Town's Land development Code (LDC), the Planning and Zoning Board, having considered the testimony and evidence in the record presented by all parties, finds that the Applicant's request does not comply with the variance criteria at Section 13.305(f)(1)(a) through (g) of the Town LDC, which are as follows [listing seven criteria for a variance]:

(Exhibit B to Answer Brief) The order listed each of the criteria for a variance and denied the request for a variance to the rear setback.

Standard of Review

This Court applies a three-part standard of review to an administrative agency's decision: "(1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *See Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citation omitted).

Analysis

Petitioners argue in a two-page brief, without citation to a record appendix or transcript, that they were improperly denied a variance to their rear setback that was needed to accommodate Reina Tejera's disabled and wheelchair-bound mother. They do not address any of the elements constraining our narrow standard of review.

The Petitioners were not deprived of due process. "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts. . ." *Id.* The Petitioners were properly noticed and were given the right to be heard and present evidence at a hearing. From the order, it is apparent that they were permitted to present arguments and make an additional variance request to adjust the side setback of their property, a request that was granted. And in contrast to their argument on appeal that the rear setback variance was needed to accommodate a disabled visitor, their written request for the rear variance was based on their desire to build a canopy and increase aesthetics and enjoyment of their property. (Answer Brief, Exhibits A and B) Petitioners were therefore afforded due process.

Competent substantial evidence supported the Board's ruling. Exhibit A to the Answer Brief is the detailed staff analysis submitted to the Board prior to the hearing. Staff analysis constitutes competent substantial evidence to support a zoning decision. *See Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.,* 128 So. 3d 19, 26-27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c]. In addition to the staff analysis, the Petitioners were permitted to testify and introduce evidence. The plans for the pool and patio accoutrements were admitted as were letters from interested neighbors. Therefore, competent substantial evidence supported the Board's decision.

In denying the variance to the rear setback, the Board did not depart from the essential requirements of law. Within the order, the Board applied the Town ordinances governing variances from the Town's land development code. The requirements of law were therefore abided.

Finally, we note that Petitioners did not file an appendix, as required by Rules 9.190(4) and 9.220, Florida Rules of Appellant Procedure. Neither did they file a transcript of the hearing before the Board, as required by Rule 9.200(b), Florida Rules of Appellate Procedure. The burden is on the Petitioners to demonstrate error, and "the lack of a trial transcript or a proper substitute results in a record that is inadequate to demonstrate reversible error and requires affirmance." *Fuhrman v. Sara G 01, LLC*, 3D22-0904, 2022 WL 17660319 (Fla. 3d DCA Dec. 14, 2022) [47 Fla. L. Weekly D2640a], *citing Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla.1979). (citation omitted)

The Petition for Writ of Certiorari is therefore **DENIED.** (SANTOVENIA and TRAWICK, JJ., CONCUR.)

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[1]Although Petitioners attached several documents to their Initial Brief, they have

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not filed an appendix. Documents relevant to review of the order below have been furnished by the Respondent.

* * *

Municipal corporations—Zoning—Rezoning—Due process—Applicant that sought rezoning and waiver of setback to allow construction of townhouses was not denied due process when, after being made aware that an additional waiver would be needed to allow some townhouses to face alley rather than right-of-way, applicant was offered continuance to better prepare to justify waiver request, but waived the offered continuance—City council did not err in denying application for site plan rezoning where applicant failed to justify waivers—City planner's determination that site plan application was consistent with comprehensive plan was not determinative of whether rezoning application would be granted where plan was not in compliance with city code without waiver—City council's decision to deny applications was supported by competent substantial evidence where applicant failed to demonstrate compliance with city code criteria for waiver

N BLVD TOWNHOMES LLC, a Florida limited liability company, Petitioner, v. CITY OF TAMPA, FLORIDA CITY COUNCIL, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 22-CA-2260. Division K. December 7, 2022. Counsel: Michelle A. Grantham, Najmy Thompson, P.L., Bradenton, for Petitioner. Toyin Aina-Hargrett, City Attorney's Office, Tampa, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CAROLINE TESCHE ARKIN, J.) This case is before the court to review Tampa City Council's denial of Petitioner's site plan application for rezoning and related, but separate, request to vacate the alley lying adjacent to the property. This court reviews City Council's decision to determine whether Petitioner was afforded due process, whether the decision is supported by competent, substantial evidence, and whether the decision comports with the essential requirements of law.[1] Petitioner seeks modification to the current zoning to construct twenty-one[2] single-family attached homes. The proposed plans are contingent on the vacation of the adjacent alley. In addressing Petitioner's application, City Council noted that a waiver of the building code requirement that front doors face public rights-of-way was not requested in Petitioner's rezoning application. After Petitioner rejected City Council's offer of a continuance to address lapses in the application, Petitioner was asked to provide justification to support the added waiver. City Council determined that Petitioner's vague reference to traffic circulation was insufficient support for the waiver and did not persuade the City to vacate its alley to support the project. Because the City Council had a right to, and did, retain control of the alley, and the proposed rezoning was contingent on the City Council vacating the alley, it also denied Petitioner's request to rezone the property. This court determines that Petitioner was afforded due process, the decision comports with the essential requirements of law, and that competent, substantial evidence supports City Council's decision. Therefore, the petition must be denied.

SUMMARY OF THE ISSUES

Petitioner contends City Council's denial of its request to vacate the alley and rezoning application violates all three criteria that a decision is required to meet to survive review in certiorari. Petitioner claims that City Council's denial of the rezoning site plan was not supported by competent, substantial evidence because the rezoning plan met all development and comprehensive plan criteria. Petitioner contends that the denial of the site plan application, based upon City Council's determination that Petitioner failed to meets its burden of proof that the development is consistent with city code and the comprehensive plan, departs from the essential requirements of law. Additionally, Petitioner argues that City Council's conclusion that Petitioner failed to request, much less justify, the two necessary waivers is unsupported by competent, substantial evidence. Furthermore, Petitioner claims that it was not afforded a meaningful opportunity to be heard on the second waiver request, violating its due process.

THE FACTS AND CASE

On July 26, 2021 Petitioner submitted an application for rezoning the 0.99-acre property located at 622 and 642 W. Dr. Martin Luther King, Jr. Blvd/3917, 3915, 3912 N. Boulevard from Planned Development to a PD comprised of twenty three-story residential townhomes. The proposal is dependent on an additional request to vacate the adjacent alley. Petitioner made several amendments to come into compliance with the city code and comprehensive plan. A week before the hearing, city staff completed a "Rezoning Staff Report," finding the rezoning application consistent with local land development regulations, but identifying a required code waiver in order to decrease the required setback from 60 feet to 45 feet.[3] An additional waiver requirement was added to the "Rezoning Staff Report" before the public hearing, according to City Land Development Coordinator Zain Husain. A second waiver was necessary because the site plans have six townhomes facing an alley instead of a street right-of-way, as required by code.[4]

On February 10, 2022, City Council heard Petitioner's two associated applications. City Council heard from City Land Development Coordinator, Zain Husain; President of the Tampa Heights Civic Association, Brian Seale; and several residents. Attorney Stephen Thompson represented the Petitioner. Upon discovering that the second waiver was not initially included in the "Rezoning Staff Report" and recognizing that Petitioner was unaware of the required second waiver prior to the hearing, City Councilmember John Dingfelder reminded the Petitioner that it had the burden to prove its case and offered a continuance to protect the Petitioner's due process rights.[5] Petitioner, instead, proceeded on the issue of justification for the waiver. Petitioner thereby waived the opportunity for a continuance. City Council determined that Petitioner's justification was inadequate and proceeded to deny Petitioner's request for the waiver. It, thereafter, also denied the request to vacate the alley on the basis that the general public interest is not served by the vacating. Only after the case was closed did Petitioner's counsel request a continuance. That request was denied.

City Council then proceeded to the application for rezoning. Councilmember John Dingfelder moved to deny the application because the applicant failed to provide competent and substantial evidence that the development, as shown on the site plan, is consistent with the comprehensive plan and city code, and failed to meet its burden of proof with respect to the requested waivers.[6] Petitioner failed to provide evidence that the proposed design is unique such that a code waiver allowing six of the townhomes to face the alley is justified.[7] His motion to deny the application was seconded by Councilmember Miranda and passed unanimously.

Petitioner asks this court to reverse the City Council's denial of the site plan application and request to vacate the alley, and approve both applications. In this "first tier" certiorari proceeding this court reviews the record to determine: (1) whether procedural due process was afforded; (2) whether the "essential requirements of the law" were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.[8] Petitioner contends the City Council violated all three criteria. As discussed below, the court disagrees.

DUE PROCESS

The due process required in quasi-judicial proceedings is not the same as that of a judicial hearing.[9] Rather, it depends on the character

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of the interest and the nature of the proceeding involved.[10] The "core" of due process is the right to notice and an opportunity to be heard.[11] Here, no one disputes that notice to the City Council hearing was adequate. Petitioner argues instead that it was unaware of the second waiver requirement of city code § 27-282.9 until the hearing and that City Council's denial of a continuance violated Petitioner's right to a meaningful opportunity to be heard on that issue.

The court is unpersuaded by Petitioner's argument because the transcript clearly shows that Councilmember John Dingfelder offered the Petitioner a continuance in order to better prepare to justify the waiver request.[12] The councilmember specifically expressed due process concerns. Counsel for the Petitioner waived the continuance, choosing instead to proceed with testimony from Petitioner's architect. Only after City Council voted to deny the request to vacate the alley did Petitioner request a continuance. By that time, the matter was closed. The court finds that Petitioner was provided a meaningful opportunity to be heard on all issues and that it waived its opportunity for a continuance of its own accord.

ESSENTIAL REQUIREMENTS OF LAW

Petitioner further contends that the denial of the site plan application, based upon City Council's conclusion that Petitioner failed to meets is burden of proof that the development is consistent with city code and the comprehensive plan, departs from the essential requirements of law. Petitioner contends "denial of the Application based on the request for waivers which are not at all related to the primary purpose of the Application cannot be the basis for the denial of the requested rezoning."[13] Petitioner is wrong. Rezoning applications must be consistent with both the comprehensive plan and city code. [14] Mr. Hussain made it clear that two waivers were required in order to comply with city code, and the "Rezoning Staff Report" was amended a week prior to the public hearing to reflect both required waivers. The court finds that City Council correctly applied city code §§§§ 27-136(6), 27-139, 27-160, and 27-282.9 in reaching its decisions. Accordingly, there is no departure from the essential requirements of law.

COMPETENT, SUBSTANTIAL EVIDENCE

Competent substantial evidence is evidence that "a reasonable mind would accept as adequate to support a conclusion."[15] The court must uphold a local government's quasi-judicial decision unless there is *no* competent evidence to support its decision.[16] The court must not focus on whether there is substantial, competent evidence to oppose the decision reached by the agency, but rather whether the local government's decision is supported by competent substantial evidence.[17]

The court finds that Petitioner's argument that the City Planner's determination that the rezoning application was consistent with the city's comprehensive plan is, in and of itself, competent, substantial evidence that the City Commission's denial was erroneous, is without merit. Staff's determination that the application was consistent with the comprehensive plan is not binding or determinative of whether the rezoning application will be granted. Further, applications for rezoning must comply with both the city's comprehensive plan *and* city code.[18] Without a waiver of city code § 27-282.9, the site plans are not in compliance with city code.

Upon review of the record, the court finds that City Council's decisions to deny both applications were supported by competent substantial evidence. It is undisputed that the proposed site plan has six homes facing the adjacent alleyway, which violates city code § 27-282.9. It is Petitioner's burden to show that its application is consistent with city code and the Tampa comprehensive plan, and to properly request any necessary waivers. City Council was well in its own discretion to deny Petitioner's request for waiver, based on the Petitioner's failure to demonstrate compliance with the criteria listed in city code § 27-139(4).[19] Petitioner had its architect speak regarding the site plans, and, as the fact finders, it was City Council's role, not this court's, to weigh the facts and determine compliance with city code § 27-139. Here, City Council denied Petitioner's request for a waiver based on Petitioner's own failure to adequately justify it. The court finds that the site plans provided, along with the weak justification for the waiver, sufficiently supports City Council's decisions to deny the request to vacate the alley and application for rezoning. It is undisputed that the Petitioner's site plans depended on use of the alleyway.

CONCLUSION

There being no legal basis to disturb the County's decision, the petition for writ of certiorari is **DENIED** on the date imprinted with the Judge's signature.

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[1]*See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982).
[2]Petitioner reduced the number of units from 21 to 20 prior to the public hearing.
[3]*See* city code §27-160.
[4]City code §27-282.9(c)(1).
[5]*See* page 182 of Appendix to Initial Brief
[6]*See* page 201 of Appendix to Initial Brief
[7]*See* city code §§27-139(4) and 27-282.9(c)(1).
[8]*Vaillant*, 419 So. 2d at 626.
[9]*Hadley v. Fla. Dep't of Admin.*, 411 So. 2d 184, 187 (Fla. 1982).
[10]*Id*.
[11]*LaChance v. Erickson,* 522 U.S. 262, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998).
[12]*See* page 201 of Appendix to Initial Brief
[13]Page 9 of Plaintiff's Petition for Writ of Certiorari.
[14]*See Board of County Comm'rs of Brevard County v. Snyder,* 627 So.2d 469, 476 (Fla.1993); *Sarasota Cnty. v. BDR Invs., L.L.C.,* 867 So. 2d 605, 607 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D552a].
[15]*Lee County v. Sunbelt Equities*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993).
[16]*Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].
[17]*Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs,* 794 So. 2d 1270, 1275 (Fla. 2001) [26 Fla. L. Weekly S329a].
[18]*See Board of County Comm'rs of Brevard County v. Snyder,* 627 So.2d 469, 476 (Fla.1993); *Sarasota Cnty. v. BDR Invs., L.L.C.,* 867 So. 2d 605, 607 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D552a]; *Lee County,* 619 So. 2d 996 at 1003.
[19]City code § 27-139 establishes that "[t]hrough the public hearing process the applicant must demonstrate compliance with the criteria established, in the relevant code, for the city council to grant approval of the waiver."

* * *

Municipal corporations—Code enforcement—Zoning—Short-term rentals in residential zone—Order finding violation of prohibition against short-term rentals in residential zone was not supported by competent substantial evidence where evidence shows that scheduled reservation for fewer than seven days was made and cancelled so quickly that property owner did not receive notification of reservation and rental did not take place

CHEROKEE HOUSE, LLC, Appellant, v. CITY OF TAMPA (Code Enforcement), Appellee. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Appellate Division. Case No. 21-CA-5157. Division H. L.T. Case No. COD-21-0000283. December 12, 2022. On review of a final order of the Code Enforcement Special Magistrate for the City of Tampa. Counsel: Grant W. Kindrick, Bleakley Bavol Denman & Grace, Tampa, for Appellant. Natalia Silver, City Attorney's Office, Tampa, for Appellee.

APPELLATE OPINION

(EMMETT L. BATTLES, J.) This case is before the court to review a final order of the City of Tampa code enforcement special magistrate finding that Appellant Cherokee House, LLC, violated the code's proscription against short-term rentals when evidence showed an apparent attempt to rent the subject real property for fewer than seven days in violation of the property's residential zoning classification. Because no competent, substantial evidence shows that the property was actually rented for a period less than seven days, and the code

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does not address, much less prohibit, mere attempts to engage in short-term rental of real property, the order finding a violation and imposing fine departs from the essential requirements of law. Therefore, the order finding violation and imposing fine must be quashed.

This court has jurisdiction. §162.11, Fla. Stat.

On April 6, 2021, the City of Tampa issued a Notice of Violation to Cherokee House, LLC (principal Ken Goodstein) stating that the property was in violation of several sections of the City of Tampa Code of Ordinances. Specifically, the notice indicated that the property was in violation of Code Sections 27-43, 27-156, and Table 4-1 of 27-156.[1] The notice asserted that because the property is zoned for use as a "dwelling unit" it is prohibited from being rented out or leased for fewer than seven days.

A hearing on the violation was held before a City of Tampa Code Enforcement Special Magistrate on May 19, 2021. Violations must be proven by a preponderance of the evidence. §9-108(l), Tampa, Fla. Code. The City presented the testimony of Laurie Tiberio, who lives next door to the subject property. Her relationship with Mr. Goodstein is not a friendly one. As evidence of the violation, the City presented an apparent reservation, a confirmation of a reservation, and receipt of payment for a reservation from April 19, 2021 to April 22, 2021, that Ms. Tiberio made under a false name in January, 2021, and canceled a short time later. This was the only evidence of the purported rental.

In rebuttal, Appellant provided documentation indicating that the reservation, confirmation, and payment receipt were incomplete. The evidence Ms. Tiberio provided showed she booked a seven-day stay, which would be legal under the City Code, then added a four-day stay by way of an "alteration request." She then cancelled the seven-day booking, leaving the four-day booking intact for a brief time before cancelling it, too, leaving no reservation for those dates. Mr. Goodstein was not even aware of the four-day booking; it was cancelled before the service he uses to assist with renting the property could notify him.[2] Indeed, Mr. Goodstein showed that Ms. Tiberio had waged something of a campaign to catch, or intentionally create, a violation on the property, and that the City effectively enabled this conduct by citing the property for a violation *before* the alleged short-term rental had even occurred. Mr. Goodstein testified he would not rent the property for fewer than seven days, and the City had no evidence that the property had been rented for fewer than seven days in the previous two years.[3] In fact, it would seem impossible for the City to have proven its case here, considering that the April 6, 2021 notice of violation was issued *before* the dates of the manufactured reservation—April 19 through April 22—had occurred. Despite this, on May 24, 2021, the special magistrate issued a written order finding that the property was in violation of the code, that the violation was irreparable, and assessed a $2500 fine.

On May 20, 2021, after the hearing but before the issuance of a written order, Appellant issued a public records request under Chapter 119, Florida Statutes. The City provided responsive documents that showed it had withheld information reflecting that it had been corresponding with Ms. Tiberio since November, 2020, as well as exculpatory evidence that showed that Cherokee House had included a declaration in its rental listing as early as November, 23, 2020 that the home could only be rented for seven days or more in compliance with the code. Appellant sought rehearing, which is authorized under the city code, but rehearing did not take place because the city clerk lost all the exhibits.[4] This appeal followed. The parties have stipulated to the re-creation of the record for purposes of the appeal.

Decisions of code enforcement boards and magistrates are reviewed on appeal to determine whether Appellant was afforded due process, whether the decision comports with the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Appellant contends that the order finding violation is not supported by competent, substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The court agrees with Appellant where the record contains no evidence that at the time of the notice of violation Appellant rented the property for less than the minimum rental period allowed in the property's zoning classification. The evidence showed that a scheduled reservation for fewer than seven days was made and cancelled so quickly that Appellant did not receive notification of the reservation.[5] Moreover, the rental never took place. Nothing presented to this court indicates that the code permits a code enforcement officer to issue a notice of violation for an attempted violation that has not actually occurred.[6] *See Canton v. Hillsborough County,* Civil Appeal No. 20-CA-3272 (Fla. 13th Jud. Cir. 2022) [30 Fla. L. Weekly Supp. 603a] (the code does not permit a code enforcement officer to issue a notice of violation for an inchoate or attempted violation that has not actually occurred.)[7]

In light of the foregoing, it is unnecessary to discuss any other issues raised by Appellant.

It is therefore ORDERED that the Order Imposing Fine is QUASHED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

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[1]The notice also cited the property as having violated section 27-326, Tampa, Fla. Code. This section is an informational provision; it does not itself mandate or prohibit any specific conduct with regard to the use of property.

[2]Mr. Goodstein's unrebutted testimony was that a reservation had to be in place for at least 48 hours and paid for before he would be notified. That did not occur here.

[3]*Cf. Super Host, LLC v. City of Tampa,* Appeal Case No. 20-CA-5743 (Fla. 13th Jud. Cir. October 24, 2022) [30 Fla. L. Weekly Supp. 538a], which contained competent evidence of a property rented for fewer than seven days' time, specifically, a *completed* two-day booking, photographs of occupants arriving, and neighbors' and a renter's testimony as to the length of the stay.

[4]The City claimed in its response that Petitioner did not seek rehearing.

[5]Undisclosed evidence in the City's possession shows that Appellant's booking site required reservations to be a minimum of seven days. Although it is unfortunate that the City withheld this evidence, it is unnecessary to sustain this court's decision. As is explained in the opinion, the code does not prohibit an immature or unripe violation.

[6]This should not be read as precluding the City from issuing a warning, however.

[7]It is unfathomable to this court how a finding that a violation that has not occurred could be deemed irreparable, for there is nothing broken. For reasons set forth in this Court's recent decision in *Super Host, LLC v. City of Tampa,* Case No. 20-CA-5743 (Fla. 13th Jud. Cir. [Appellate] October 24, 2022), had a violation occurred it is accurate to say it would not be curable, but it could not be considered irreparable because only violations specifically deemed by the code to be irreparable may be considered as such. Such violations more closely fit the code's reference to *transient* violation. §§ 9-2 (defining "itinerant" or "transient" violation), 9-3(c), Tampa, Fla. Code.

* * *

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Licensee's failure to maintain single lane justified traffic stop irrespective of lack of risk to driver or others—Moreover, stop was lawful where irregular driving pattern provided officer with founded suspicion of impaired driving

JIMMIE LEE AIKENS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 14th Judicial Circuit (Appellate) in and for Bay County. Case No. 21-0892-CA. December 7, 2022. Counsel: Elana J. Jones, Former Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JAMES J. GOODMAN, J.) **THIS MATTER** is before the Court on the Petition for Writ of Certiorari, filed July 12, 2021. The Court heard the parties' oral arguments on November 2, 2022. Having considered the Petition for Writ of Certiorari, the Department's Response, and

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Petitioner's Reply, counsel's arguments, the applicable law, court file and the record, and being otherwise fully advised, this Court finds as follows:

FINDINGS OF FACT

1. On March 21, 2021, Officer Dmitry Smolkin of the Panama City Police Department, while driving in the left lane behind Petitioner, observed that Petitioner failed to maintain his lane of travel and was swerving from the inside left lane to the center lane divider and over the right lane divider. (Smolkin's Aff.). Due to the vehicle's driving pattern, the Officer initiated a traffic stop at the intersection with Hickory Avenue and U.S. 98. (*Id*.)

2. Upon contacting Petitioner, Officer Smolkin detected the odor of an alcoholic beverage on Petitioner's breath and noticed that his eyes were watery and his speech slurred. (*Id*.) The passenger in the vehicle was also visibly intoxicated at the time of the stop. (*Id*.) Subsequently, another officer arrived at the scene and also detected the odor of an alcoholic beverage on Petitioner's breath. (*Id*.)

3. Petitioner was then asked to participate in a Field Sobriety Evaluation, which showed additional indicators of impairment. (*Id*.) Accordingly, Officer Smolkin placed Petitioner under arrest for driving under the influence and requested him to submit to a breath test. (*Id*.) After Petitioner refused to submit to a breath test at the scene, he was transported to the Bay County Jail, where he was read CDL Implied Consent Warning, and a breath test was conducted. (*Id*.) After a 20-minute observation period, the Petitioner provided two valid breath test samples of .152g/210L and .155g/210L. (*Id*.) Subsequently, Petitioner's driving license was suspended.

4. Following his arrest for DUI, Petitioner requested a formal administrative review of his license suspension pursuant to section 322.2615, Florida Statutes. After an evidentiary hearing, the hearing officer determined that the evidence was sufficient to sustain the suspension. (*See* Findings of Fact, Conclusions of Law and Decisions, Petr.'s Ex. "A," filed July 12, 2021.)

5. After the hearing officer's determination, Petitioner timely filed the underlying Petition in this Court, arguing that the administrative order of the hearing officer failed to comply with the essential requirements of the law and was not supported by competent, substantial evidence. In pertinent part, like his arguments raised at the lower tribunal, Petition challenges the validity of the initial traffic stop. Precisely, Petitioner claims that the Department should have invalidated his driving license suspension for DUI because his vehicle was unlawfully stopped.

STANDARD OF REVIEW

6. Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine (1) whether procedural due process has been accorded, (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. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Furthermore, it is an error for the Court to reweigh the evidence and substitute its judgment with that of the hearing officer. *Dep't of Highway Safety & Motor Vehicles v. Favino*, 667 So. 2d 305, 309 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a].

THE LAW

7. An officer can stop a motor vehicle based on observations indicating that there is a problem with the driver or the vehicle. *Bailey v. State*, 319 So. 2d 22 (Fla. 1975) ("[A] stop is permitted even without a traffic violation, so long as the stop is supported by a reasonable suspicion of impairment, unfitness or vehicle defects."). As explained in *Bailey*, "[b]ecause of the dangers inherent to our modern vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation." *Id*. Based on this principle, the *Bailey* court held that it was proper for an officer to stop a vehicle when it was going 45 m.p.h. and weaving within its lane, even though the officer observed nothing indicating a traffic violation or commission of a crime. *Id*.

8. In addition, as explained in *State, Dept. of Highway Safety and Motor Vehicles v. DeShong*:

> [e]rratic driving similar to that involved in this case has been held sufficient to establish a founded suspicion and to validate a DUI stop. . . . Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop. . . . The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior.

603 So. 2d 1349, 1952 (Fla. 2d DCA 1992)

9. In support of his position, Petitioner relied primarily on the decisions in *Crooks v. State*, 710 So. 2d 1041 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1323b], *Hurd v. State*, 958 So. 2d 600 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a], and *Jordan v. State*, 831 So. 2d 1241 (Fla. 3d DCA 2002) [28 Fla. L. Weekly D84a], asserting that the weaving outside of the lane was insufficient to support the underlying traffic stop since there was no indication that said conduct created any safety concerns. However, Petitioner's reliance on these cases is misplaced.

10. In *Crook*, the officer observed a vehicle cross over the right-hand line of the roadway three times and stopped the driver for violating section 316.089(1), Florida Statutes, which requires a driver to operate a vehicle "as nearly as practicable entirely within a single lane," and that the drive should not move from the lane until determined that this could be done safely. Accordingly, the appellate court in *Crook* disagreed with the trial court that the stop was proper and concluded that the evidence was insufficient to support a violation of the cited statute. For that reason, the *Crook* decision has been misinterpreted as a departure from the rulings in *DeShong* and *Bailey*.

11. However, the *Crook* decision has been further clarified by the Second District Court of Appeal in *State v. Davidson*, 744 So. 2d 1180 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a], where the court recognized the legitimacy of a traffic stop to investigate unusual driving behavior. *Davidson*, 744 So. 2d at 1181. Precisely, the Second District expressly distinguished *Crook* because the deputy there did not think the defendant was in any way impaired and because the law enforcement personnel had caused the defendant to drift over the line. *Id*. The same distinction has been further explained by Judge Altenbernd in his concurring opinion in *Harrington v. Dep't of Hwy. Safety & Motor Vehicles*, 136 So. 3d 691 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D273b], where he wrote:

> A headnote to [the *Crooks*] opinion overstates and oversimplifies the holding in the case[.] Mr. Crooks was not stopped on suspicion of driving under the influence when he was weaving in his lane or otherwise driving in a fashion that suggested he was impaired. . . . No officer in *Crooks* suggested that he or she believed that Mr. Crooks might be intoxicated or otherwise impaired. I do not regard *Crooks* as even persuasive precedent in a case where an officer stops a car late at night because the driver is weaving in a lane and there is no basis to believe that the driver is avoiding other traffic. Even when a vehicle manages to stay within a single lane, there are patterns of driving that an experienced officer may rely upon to establish reasonable suspicion that the driver is impaired. That suspicion allows the officer to conduct a brief traffic stop to determine whether the officer has probable cause to arrest the driver for DUI.

Harrington v, 136 So. 3d at 691-92

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12. Thus, a traffic stop is considered lawful when made for investigatory purposes based on unusual driving falling short of a traffic violation. *State v. Davidson*, 744 So. 2d 1180, 1181 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a] (explaining that "[t]he courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior").

13. Moreover, the correct test to be applied in such situations is whether the officer who initiated the traffic stop had an objectively reasonable basis for making the traffic stop. *Dobrin v. Fla. Dep't of Hwy. Safety & Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a].

ANALYSIS

14. In the instant matter, a review of the Officer's Report shows that it does not include a stated reasoning for the stop besides the vehicle's unusual driving pattern. However, under the principles established in *Bailey* and *DeShong*, traffic stops are permitted when an officer observes an unusual driving pattern and suspects the driver might be impaired. Here, it appears that the way Petitioner drove the vehicle had led to the Officer's decision to conduct the initial stop.

15. In this regard, it should be noted that the Supreme Court's ruling in *Dobrin* has sometimes been misunderstood as requiring the officer's expressed statement in his report that he suspected the driver was ill, tired, impaired, etc. *See Dep't of Highway Safety and Motor Vehicles v. Utley*, 930 So. 2d 698 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1135a] (J. Hawkes concurring); *see also State, Dept. of Highway Safety & Motor Vehicles v. Maggert*, 941 So. 2d 431 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2530a], review denied, 952 So. 2d 1190 (Fla. 2007) (where objective evidence established probable cause for DUI, absence of a statement in the arrest report that officer made the stop for suspicion of impairment, does not negate probable cause). However, while the lack of such a statement could be a basis for confirming a lower tribunal's ruling as articulated in the decision's dicta, the holding of *Dobrin* does not stand for the proposition that the record *must* include the officer's *subjective* reasoning for stopping a particular vehicle (emphasis added). *See Utley*, 930 So. 2d at 699-700. Instead, to assume such a requirement would lead to a controversy with the opinion in *Whren*,[1] which the Florida courts are required to follow. *Id*.

16. Indeed, as discussed above, the applicable case law confirms that failure to maintain a single lane alone can justify a traffic stop. *See Roberts v. State,* 732 So. 2d 1127, 1128 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1475c] ((weaving several times within a single lane held sufficient to justify a stop where there was no evidence to show endangerment to others and where no traffic violation had occurred); *see also Ndow v. State*, 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a] ("If a police officer observes a motor vehicle operating in an unusual manner, there may be justification for a stop even when there is no violation of vehicular regulations and no citation is issued."). The fact that the Officer's Report in the instant matter did not include the expressed statement that "he stopped the vehicle because he suspected [Petitioner] was driving under the influence, or was ill, tired, or in distress" is not critical when the arrest report could support such an objective basis to justify the initial stop. *See Utley*, 930 So. 2d at 699-700; *see also State v. Perez-Garcia*, 917 So. 2d 894, 897 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2397b], decision quashed on other grounds, 983 So. 2d 578 (Fla. 2008) [33 Fla. L. Weekly S373a] ("[A]n officer's state of mind, motivation, or subjective intent plays no role in the ordinary probable cause analysis under the Fourth Amendment or Art. I, section 12 of the Florida Constitution."). Moreover, there is no specific requirement, as Petitioner argues, that the operation of the vehicle should create a risk to the driver or others. *Dep't of Hwy. Safety & Motor Vehicles v. Jones*, 935 So. 532, 535 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1518a] (citing *Yanes v. State*, 877 So. 2d 25, 26-7 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a]).

17. Finally, a traffic stop can be based on probable cause for a traffic infraction or a reasonable suspicion of a crime. *State v. Moore*, 791 So. 2d 1246 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2037d]. Under section 901.15(1), Florida Statutes, an officer is authorized to arrest a person who commits a crime in his presence. There is no suggestion that the traffic stop here was initiated because Petitioner violated section 316.089(1), Florida Statutes, and Petitioner was not issued a citation for failure to drive within a single lane. However, driving a vehicle while under the influence of alcohol is a crime per section 316.193, Florida Statutes. Even in the absence of probable cause for the arrest prior to the stop, an officer can stop a driver based upon a "founded suspicion" that the person is driving while under the influence. *State v. Carrillo*, 506 So. 2d 495, 496 (Fla. 5th DCA 1987). The irregular driving pattern of Petitioner's vehicle sufficed for the Officer's founded suspicion. Thereafter, the Officer's investigation established probable cause for Petitioner's arrest. § 901.151, Fla. Stat.; *see also Carrillo,* 506 So. 2d at 496. Accordingly, the suspension of his driving license was also appropriate.

18. Based on the record and the specific facts in this case, the Court concludes that the Department complied with the essential requirements of the law and that there was substantial, competent evidence to support the Hearing Officer's Order.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Petition for Writ of Certiorari, filed on July 12, 2021, is hereby **DENIED**.

---

[1]The Constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved. *Whren v. United States*, 517 U.S. 806, 813 (1996).

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Willful refusal—Licensee's statement that he could not provide breath sample due to health reasons, standing alone, is not sufficient to establish that his refusal to submit to breath test was not willful

DAVID WHYTE, 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. 22-CA-372-K. December 22, 2022. Counsel: Elana J. Jones, Former 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 26, 2022. Petitioner seeks certiorari review of Respondent's final order sustaining Petitioner's driver license suspension under section 322.2615, Florida Statutes, for the refusal to submit to a breath, blood, or urine 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, the Department's Response to Petition for Writ of Certiorari, and heard argument on December 20, 2022. Based on the foregoing, this Court finds as follows:

Factual Background:

On January 12, 2022, Petitioner was arrested by the Monroe County Sheriff's Office for driving under the influence (DUI).

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Subsequently, Petitioner's driver license was suspended as a result of Petitioner's refusal to submit to a breath test. Petitioner requested a formal administrative hearing with the Department to challenge the suspension, which was held on April 21, 2022. Deputy Torres of the Monroe County Sheriff's Office appeared and testified. At the hearing, Deputy Torres testified that he requested Petitioner provide a sample of his breath, and Petitioner advised that because of health reasons he could not provide a sample. As a result, Petitioner was read the implied consent warning and he again refused to submit to a breath test.

The Hearing Officer sustained the suspension, finding there was probable cause that Petitioner 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; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if he 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. The hearing officer found that all elements necessary to sustain the suspension for refusal to submit to a breath, blood, or urine test under section 322.2615 of the Florida Statutes, were supported by a preponderance of the evidence.

Standard of Review:

A circuit court's review of an administrative agency decision is limited to the following 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. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982). Further, it is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination. *Cohen v. School Board of Dade County, Florida*, 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984); *Campbell v. Vetter*, 392 So. 2d 6 (Fla. 4th DCA 1980), *pet. for review denied*, 399 So. 2d 1140 (Fla. 1981).

Analysis:

Petitioner argues that his refusal was not willful since he advised Deputy Torres that he could not provide a sample of his breath because of health reasons. Other than that statement to the deputy, there was no evidence in the record to support the Petitioner's statement that he suffered from a medical condition preventing him from providing a breath sample. Based on the caselaw cited by Petitioner and Respondent, the Petitioner's statement in and of itself is not sufficient to establish that this was not a willful refusal. Otherwise, everyone who is confronted with a request to provide a breath test would only need to say that they suffered from a medical condition to avoid providing a breath sample. In this case there was no evidence showing Petitioner made any effort to submit to the breath test or evidence presented by the Petitioner that his medical condition prevented him from providing a breath test to establish that his refusal was not willful.

Accordingly, this Court concludes that the Department's decision to uphold the Petitioner's driver license suspension is supported by competent substantial evidence, that the Petitioner was accorded procedural due process, and that there was no departure from the essential requirements of the law.

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

* * *

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CIRCUIT COURTS—ORIGINAL

Insurance—Bad faith—Conditions precedent—Civil remedy notice—CRN that demanded attorney's fees and costs that insurer was not obligated to pay under contract was defective and invalid—Complaint dismissed with prejudice

BARRY GARMAN, Plaintiff, v. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 1st Judicial Circuit in and for Escambia County. Case No. 2022-CA-001608, Division E. January 5, 2023. Jan Shackelford, Judge. Counsel: Rachelle Carnes, Krapf Legal, Clearwater, for Plaintiff. Amanda Kidd, Boyd & Jenerette, P.A., Pensacola, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION TO STAY DISCOVERY

THIS CAUSE, having come before this Honorable Court on December 29, 2022, upon Defendant's Motion to Dismiss and Motion to Stay Discovery, and after the Court having reviewed the motions, and being otherwise advised in the premises, it is hereby **ORDERED and ADJUDGED** as follows:

1. Plaintiff BARRY GARMAN's Complaint against STATE FARM FLORIDA INSURANCE COMPANY ("STATE FARM") for insurance bad faith pursuant to § 624.155, Florida Statutes, is hereby DISMISSED WITH PREJUDICE for failure to state a cause of action, as the Civil Remedy Notice upon which this action is predicated was defective. *See Talat Enterprises, Inc. v. Aetna Cas. And Sur. Co.,* 753 So.2d 1278, 1283-84 (Fla. 2000) [25 Fla. L. Weekly S172a]; *Vest v. Travelers Ins. Co.,* 753 So.2d 1270, 1275 (Fla. 2000) [25 Fla. L. Weekly S177a].

2. As a condition precedent to bringing a cause of action pursuant to § 624.155, Florida Statutes, an insured must first serve on the insurer and file a Civil Remedy Notice "CRN" describing the violation in detail, and the insurer must then fail to cure the properly noticed violation within 60 days. *Id.,* F.S. §§ 624.155(3)(a),(b),(d).

3. Plaintiff BARRY GARMAN's Civil Remedy Notice failed to comply with the strict requirements of F.S. § 624.155, in that it failed to offer a proper and valid cure by demanding payment of extra-contractual damages by the way of its demand for STATE FARM's payment of attorney's fees and costs.

4. At the time the Civil Remedy Notice was filed against STATE FARM, there was no pending lawsuit filed by Plaintiff against STATE FARM. There was further no STATE FARM policy provision which obligated STATE FARM to pay Plaintiff his attorneys fees and/or costs. Accordingly, there was no mechanism under which STATE FARM would have been obligated to pay any attorney's fees or costs to the Plaintiff at the time the Civil Remedy Notice was filed and the demand for same as part of the CRN cure was for extra-contractual damages, which render the Civil Remedy Notice defective and invalid.

5. Because Plaintiff can no longer remedy the failure to comply with F.S. § 624.155, dismissal with prejudice is appropriate.

6. STATE FARM's Motion to Stay Discovery pending the outcome of the Motion to Dismiss is hereby rendered MOOT.

* * *

Insurance—Homeowners—Insured's action against insurer—Conditions precedent to suit—Retroactive application—Statute that creates new presuit obligations for insureds does not apply retroactively to policy issued prior to statute's effective date—Motion to dismiss is denied

CORY T. SHROPSHIRE and LASONYA SHROPSHIRE, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY, a Florida for-profit corporation, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 22-CC-005185. December 8, 2022. James A. Ruth, Judge. Counsel: Matthew S. Brown, Hair Shunnarah Trial Attorneys, Jacksonville, for Plaintiffs. David A. Hildreth, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss, Or Alternatively, Motion for Judgment on the Pleadings. The Court has reviewed the Motion and Responses and is otherwise advised in the premises. It is hereby:

ORDERED and ADJUDGED:

1. The Defendant's Motion is DENIED.
2. Fla. Stat. 627.70152 became effective July 1, 2021.
3. Fla. Stat. 627.70152 creates pre-suit notice requirements.
4. The insurance policy related to the claim that is the subject of this matter commenced on December 7, 2020 and ended on December 7, 2021.
5. The policy period pre-dates the enactment of Fla. Stat. 627.70152.
6. Fla. Stat. 627.70152 creates new obligations to the Plaintiffs that did not exist at the time the policy went into effect.
7. Retroactive application of this statute would be in violation of *Menendez v. Progressive Express Insurance Co., Inc*., 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b].
8. The Defendant shall respond to Plaintiffs' Complaint within ten (10) days of Entry of this Order.

* * *

Insurance—Builders' risk—Coverage—Vacant building—There was no coverage for water remediation services at vacant building that was vandalized more than 60 days after inception of policy where policy only included coverage for 60 days from policy inception unless building permits had been obtained and rehabilitation or renovation work had begun—No merit to arguments that presence in building of tables and chairs used to meet with contractors and engineers meant that property was not vacant or that planning to do work on building met requirement that rehabilitation or renovation work had begun

DRIRITE USA, INC., Plaintiff, v. PROSPERITAS LEADERSHIP ACADEMY, INC. and OHIO CASUALTY INSURANCE COMPANY, Defendants. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2018-CA-011666-O. January 4, 2023. A. James Craner, Judge. Counsel: William N. Asthma, Asthma & Asthma, P.A., Winter Garden; and Guy H. Gilbert, Law Office of Guy H. Gilbert, Orlando, for Plaintiff. Matthew J. Lavisky, Latasha S. Scott, and Jamie Combee Novaes, Butler Weihmuller Katz Craig LLP, Tampa, for Ohio Casualty Insurance Company, Defendant. Jerry Girley, The Girley Law Firm, P.A., Orlando, for Prosperitas Leadership Academy, Defendant.

ORDER GRANTING MOTION FOR SUMMARY FINAL JUDGMENT

THIS CAUSE came before the Court on December 19, 2022, upon Ohio Casualty Insurance Company's ("Ohio Casualty") Motion for Summary Final Judgment ("the Motion"). The Court has reviewed the Motion, the Response, and the Reply. The Court also heard argument of counsel. The Court is fully advised. For the reasons stated on the record and set forth below, the Motion is **GRANTED.**

Ohio Casualty issued a Builders' Risk Rehabilitation and Renovation insurance policy to Prosperitas Leadership Academy, Inc., with an effective date of March 30, 2018. The insurance policy provides:

PROPERTY COVERED

"We" cover the following property unless the property is excluded or subject to limitations.

Rehabilitation And Renovation—"We" cover buildings or structures while in the course of rehabilitation or renovation as described below.

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1. Coverage—

a. Existing Building—If coverage for Existing Building is indicated on the "schedule of coverages", "we" cover direct physical loss caused by a covered peril to an "existing building" while in the course of rehabilitation or renovation.

. . .

COVERAGE LIMITATION

(X) Vacant Building—"We" only cover a vacant "existing building" for 60 consecutive days from the inception date of this policy unless building permits have been obtained and rehabilitation or renovation work has begun on the "existing building".

On August 24, 2018, the property was vandalized, resulting in water damage. Plaintiff contends it did work at the property subject to an Assignment of Benefits. Ohio Casualty contends there is no coverage based on the policy provisions cited above.

Plaintiff contends that these provisions are ambiguous because certain terms are not defined. The Court rejects this argument. "The lack of a definition of a term in a policy does not render it ambiguous or in need of interpretation by the courts, but rather such terms must be given their every day meaning and should be read with regards to ordinary people's skill and experience." *Miglino v. Universal Prop. & Cas. Ins. Co.,* 174 So. 3d 479, 481 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1910a]. The Court finds that these provisions are unambiguous.

The Court first addresses the Vacant Building Coverage Limitation. The Court finds that the property was vacant. The Court relies on the deposition transcript of Michael Spence and the documents attached thereto, including photographs. The Court rejects the argument that the existence of a couple of tables and chairs for Prosperitas to meet with contractors or engineers means that the property was not vacant. *See e.g., Faraj v. Ohio Cas. Ins.* Co., 543 F. Supp. 3d 552, 562 n.4 (N.D. Ohio 2021).

In addition, it is clear that more than 60 days passed between the inception of the insurance policy and the date of loss. Thus, there is no coverage unless two conditions were met: (1) building permits were obtained; and (2) rehabilitation or renovation work had begun. The Court finds neither condition was met. It is undisputed that no permits were obtained. The Court further finds that rehabilitation or renovation work had not begun. The Court agrees with Ohio Casualty that the requirement that "rehabilitation or renovation work has begun" requires more than planning to do such work by meeting with or engaging engineers or architects. *Belich v. Westfield Ins. Co.,* 99-L-163, 2001 WL 20751, at *3 (Ohio Ct. App. Dec. 29, 2000); *Faraj,* 543 F. Supp. 3d at 560. In this case, the summary judgment evidence shows that no rehabilitation or renovation work had begun. For this same reason, the Court also finds that no coverage exists under the grant of coverage because the property was not "in the course of rehabilitation or renovation."

For the reasons stated above and on the record at the hearing, it is **ORDERED AND ADJUDGED** that **FINAL JUDGMENT** is entered for Defendant Ohio Casualty Insurance Company and against Plaintiff DriRite USA, Inc. Plaintiff DriRite USA, Inc. shall take nothing by this action from Ohio Casualty Insurance Company. Defendant Ohio Casualty Insurance Company shall go hence without day.

* * *

Insurance—Uninsured motorist—Rejection of coverage—Validity—There is no genuine issue of material fact as to whether insured signed UM selection/rejection form where electronic signature was typed out on signature box that is logically associated with form—Insured cannot raise issues that form approved by Office of Insurance Regulation is not being used as intended by OIR or that OIR was wrong in approving form without first exhausting administrative remedies with OIR—No merit to claim that insurer's process of presenting UM selection/rejection form after insured has made initial selections of coverage is invalid—Conclusive presumption that insured who has signed OIR-approved UM selection/rejection form made informed, knowing choice cannot be rebutted by testimony that insured did not read form—Insurer is entitled to final summary judgment

JENNIFER N. HOLLEY, Plaintiff, v. BRENDA GALVAN, as personal representative and on behalf of ASHLEY IVETTE SALCEDO, deceased, PROGRESSIVE SELECT INSURANCE COMPANY, Defendants. Circuit Court, 10th Judicial Circuit in and for Polk County. Case No. 53-2019-CA-003156-0000-00, Civil Division 15. January 4, 2023. William D. Sites, Judge. Counsel: Gregg Silverstein, Dan Moody, and Lydia Zbrzeznj, for Plaintiff. William Bracken, for Brenda Galvan, Defendant. Kansas Gooden and Josh Hartley, Boyd & Jenerette, P.A., Miami, for Progressive Select Insurance Company, Defendant.

FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT PROGRESSIVE SELECT INSURANCE COMPANY

This cause having come before the Court for hearing on November 16, 2022, on Defendant Progressive Select Insurance Company's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment, and the Court having heard the arguments of counsel, having reviewed Progressive's Motion for Summary Judgment, Plaintiff's Response, Plaintiff's Motion for Summary Judgment, Progressive's Response, Plaintiff's Motion to Strike and Reply to Progressive's Response and Progressive's Motion to Strike Plaintiff's Reply, having considered the applicable law and record evidence, and being otherwise duly advised in the premises, the Court finds as follows:

FACTS

The facts are largely undisputed. On April 15, 2018, the Plaintiff, Jennifer Holley, and her mother, Dorothy Holley, made the decision to purchase a Progressive automobile insurance policy from Progressive's website. The policy did not provide Uninsured/Underinsured ("UM") coverage, but because the policy provided bodily injury liability limits of $10,000 each person and $20,000 each accident, Progressive was required to obtain a written rejection of UM coverage. Plaintiff and her mother followed the steps on the Progressive website to electronically sign the UM selection/rejection form rejecting UM coverage. The Office of Insurance Regulation ("OIR") had approved this form.

On July 31, 2018, Jennifer Holley was involved in an automobile accident. Plaintiff subsequently filed the instant lawsuit claiming entitlement to UM coverage.

DISCUSSION

I. Section 627.727, Florida Statutes, Conclusive Presumption

"Generally, UM benefits under an automobile insurance policy are equal to the policy's liability limits." *Chase v. Horace Mann Ins. Co.,* 158 So. 3d 514, 517 (Fla. 2015) [40 Fla. L. Weekly S97b]. Nevertheless, an insured may reduce their coverage by selecting stacking coverage with limits lower than the bodily injury limits, selecting non-stacking coverage, or rejecting UM coverage altogether. 627.727(9), Fla. Stat.; *State Farm Fire & Cas. Ins. Co. v. Wilson,* 330 So. 3d 67 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D1183a]. "If an insured makes such a choice and does so by signing an OIR-approved form, it shall 'be conclusively presumed' that the insured has made an 'informed, knowing' choice regarding UM coverage on behalf of all insureds." *Id.*; (quoting §§ 627.727(1), (9), Fla. Stat).

"The very purpose of the conclusive presumption is to avoid litigation . . . ." *Wilson,* 330 So. 3d at 76; *see also Larusso,* 888 So. 2d at 718 n.1 (noting that without the conclusive presumption there would be "the potential of litigation of forms rejecting uninsured motorist coverage in every case in which they are present").

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> The reason the legislature authorized the conclusive presumption only where the insured has signed an OIR-approved form is to preempt litigation that has the goal of second-guessing the substantive validity and legal sufficiency of a form's content. Obviously, insurers rely on such forms to determine premiums and manage risk. . . .
>
> > The legislature granted [OIR] the authority to approve or disapprove forms used by each insurance company to offer or limit coverage. Insurance companies rely on [OIR] approval in taking these applications and issuing insurance based upon the rejection of UM protections as indicated on these forms. Lower premiums are charged as a result of such rejections. So that the insurer can adequately establish its risk and charge appropriate premiums, the [l]egislature created a conclusive presumption that the signing of the approved form establish a knowing acceptance of the limitations.

Wilson, 330 So. 3d at 76 (quoting *Larusso,* 888 So. 3d at 718). Indeed, a conclusive presumption is one that "cannot be overcome by any additional evidence or argument." Black's Law Dictionary 1223 (8th ed. 2004). It is not rebuttable in any manner.

In the instant case, Defendant seeks summary judgment arguing that because it has presented a signed UM selection/rejection form that meets all the requirements set forth in Section 627.727(1), it is entitled to a conclusive presumption that that there was a knowing and informed rejection of UM coverage. In support, Defendant identifies the insurance policy and the signed UM selection/rejection form, which reflect that UM coverage was rejected and that Plaintiff never paid a premium for UM coverage. Defendant also provides sworn deposition testimony from the Plaintiff verifying that she electronically signed the UM selection/rejection form. Moreover, Defendant provides exhibits, demonstrating that the OIR approved Progressive's UM selection/rejection form and which also explain the process that Plaintiff and her mother navigated when purchasing the policy and signing the UM selection/rejection form.

Plaintiff, on the other hand, contends that the UM selection/rejection form is not valid and is therefore unenforceable. Specifically, Plaintiff contends that: (1) the UM selection/rejection form was not electronically signed by Plaintiff, (2) the UM selection/rejection form was allegedly not approved by the OIR, and (3) the procedure Progressive used for Plaintiff to reject UM coverage is legally invalid and prevents a conclusive presumption of a knowing and informed rejection of UM coverage. Thus, it is Plaintiff's position that she is entitled to stacked UM coverage as a matter of law.

A. Written Signature

Defendant argues that there is no genuine issue of material fact as to whether the Plaintiff signed the UM selection/rejection form. Under Florida law, an electronic signature is defined as "any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing." § 668.50(4), Fla. Stat.; *see also* § 668.50(2)(h) Fla. Stat. (The Uniform Electronic Transaction Act ("UETA") defining an electronic signature as "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.").

Defendant has pointed to both the Plaintiff's own sworn testimony in this case and the signed UM selection/rejection form to support its request for summary judgment. Plaintiff argues that because her electronic signature was typed out on an electronic signature box directly below the form, it does not constitute an actual written signature and the UM selection/rejection form is unsigned. However, Florida's UM statute allows electronic signatures and a "signature may be validly affixed by a number of different means" *Haire v. Florida Dept. of Ag. And Cons. Services,* 870, So. 2d 774, 789 (Fla. 2004) [29 Fla. L. Weekly S67a]; *See also Pflug v. Allstate Fire & Cas. Ins. Co.,* 2022 U.S. Dist. LEXIS 2960 (M.D. Fla. Jan 6, 2004). Plaintiff's position also ignores the plain definition of electronic signatures that allow them to be "logically associated with" a writing. Here, the signature box is indisputably logically associated with the UM selection/rejection form and, thus, the Court concludes that there is no genuine issue of material fact on the question of whether Plaintiff signed the UM selection/rejection form. As cogently explained by the *Pflug* Court:

> [f]or better or for worse, electronic signatures are now a part of everyday life. They are legally valid. Many of us knowingly choose to affix our signatures, both electronic and physical, to contracts without carefully reading the contractual obligations we are getting ourselves into. When we make that choice, as many of us do, we have to live with the consequences."

2022 U.S. Dist. LEXIS 2960 at *6-7.

B. OIR Approval

Plaintiff also argues that she is entitled to summary judgment in her favor because the Progressive UM selection/rejection form was not approved by the OIR. Plaintiff's position is not that Progressive failed to obtain OIR approval for its UM selection/rejection form altogether; rather, it is Plaintiff's position that the UM selection/rejection form approved by the OIR was blank and that Progressive materially altered the OIR approved form in such a way that it cannot be used as intended by the OIR.

Defendant argues that Plaintiff has failed to point to any record evidence that it altered the form or that the allegedly changed UM selection/rejection form was not used as intended by the OIR. Defendant maintains Plaintiff failed to exhaust her administrative remedies with the OIR prior to bringing the lawsuit.

In other words, there is no dispute that the subject form was approved by OIR. Plaintiff simply claims the approved form is not being used in the manner contemplated by the OIR. When a party is aggrieved by a decision of an administrative agency, like the OIR in this case, Florida circuit courts have no authority to provide relief before administrative remedies are exhausted. *Serchay v. State Farm Fla. Ins. Co.,* 25 So. 3d 652 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D129a]; *State Farm Mutual Automobile v. Gibbons,* 860 So. 2d 1060 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2800b]; *Progressive Express Ins. Co. v. Reaume*, 927 So. 2d 1120 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2004a].

The Court agrees with the Defendant that Plaintiff has failed to provide any record evidence that it altered the form and failed to establish that Progressive is not using its UM selection/rejection form in accordance with how the OIR intended it for to be used. The very purpose of the conclusive presumption mandated in Section 627.727, Florida Statutes, is to avoid litigation and it is not the role of this Court to guess as to how the OIR did or did not intend for Progressive to use its UM selection/rejection form. *See Wilson,* 330 So. 3d at 77 (holding that it is not the role of the judiciary to decide whether an OIR-approved form is consistent with the UM statute because "[t]he legislature obviated such inquiries" through the conclusive presumption mandated in Florida Statute Section 627.727."). As the Second DCA in *Wilson* held, "[j]udicial disregard of this statutory mandate amounts to an improper appropriation of legislative power, which our constitution forbids." *Id*.

The undisputed material facts here establish that the OIR approved Progressive's UM selection/rejection form. If Plaintiff believed that the OIR was wrong to have approved it, or that Progressive is not using the form as intended by the OIR, she must have first exhausted her administrative remedies with the OIR in order to establish that the form is not being used as intended.

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C. The Progressive Process to Reject UM Coverage

Plaintiff also argues that she is entitled to summary judgment because the Progressive process that Plaintiff used to reject UM coverage is invalid. Specifically, Plaintiff argues that she is entitled to stacked UM coverage as a matter of law because Plaintiff did not electronically sign the UM selection/rejection form until after she made her initial selections of coverage.

However, the temporal requirement posited by Plaintiff is completely absent from the statute as Section 627.727(1), Florida Statutes, does not require the execution of a UM selection/rejection form prior to an insured making their selections of coverages. There is absolutely nothing in the text of Section 627.727, Florida Statutes, that prohibits Progressive from preparing its UM selection/rejection form in accordance with its insureds coverage selections that are made during the application, and then presenting it to them for their review, approval, and signature. *See* § 627.727, Fla. Stat. Indeed, this is all done in connection with binding the policy.

The Court is bound by the plain text of the UM statute and Plaintiff fails to address how decades worth of precedent holding that a party is bound by the terms of a contract when they are given the opportunity to read it, but chose not to or did not understand it, prior to signing it is somehow inapplicable to the instant situation. *See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton,* 467 So. 2d 311, 313 (Fla. 5th DCA 1985) (rejecting argument that customer was not bound by standard contract forms she signed because she did not read or understand the forms); *All Fla. Sur. Co. v. Coker,* 88 So. 2d 508, 510 (Fla. 1956) ("one who signs or accepts a written instrument without reading it with care is likely to be surprised and grieved at its contents later on. In most cases he had been held bound in accordance with its written terms.") (quoting Corbin on Contracts Section 607).

In fact, this principle of law has been applied to the execution of UM selection/rejection forms. In *White v. Allstate Ins. Co.,* 530 So. 2d 967, 969 (Fla. 1st DCA 1988), the First District Court of Appeal held:

> [t]he presumption created by § 627.727 cannot be rebutted by testimony that the person signing the rejection form did not read it. The consequences of signing any document or contract cannot be avoided by merely testifying that the document or contract was not read, and this is particularly true of the document in question which contained a warning and notice in large type that it should be carefully read.

Id. at 969; *see also Liberty Mut. Ins. Co. v. Ledford,* 691 So. 2d 1164, 1166 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D982a] (holding the conclusive presumption cannot be rebutted by testimony that someone did not read the form); *Baum v. Allstate Ins. Co.,* 496 So. 2d 201, 204 (Fla. 4th DCA 1986) (affirming entry of final judgment in favor of insurance company and rejecting insured's argument that there was not an informed rejection of UM coverage because the insured did not understand the form he signed and further holding that "one cannot claim ignorance of the contents of a written instrument which one signs.") (internal citations omitted).

The undisputed material facts in this case demonstrate that, in exchange for a discounted premium, Plaintiff purchased a policy of insurance without UM coverage and memorialized her intent to reject UM coverage by electronically signing Progressive's OIR approved UM selection/rejection form. Plaintiff herself swore under oath in this action that she signed her name to the UM selection/rejection form. Plaintiff had numerous opportunities throughout the process to request UM coverage; however, she choose not to.

After sustaining injuries in an accident, Plaintiff regretted her decision to reject UM coverage and has filed a lawsuit to try and claim the benefit of coverage that she never paid for. However, this Court cannot rewrite the insurance contract to relieve Plaintiff of a bargain that turned out to be improvident.

Progressive is entitled to a conclusive presumption that there was an informed and knowing rejection of UM coverage. The OIR approved Progressive's UM selection/rejection form that meets all the requirements of Section 627.727, Florida Statutes. Plaintiff is bound by her electronic signature even if she did not read and/or fully understand the UM selection/rejection form prior to electronically signing it. There is no evidence of fraud, forgery, or trickery. The very purpose of the conclusive presumption mandated in Section 627.727, Florida Statutes, is to reduce litigation. Accordingly, the Court finds that based on the undisputed material facts that Progressive is entitled to final summary judgment

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

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

2. Plaintiffs Motion for Summary Judgment is **DENIED**.

3. This Court hereby enters final summary judgment in favor of Defendant PROGRESSIVE SELECT INSURANCE COMPANY. Plaintiff JENNIFER HOLLEY shall take nothing by this action and Defendant PROGRESSIVE SELECT INSURANCE COMPANY shall go hence without day.

4. This Court reserves jurisdiction to determine entitlement and amount of taxable costs and attorney's fees.

* * *

Criminal law—Discharging firearm in public or residential property—Location of shot—Evidence—Expert—Evidence generated by ShotSpotter, a private company which purports to be able to establish whether a firearm was discharged as well as the time and location of the shot, is excluded for failure to satisfy *Daubert* test—State failed to demonstrate that the evidence it sought to produce was the product of reliable scientific principles and methods, and that state's proposed expert, a non-scientist and ShotSpotter employee, had applied those principles and methods reliably to the facts of the case—Proposed expert's opinion that shots were fired at the time and place contemplated in state's accusations is predicated on the functioning of a series of machines, and there was no evidence that the functioning of those machines is supported by reliable scientific principles— Additionally, for purposes of section 90.702, proposed expert's position as a full-time ShotSpotter employee prevents his assurances that ShotSpotter is predicated on reliable scientific principles and methods from being likened to assurances made by an independent witness

STATE OF FLORIDA, Plaintiff, v. LYNELL R. BULLARD, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-11101. February 6, 2023. Milton Hirsch, Judge.

ORDER ON ADMISSIBILITY OF "SHOTSPOTTER" EVIDENCE

I. Introduction

Defendant Lynell R. Bullard is charged with, among other crimes, discharging a firearm in public or on residential property, in violation of Fla. Stat. § 790.15. In order better to demonstrate that the scene of the alleged shooting was in fact a "public place" or "residential property" as defined in that statute, the prosecution seeks to offer at trial certain evidence generated by a private company called "ShotSpotter." The defense objects, citing Fla. Stat. § 90.702, Florida's codification of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1997).

Because "ShotSpotter" evidence[1] has been neither *Daubert*-tested nor *Daubert*-approved in Florida, I was obliged to conduct an evidentiary hearing. Transcript references in this order (which take the form "Tr.") are to that hearing, which was held on January 6.

II. Facts

At the hearing, the prosecution called but one witness: Walter Collier, an employee of ShotSpotter since 2014. Tr. 9. Mr. Collier is

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not a scientist. He does not have "a college degree in computer science," Tr. 31, or indeed in anything else, Tr. 32, 33. His background is as a police officer, an employment that he held for nearly two decades. Tr. 6. His present title is that of a "forensic services manager" at ShotSpotter, Inc. Tr. 6.[2] In that capacity, "most of [his] time is spent reviewing [ShotSpotter] data for . . . customers, preparing reports of those reviews, and also providing testimony based on those reviews." Tr. 10.

Mr. Collier has received *some* training from ShotSpotter. Tr. 11.

> But there is a huge dependency on my previous [police] experience. And one of the requirements is obviously understanding what gunfire sounds like. I mean, I had plenty of opportunities to listen to it at ShotSpotter but I did have a past experience in law enforcement where I had plenty of opportunities to listen. So, my experience coupled with that training at ShotSpotter are basically my training to do what I do.

Tr. 11. *See also* Tr. 36 ("Q: ShotSpotter doesn't give you any formal training on how to determine what a gunshot is or isn't, correct? A: . . . I would say no, they don't train me on that. That came from my life experience.").

Mr. Collier managed, not without difficulty, to explain the ShotSpotter system to a judge whose level of technical sophistication can be charitably described as rudimentary:

> THE COURT: So, [ShotSpotter] listens to loud noises and it tells somebody somewhere that it heard loud noises; is that the idea?
>
> THE WITNESS: That's basically it, sir. . . .

Tr. 40.

> THE COURT: All right. And let's say that the machine says, gee sounds like a gunshot to me, . . . where does it send that information?
>
> THE WITNESS: Then that machine sends it to a human individual in our Incident Review Center who listens to it.
>
> THE COURT: Is that you or is that somebody else?
>
> THE WITNESS: That's somebody else.
>
> THE COURT: And that person listens to like a tape-recording of the noise; is that the idea?
>
> THE WITNESS: For the most part, yes. . .
>
> THE COURT: So, there's a human being who listens to a noise and says, sounds like gunfire to me. Where do we go from there? What's the next step?
>
> THE WITNESS: From there, they would classify it as likely gunfire. And then they would publish it . . . publishing it is just sending it . . .
>
> THE COURT: Tell the police department[?]
>
> THE WITNESS: Police department. Yes, sir.

Tr. 43. In some but by no means all instances, Mr. Collier will be asked to review the results. Tr. 43. That "could be a year [afterward], it could be an hour afterward." Tr. 43, 44. In undertaking such a review, Mr. Collier listens to the tape recording of the purported gunshot. Tr. 45. He is also provided with "a visual representation of that audio file in a WAV form where you can see the peaks and valleys." Tr. 45.[3] Asked how that visual representation is generated, Mr. Collier could say only that it comes from "software." He concedes that he had no role in designing that software. Tr. 45. He further concedes that he was "simply trained that if the WAVS look like this, that's likely consistent with gunfire. But if the WAVS look like that, it might be something else." Tr. 45. He does not know who designed this WAV system, or who can explain how and why it works; although he supposes "it would likely be one of our software engineers." Tr. 46.

> THE COURT: All right. There's somebody at ShotSpotter who can explain to me the science behind why that WAV indicates an impulsive sound; is that right?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: But that's not your job.
>
> THE WITNESS: No, sir.

Tr. 46-47.

Mr. Collier acknowledges that there have been occasions—he has kept no record, so he does not know how many occasions—when he disagreed with the ShotSpotter determination of what was and what was not gunfire. Tr. 30-31; 48, 49. In the same vein, he does not know what ShotSpotter's error rate is, Tr. 20-21, 77, or even if a record is kept that would make it possible to calculate error rate.

The information that ShotSpotter purports to convey is of three kinds: whether a shot was fired, the location where the shot was fired, and the time the shot was fired. Tr. 78. Mr. Collier's involvement is limited to the first of these determinations. He has no part in determining the location or address where a shot was fired, nor in reviewing or assessing the accuracy of such a determination. Tr. 79. The same is true of ShotSpotter's determination of the time at which a shot was fired: Mr. Collier has no role in that. Tr. 79. He believes that the process by which location or address is determined is called "multilateration," Tr. 54-55, 68-70, which he believes was developed in World War I, Tr. 55, but it is not his responsibility to understand or apply the science, if any, behind that process.

ShotSpotter does not require Mr. Collier to undergo periodic competency training or proficiency training. Tr. 37. He has no role in maintaining ShotSpotter software, or in testing that software for accuracy. Tr. 38. Regarding the ShotSpotter equipment that was used in this case, he does not know when it was installed or when it was last serviced. Tr. 25. Asked when it was last checked for accuracy, he testified that it does not need to be checked for accuracy. Tr. 25.

If permitted to testify at trial, Mr. Collier will opine that a shot or shots were fired at the address and time contemplated in the prosecution's accusations.

III. Analysis

After much back-and-forth, Florida finally abandoned *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) and adopted a version of *Daubert, supra,* as codified at Fla. Stat. § 90.702.[4] That version provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

With the foregoing factors in mind, I asked counsel for the prosecution what I considered to be a threshold question: Mr. Collier is being offered as an expert on . . . what? Tr. 49. The following ensued:

> PROSECUTION COUNSEL: On the review and analysis of ShotSpotter-detected incidents that they have classified as gunshots. . . .
>
> THE COURT: . . . [T]hat proceeds on the premise, Mr. [Prosecutor], that the machine itself is working correctly, [and] that the science, if any, that underlies the machine is valid.
>
> PROSECUTION COUNSEL: Essentially, yes, Judge. . . .
>
> THE COURT: . . . [Mr. Collier has] been very honest with us and he's told us he didn't design these machines, he didn't design the software, the algorithms, and so on. He's been honest with us about that. There are other people who did that. So what you're saying is assuming, proceeding on the premise that the machine is supported by good science, then the next step, which is his review, he's qualified to do.

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PROSECUTION COUNSEL: Correct.

Tr. 50. *See also* Tr. 16.

This won't do. The prosecution wants to rely on ShotSpotter evidence to establish that a shot or shots were fired; to identify the address that the shot or shots came from (this may be the most important datum); and to establish the time of the shooting. As to the second and third of these factors Mr. Collier has no involvement at all. Regarding the fixing of a location, he knows only what he was told: that there is something called "multilateration" that permits this analysis, and that "multilateration" has its roots in the First World War. Mr. Collier does not review or revise the computer's determination of location. He could not do so, because he has no expertise in this area. He is not schooled in the science or mathematics, if any, that underlie this process. He has been told by his employers that it works, and that he is not to concern himself with it. The same is true with the fixing of the time of the shot or shots. The prosecution offers Mr. Collier as an expert in doing what Mr. Collier does: listening to recorded noises and deciding if they sound like gunfire. But what Mr. Collier does is predicated on the functioning of a series of machines, and the threshold question before me is whether the functioning of those machines is supported by reliable scientific principles and methods. That threshold question was not addressed by Mr. Collier, because he is not qualified to address it.

In *United States v. Godinez, supra,* the Seventh Circuit found that the trial court abused its discretion in admitting ShotSpotter evidence. *Godinez,* 7 F. 4th at 638. This was so for several reasons. The trial court relied on a Nebraska case, *State v. Hill,* 851 N.W. 2d 670 (Neb. 2014). But the defendant in *Hill,* unlike the defendant in *Godinez* and the defendant at bar, raised no objection to the ShotSpotter opinion testimony regarding location. *Godinez*, 7 F. 4th at 637. The ShotSpotter witness in *Godinez,* as in *Hill,* was a Mr. Greene; and the trial court in *Godinez* treated Greene as being a qualified expert witness because he had been deemed qualified in *Hill.* "But his qualification in *Hill* does not ensure the reliability of ShotSpotter's methodology here." *Godinez,* 7 F. 4th at 637.

In the case at bar, the prosecution chose to call no scientists, no engineers, no software designers or computer programmers, to testify to the scientific underpinnings of what ShotSpotter does (or claims to do). That was a choice the prosecution was free to make. I suspect that such scientific experts exist, both within and without the employ of ShotSpotter, but it is not for me to attempt to imagine what testimony they might have given had they been called. Of the three *Daubert* factors set forth under § 90.702, I am particularly concerned with the requirement that the proffered evidence be the product of reliable scientific principles and methods. In truth I was presented with no testimony regarding scientific principles and methods. I was told that a very experienced and obviously very well-intentioned former police officer listens to a tape-recording of what could have been gunfire and decides, based on his many years of police experience, whether it sounds like gunfire to him. (He also looks at some waves; but the science behind those waves, if there is any, is unknown to him. Tr. 45-47.) Sometimes he agrees with the computer's conclusion that the sound was that of gunfire. Sometimes he disagrees. He does not know how often he disagrees, Tr. 30-31; 48, 49, or what further steps can be taken to resolve the disagreement, or whether his disagreement comes more often from one bank of microphones located in one neighborhood than from other banks of microphones located in other neighborhoods.

No doubt Mr. Collier, or any comparably experienced current or former police officer, could testify at trial that he was walking down the street and heard the sound of gunfire; and that it seemed to come from this or that direction. But he would not be testifying that there had been some kind of scientific determination that the sound he heard was gunfire, to the exclusion of all comparable sounds. And he would certainly not be testifying as to the exact address from which the sound came.

Here, however, an opinion that amounts to little more than, "I listened to a tape recording and based on my experience the sound I heard seemed like gunfire to me" comes before the jury festooned, not in mere bells and whistles, but in all the tintinnabulation and trills of science itself. No doubt Edgar Allen Poe expressed the feeling of many a juror when he wrote, "Science! true daughter of Old Time thou art!" Edgar Allen Poe, *Sonnet to Science.* Conveying to jurors the impression—an impression that may be supportable but on the record before me is unsupported—that the opinions and conclusions Mr. Collier will offer at trial are the product of irrefragable science raises problems under both § 90.702 and § 90.403. Fla. Stat. § 90.403 instructs me to exclude even relevant and admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, or the like. That danger of unfair prejudice and of misleading the jury is very great when, in Hamlet's words, "the trappings and the suits of" science are used to bootstrap a former police officer's impression that something sounds like gunfire, into an incontrovertible scientific determination that a gun was shot, and where it was shot, and when it was shot. *See also Flanagan v. State,* 625 So. 2d 827, 828 (Fla. 1993) ("The jury will naturally assume that the scientific principles underlying the expert's conclusions are valid.")

There is an additional concern. The much-litigated case of *Ramirez v. State,* 810 So. 2d 836 (Fla. 2001) [27 Fla. L. Weekly S221b] [involved testimony by an employee of the Miami-Dade crime lab purporting to identify a particular knife as a murder weapon. In retrospect, *Ramirez,* like *Coppolino, see supra* n.4, was a stepping-stone on Florida's path from *Frye* to *Daubert.* It afforded the Florida Supreme Court an opportunity to caution against a too-credulous receipt of purportedly scientific testimony "if the expert has a personal stake in the new theory or is prone to an institutional bias." *Ramirez* at 844, n. 13 (citing, *inter alia, People v. Young,* 319 N.W. 2d 270 (Mich. 1986)). Mr. Collier is a full-time employee of ShotSpotter, a private, for-profit business. As previously noted, he gets his daily bread by "reviewing [ShotSpotter] data for . . . customers, preparing reports of those reviews, and also providing testimony based on those reviews." Tr. 10. If his testimony is restricted or excluded, he is of less value to his employer. If his testimony is received, he has earned his pay. I have noted, and will note again, that Mr. Collier is possessed of many admirable qualities; but he "has a personal stake in the new theory [and] is prone to an institutional bias." That does not bear upon an assessment of him as a person, but it bears upon an assessment of him as a witness; and more importantly, on an assessment of the admissibility of his testimony. For purposes of § 90.702, his assurances that ShotSpotter is predicated upon reliable scientific principles and methods (to the extent he, as a non-scientist, offered any such assurances at all) cannot be likened to assurances made by an independent witness.

IV. Conclusion

In *State v. Graham,* 322 S.W. 2d 188 (Mo. 1959), the Supreme Court of Missouri was called upon to apply the *Frye* test to the then-neoteric science of radar. After struggling heroically with the applicable scientific principles, the court shrugged its shoulders and candidly concluded that, "whether the radar device is an instrument applying known laws of science, or whether it is a genie in a jug, emitting evil emanations, makes no difference; the important thing is that *it works*." *Graham,* 322 S.W. 2d at 196 (emphasis in original). That "oh-come-on-everybody-knows-it-works" approach might have been good enough under *Frye.* It isn't good enough under *Daubert.* The prosecution was obliged to demonstrate that the ShotSpotter

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evidence it seeks to introduce in this case is "the product of reliable [scientific] principles and methods," and that Mr. Collier (or anyone else whose testimony the prosecution proposes to offer at trial) "has applied th[os]e principles and methods reliably to the facts of this] case." Fla. Stat. § 90.702(2) and (3). It has not done so.

There is another *Frye*-versus-*Daubert* distinction that I must consider. *Frye* was an all-or-nothing-at-all test: a particular technology was admissible under *Frye* or it was not. *Daubert* requires consideration of the context in which, and purpose for which, technology is being applied to a given case. I assume for the sake of the argument that there are different contexts in which, and different purposes for which, ShotSpotter evidence would be admissible; perhaps there are many such contexts, and many such purposes. But the evidence that the prosecution seeks to offer here is not admissible. On the particular facts of this case, and on the particular evidentiary record before me, the defense motion to exclude is granted.

---

[1]ShotSpotter is "an acoustic gunshot detection and location system." *United States v. Godinez,* 7 F. 4th 628, 633 (7th Cir. 2021). *See also Commonwealth v. Watson,* 487 Mass. 156, 157 n. 2 (2021) ("ShotSpotter uses sensors to detect a possible gunshot and approximates its location); *State v. Harvey,* 932 N.W. 2d 792, 797 n. 2 (Minn. 2019) ("A ShotSpotter is gunshot-detection technology . . . . The technology consists of a series of acoustic sensors placed in different locations. When gunshots are detected by a ShotSpotter, data are sent to a remote server managed by a third party, which then conveys the location and time of the gunshots to the . . . [p]olice [d]epartment"); Tr. 15, 39.

[2]Mr. Collier is also a Chicago Cubs fan. Tr. 8. Standing alone, that may not qualify him as an expert witness; but it does demonstrate loyalty, the ability to weather suffering, and an unquenchable hope. In the words of columnist George Will, "Cubs fans are 90 percent scar tissue." *See* https://www.azquotes.com/quote/1388745. Surely these good qualities must count for something.

[3]"WAV" is an acronym for "waveform audio file format." *See* https://en.wikipedia.org/wiki/WAV.

[4]Among the principal criticisms of *Frye* were that in some circumstances it permitted "junk science" to be received, *see gen'ly Perez v. Bell South Telecommunications,* 138 So. 3d 492 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D865b]; and that in other circumstances it excluded valid science simply because that science had yet to percolate through the scientific community sufficiently to achieve "general acceptance." As to the latter criticism, *see Coppolino v. State,* 223 So. 2d 68, 75 (Fla. 2d DCA 1968) (Mann, J., concurring) ("The tests by which the medical examiner sought to determine [the cause of] death . . . were novel and devised specifically for this case. This does not render the evidence inadmissible. Society need not tolerate homicide until there develops a body of medical literature about some particular lethal agent."). Regarding the *Coppolino* case generally, *see* John D. MacDonald, No Deadly Drug (1968).

* * *

Municipal corporations—Zoning ordinance—Constitutionality—Challenge to constitutionality of ordinance restricting construction of structures within 50 feet of erosion control line brought by property owners who had been ordered to remove large treehouse built within prohibited ECL—Even if plaintiffs were successful in challenging constitutionality of 2007 ordinance, treehouse would still be in violation of 50-foot setback established in virtually identical 2004 ordinance that was not challenged—Ordinance challenged more than five years after adoption for noncompliance with single-subject rule is subject to mere "substantial compliance" standard—Ordinance does not violate single-subject requirement of section 166.041(2) where ordinance has oneness of purpose to implement variety of general and specific revisions to city zoning rules with specific provisions having logical connection with each other—Ordinance title is sufficient to put interested parties on notice of part of zoning code being revised and lead them to inquire into body of ordinance for details about amendments—Ordinance, which does not absolutely bar construction landward or seaward of ECL, does not on its face violate plaintiffs' substantive due process rights or constitute taking—Argument that ordinance impermissibly conflicts with section 161.053 by depriving upland owners of use and enjoyment of their property was rejected by circuit court in prior case and is barred by doctrine of res judicata—Further, statutes implementing state policy of combating beach erosion do not preempt city from enacting reasonable legislation in support of land development code or limit city's authority over areas landward of ECL

RICHARD HAZEN and HUONG L. TRAN, Plaintiffs, v. THE CITY OF HOLMES BEACH, a municipal corporation of the State of Florida, Defendant. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2013-CA-4098. January 20, 2023. Edward Nicholas, Judge. Counsel: David M. Levin and Bruce Alexander Minnick, for Plaintiffs. Randy Mora and Jay Daigneault, for Defendant.

FINAL ORDER ON PLAINTIFFS' THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

THIS CAUSE having come on for hearing on October 14, 2022, pursuant to Plaintiffs' Brief/Memorandum of Law in Support of Plaintiffs' Third Amended Complaint for Declaratory Judgment, said Brief/Memorandum having been filed on June 30, 2022, and the Court having reviewed and considered said filing; having considered, as well, Defendant's Amended Legal Brief and Memorandum of Law in Opposition to Plaintiffs' Relief Sought In This Declaratory Action, said response having been filed on August 23, 2022; having considered Plaintiffs' Reply to Defendant's Amended Legal Brief and Memorandum of Law in Opposition To Plaintiffs' Third Amended Complaint for Declaratory Judgment, said reply having been filed on September 19, 2022; having reviewed, of course, Plaintiffs' Third Amended Complaint, filed January 7, 2020; having considered the arguments of counsel and the case law provided by each, and being fully advised of the premises, finds as follows:

Ordinances at Issue

At the outset, before recounting any factual background of this case, the Court notes that a brief chronicling of the progression of certain local ordinances is key to the ultimate determination of this matter. In May 2004, the City of Holmes Beach adopted Ordinance No. 04-02, impacting the setback requirement for building and development along the City's island coastline. Ordinance No. 04-02, modifying the City's Land Development Code, was entitled:

> AN ORDINANCE OF THE CITY OF HOLMES BEACH, FLORIDA, PROVIDING FOR FINDINGS OF FACT; AMENDING ARTICLE III, SECTION B 4 d OF THE LAND DEVELOPMENT CODE TO MODIFY THE SETBACK REQUIREMENT FOR COASTAL BUILDING AND DEVELOPMENT ACTIVITIES; AMENDING ARTICLE II OF THE LAND DEVELOPMENT CODE TO ADD A DEFINITION OF "MEAN HIGH WATER" AND REVISE THE DEFINITION OF "MEAN HIGH WATER LINE"; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

In pertinent part, Ordinance No. 04-02 reads:

> **4. Supplementary development regulations.**
>
> **d.** ***Coastal building and development activities contiguous to Gulf of Mexico.*** Anything to the contrary contained in this ordinance notwithstanding, no person, firm, partnership, corporation or public agency shall construct any structure or building, including any dwelling, hotel, motel, apartment building or other multifamily dwelling, nor construct any structures or facilities appurtenant to existing structures or buildings, including patios, garages, sheds, swimming pools or spas within 50 feet of the erosion control line as established by the State of Florida. The Board of Adjustment shall have no authority to grant any variance from the provisions of this paragraph that would permit any excavation or construction as hereinabove specified within 50 feet of the erosion control line as established by the State of Florida. Provided, however, that seawalls, groins, revetments, dune walkovers and similar structures, the sole purpose of which is the protection, establishment, maintenance or nourishment of beach areas, or for the sole purpose of protection of existing buildings or structures from the waters of the Gulf of Mexico, shall be exempt from the provisions of this section if the proposed work is first approved by the Building Official. Construction seaward

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of the coastal construction control line shall be subject to all laws and regulations of the State of Florida, and the City of Holmes Beach Code of Ordinances unless contrary to state law.

Three years after implementation of its 2004 Ordinance, in May 2007, the City adopted Ordinance No. 07-04—the subject of Plaintiffs' present challenge—which contains virtually identical language to the preceding Ordinance No. 04-02, as part of a wide-ranging and comprehensive amendment to the City's Land Development Code. Like Ordinance No. 04-02, the subsequent Ordinance No. 07-04 addressed and prohibited construction of "structures or buildings" within the erosion control line. Indeed, in relevant part, Section 7.2 of Ordinance No. 07-04 reads as follows:

ARTICLE VII. RESOURCE PROTECTION STANDARDS.

DIVISION 2 - DEVELOPMENT ACTIVITIES CONTIGUOUS TO THE GULF OF MEXICO

A. Setback from the erosion control line. Anything to the contrary contained in this ordinance notwithstanding, no person, firm, partnership, corporation or public agency shall construct any structure or building, including any dwelling, hotel, motel, apartment building or other multifamily dwelling, nor construct any structures or facilities appurtenant to existing structures or buildings including patios, garages, sheds, swimming pools or spas within 50 feet of the erosion control line as established by the State of Florida.

1. ***Variances.*** The board of adjustment shall have no authority to grant any variance from the provisions of this paragraph that would permit any excavation or construction as hereinabove specified within 50 feet of the erosion control line as established by the State of Florida.

2. ***Exemptions.*** Seawalls, groins, revetments, dune walkovers and similar structures, the sole purpose of which is the protection, establishment, maintenance or nourishment of beach areas, or for the sole purpose of protection of existing buildings or structures from the waters of the Gulf of Mexico, shall be exempt from the provisions of this section if the proposed work is first approved by the building official.

B. Construction seaward of the coastal control line. Construction seaward of the coastal construction control line shall be subject to all laws and regulations of the State of Florida, and the City of Holmes Beach Code of Ordinances unless contrary to state law.

As indicated (and as corroborated by the affidavit of William Brisson), the City's 2007 Land Development Code restrictions appear virtually identical to those in the City's 2004 Ordinance. The prohibitions within Ordinance No. 07-04 and its relation back to Ordinance No. 04-02 are significant, as will be explained further herein.

Factual and Procedural Background

But first, a bit of factual background is in order. As is evidenced by the above-styled case number, this cause has had a long and litigious history. At the risk of woefully oversimplifying this protracted and contentious dispute, Plaintiffs constructed a large (400-500 square foot) "Swiss Family Robinson"-style treehouse structure within an Australian pine tree on their property, which is located within the prohibited erosion control line and in violation of City Ordinance No. 07-04 (and, in effect, Ordinance No. 04-02). On September 16, 2014, the Honorable Janette Dunnigan resolved a majority of Plaintiffs' initial claims when she affirmed the City's Code Enforcement Board's finding that the treehouse was within thirty (30) feet of the erosion control line, in violation of Section 7.2's fifty (50) foot setback requirement and ruled that the setback provisions were constitutional.[1]

Further highlighting the protracted litigation surrounding the tree house at issue, this Court points to the U.S. Court of Appeals for the Eleventh Circuit's observation in *Tran v. City of Holmes Beach,* 817 Fed. Appx. 911 (11th Cir. 2020), opining that case involved "the latest round in a nearly decade-long legal fight in state administrative proceedings, state court proceedings and in federal court over a treehouse the Hazens built without a permit on their beachfront property." As it turns out, Plaintiffs' instant constitutional challenges are, in fact, the "latest round" in a now nearly twelve (12) year fight seeking to ultimately circumvent compliance with the City of Holmes Beach Code Enforcement Board's July 2013 order. Although the constitutional challenges herein require distinct and unique inquiries, it is not lost on this Court that *all* of Plaintiffs' ancillary causes of action, and *all* of the appeals resulting therefrom, throughout this decade-plus-long saga have, thus far, resolved in the City's favor.

In their present Third Amended Complaint for Declaratory Judgment, Plaintiffs raise four enumerated Counts. Plaintiffs allege, in Count I, that the ordinance purportedly in question—Ordinance No. 07-04—is void because it violates the "single subject" requirements of the Florida Constitution and § 166.041, Fla. Stat.; in Count II, that the ordinance is void because it violates the procedural due process clause of the Florida Constitution; in Count III, that the ordinance is void because its terms impose an unconstitutional restriction on Plaintiffs' substantive due process rights under the Florida Constitution; and in Count IV, that the ordinance is void because it conflicts with §§ 161.141 and 161.053, Fla. Stat.

Standards for Entry of Summary and Declaratory Judgments

Upon review and consideration of a motion for summary judgment, Rule 1.510 provides:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.

See Fla. R. Civ. P. 1.510(a). Rule 1.510(f) further permits that "[a]fter giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties the material facts that may not be genuinely in dispute."

A court may grant declaratory judgment under § 86.021, Fla. Stat., if the movant shows:

> [1] there is a bona fide, actual, present practical need for the declaration; [2] that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; [3] that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; [4] that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; and [5] 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 the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991) (quoting *May v. Holley,* 59 So. 2d 636, 639 (Fla. 1952)). "A trial court's ruling on a petition for declaratory judgment is given great deference," and "[t]he standard of review [on appeal] is whether the trial court abused its discretion." *Jackson v. State,* 893 So. 2d 706, 707 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D725b], *citing Palumbo v. Moore*, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D489b].

The constitutionality of a statute may be entertained in a declaratory action; however, it must be shown there is "a bona fide need for such a declaration based on present, ascertainable facts or the court lacks jurisdiction to render declaratory relief." *Martinez,* 582 So. 2d at 1170 (citing *Ervin v. Taylor,* 66 So. 2d 816 (Fla. 1953)). In the instant case, the Court finds that (1) there is an actual, present practical need for a declaration inasmuch as Plaintiffs' have been ordered "to

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demolish and remove" the tree house; (2) the declaration deals with a present controversy as to the constitutionality of the statutorily mandated destruction of Plaintiffs' property; (3) Plaintiffs' constitutional rights in regard to the mandated destruction of their property depend upon the constitutionality of Ordinance No. 07-04 and Ordinance No. 04-02; (4) Plaintiffs have an actual, present, adverse, and antagonistic interest in the constitutionality of the statutorily mandated destruction of their property; and (5) all of the antagonistic and adverse interests are before the Court by proper process and the parties are not merely seeking legal advice from the Court. *Martinez,* 582 So. 2d at 1170; *Rosenhouse v. 1950 Spring Term Grand Jury, in & for Dade Cnty.,* 56 So. 2d 445, 448 (Fla. 1952) ("The Circuit Court is authorized to adjudicate the question of the constitutionality of a statute in a declaratory judgment proceeding."); *Butler v. State, Dep't of Ins.,* 680 So. 2d 1103, 1106 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1498c] ("If the statute being implemented by an agency is claimed to be facially unconstitutional, the circuit court may, in appropriate circumstances, entertain a declaratory action on the statute's validity."). As such, the Court concludes that it is authorized to adjudicate the issues raised in this action.

Moreover, the relevant and material facts of this case are not in dispute, and both parties have demonstrated an entitlement to a judgment on the pleadings filed before the Court.

Scrutiny for Constitutional Challenges to Statutes or Ordinances

As outlined *supra,* Plaintiffs challenge the constitutionality of a municipal zoning ordinance. In this instance, because no suspect class or fundamental right is involved,[2] a rational basis scrutiny applies. Under such scrutiny, a municipality's zoning ordinance should be upheld if it bears a rational relationship to a legitimate public purpose. In *Kuvin v. City of Coral Gables,* 62 So. 3d 625 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1923a], the Third District Court of Appeal discussed the appropriate scrutiny to be utilized when reviewing zoning regulations. This Court finds a significant portion of the Third District's opinion in *Kuvin* useful in reviewing Plaintiffs' present claims:

> "The judicial lens through which this Court must examine the City's exercise of its police power is governed by well-established law, beginning with the premise that rational basis scrutiny "**is the most relaxed and tolerant form of judicial scrutiny**," *Stanglin,* 490 U.S. at 26, 109 S.Ct. 1591 (emphasis added), and municipal zoning ordinances, which are legislative enactments, are presumed to be valid and constitutional. *See Orange County v. Costco Wholesale Corp.,* 823 So. 2d 732, 737 (Fla. 2002) [27 Fla. L. Weekly S608b] specifying that ordinances reflecting legislative action are entitled to a presumption of validity; *State v. Hanna,* 901 So. 2d 201, 204 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D816a] (holding that statutes and ordinances are presumed to be constitutional and all reasonable doubts must be resolved in favor of constitutionality).
>
> Statutes and ordinances in Florida not only enjoy a presumption in favor of constitutionality, the Florida Supreme Court and this Court have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality's police power. *See Dep't of Cmty. Affairs v. Moorman,* 664 So. 2d 930, 933 (Fla. 1995) [20 Fla. L. Weekly S500a] ("[W]e have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relationship to legitimate societal policies."); *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.,* 111 So. 2d 439, 443 (Fla. 1959) (holding that zoning regulations are presumptively valid, "and the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is unreasonable and bears no substantial relation to public health, safety, morals or general welfare"); *City of Coral Gables v. Wood,* 305 So. 2d 261, 263 (Fla. 3d DCA 1974) ("A zoning ordinance will be upheld unless it is clearly shown that it has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety or welfare.").
>
> A zoning regulation also must be upheld if reasonable persons could differ as to its propriety. In other words, "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Vill. Of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Bd. Of County Comm'rs of Brevard County v, Snyder,* 627 So. 2d 469, 472 (Fla. 1993); *City of Miami Beach v. Ocean & Inland Co.,* 147 Fla. 480, 3 So. 2d 364 (1941).
>
> "The fairly debatable rule has its basis in the deference that the judicial power owes the legislative function under the separation of powers doctrine inherent in our form of government and expressly embodied in our state and federal constitutions." *Albright v. Hensley,* 492 So. 2d 852, 856 (Fla. 5th DCA 1986) (Cowart, J., dissenting). Thus, "[t]he fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to is propriety." *Martin County v. Yusem,* 690 So. 2d 1288, 1295 (Fla. 1997) [22 Fla. L. Weekly S156a]."

Kuvin, 62 So. 3d at 632-33.

Additional Initial Observations Regarding the Ordinances at Issue

As indicated at the outset, the restriction on construction of structures or buildings within 50 feet of the erosion control line contained within Ordinance No. 07-04 was actually adopted in 2004, pursuant to Ordinance No. 04-02. As such, Plaintiffs' overall challenge to the 2007 Land Development Code language is misplaced. Notably, the language with regard to building and development activities within 50 feet of the erosion control line is materially consistent between the two ordinances, and as will be discussed under Count I *infra,* such material consistency contravenes Plaintiffs' belated challenge to the subsequent Ordinance No. 07-04. As such, even if this Court were to find the language in Section 7.2 of Ordinance No. 07-04 problematic—which this Court expressly does not—absent an attack on the previous and virtually identical 2004 ordinance, Plaintiffs' treehouse would still be in violation of the 50-foot setback provision.

Said another way, the City correctly points out that the setback, the prohibition against building and development within 50 feet of the erosion control line, was actually adopted in 2004, not 2007. Plaintiffs argue that Ordinance No. 07-04, in effect, repealed Ordinance No. 04-02, citing *Oldham v. Rooks,* 361 So. 2d 140 (Fla. 1978), as authority. The Court finds *Oldham* inapplicable and also finds that nothing in Ordinance No. 07-04 "repealed" the prior ordinance, the pertinent part of which, as indicated, is almost identical to the 2004 Ordinance in all but format. Undeniably, the subsequent Ordinance No. 07-04 reaffirms the prohibition against coastal building and development within 50 feet of the erosion control line. Notwithstanding this problem with Plaintiffs' declaratory action, generally, the Court will address each of Plaintiff's four Counts, in turn, and ultimately finds Defendant City is entitled to judgment in its favor as to each of Plaintiffs' challenges.

Count I - "Single-subject" Requirement under Article III, Section 6, Florida Constitution and Section 166.041 Florida Statutes.

Article III, Section 6, of the Florida Constitution mandates, "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Similarly, § 166.041(2), Fla. Stat., requires, "Each ordinance or resolution shall be introduced in writing and shall embrace but one subject and matters properly connected therewith. The subject shall be

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clearly stated in the title." The parties disagree on whether the *constitutional* "single subject" requirement applies to adoption of municipal ordinances.

Plaintiffs argue, "The City of Holmes Beach Ordinance No. 07-04 failed to substantially comply with the 'single-subject' provisions of Article III, Section 6, Florida Constitution and Section 166.041, Florida Statutes, and the requirement that the Title ***clearly*** state the subject of the ordinance. Accordingly, said Ordinance must be deemed null and void." Suggesting that the ordinance contains "four separate and distinct subjects," Plaintiffs argue that "[t]he Title of City of Holmes Beach Ordinance No. 07-04, suffers from all of the evils intended to be prevented by Article III, Section 6, Florida Constitution and Section 166.041 Florida Statutes."

Citing *Charter Review Comm'n of Orange County v. Scott,* 647 So. 2d 835 (Fla. 1994), Defendant City counters that "while Plaintiffs contend that the single-subject requirement in Article 2 [sic], Section 6 of the Florida Constitution applies to municipal ordinances, it clearly does not." Quoting a brief portion of the *Charter Review* opinion, the City contends, "This provision has been interpreted to apply to laws adopted by the Florida Legislature, not individual municipalities." The Court acknowledges a dearth of case law regarding whether the *constitutional* "single subject" requirement applies to municipal ordinances, but a thorough reading of the *Charter Review* opinion, reveals, at the very least, that the *statutory* "single subject" rule definitely applies:

> The Florida Constitution and Florida Statutes impose a single-subject requirement in various situations. For instance, article III of the constitution contains a single-subject requirement for laws passed by the legislature, and article XI imposes a single-subject requirement for constitutional amendments proposed by initiative petition. Section 125.67, Florida Statutes (1991), applies the single-subject rule to county ordinances, and ***section 166.041(2) places a single-subject requirement on municipal ordinances.*** Neither the constitution nor Florida Statutes applies the rule to proposed amendments to county charters.

Charter Review, 647 So. 2d at 836-37 (emphasis added). Thus, while Plaintiff movants have failed to definitively establish that the *constitutional* single subject rule does, in fact, apply to county and municipal ordinances of this nature, the single subject requirement of § 166.041(2), Fla. Stat., does, indeed, relate to the adoption of municipal ordinances. *See also City of Miami v. Miami Ass'n of Firefighters, Local 587,* 744 So. 2d 555, 555-556 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2482a].

Upon acknowledging that the statutory "single subject" rule applies, the City argues adoption of Ordinance No. 07-04 "substantially complied with statutory requirements, such that it would be unreasonable to deny its validity fifteen (15) years after its adoption, in an action commenced six (6) years after its adoption." In support of this argument, the City points to § 166.041(7), Fla. Stat., which provides:

> Five years after the adoption of any ordinance or resolution adopted after the effective date of this act, no cause of action shall be commenced as to the validity of an ordinance or resolution based on the failure to strictly adhere to the provisions contained in this section. After 5 years, substantial compliance with the provisions contained in this section shall be a defense to an action to invalidate an ordinance or resolution for failure to comply with the provisions contained in this section. Without limitation, the common law doctrines of laches and waiver are valid defenses to any action challenging the validity of an ordinance or resolution based on failure to strictly adhere to the provisions contained in this section.

Having already determined the contested restriction on construction of structures or buildings within 50 feet of the erosion control line contained within Ordinance No. 07-04 was actually adopted in 2004, pursuant to Ordinance No. 04-02, the Court finds the five-year limitations period provided in § 166.041(7), Fla. Stat., is detrimental to Plaintiffs' statutory challenge, which was not commenced until 2013, regardless which version of the Ordinance (2007 or 2004) is at issue.

In any event, Defendant City alleges it "is entitled to summary judgment on the first count of the T[hird] A[mended] C[omplaint], because the Ordinance does not violate the 'single-subject requirements of the Florida Constitution or Florida Statutes." The City argues in support that "the entirety of the challenged ordinance has a 'logical and natural oneness of purpose,' which was to make a variety of revisions to the zoning rules applicable in the City" and further states, "the overall purpose of the ordinance clearly was to make changes to the zoning within the City to react to the policy and planning priorities of the governing board then in office. Thus, the more parcel-specific use components of the ordinance 'possess a natural relation and connection as component parts or aspects of [the] single dominant plan or scheme' of the ordinance, to wit: revise the zoning rules within the City, both in general and, as to certain areas of the City, with specificity."

Because Ordinance No. 07-04 so clearly does not violate the statutory single-subject requirement, the Court agrees with the City's rationale on this Count. The bottom line is that the Ordinance does, in fact, "embrace but one subject and matters properly connected therewith;" the language is *not* confusing or misleading, and the title is reasonably sufficient to inform the public of the essence and scope of the adopted changes. *See* Article III, Section 6, of the Florida Constitution; *see also North Beach Medical Center v. City of Fort Lauderdale,* 374 So. 2d 1106, 1108 (Fla. 4th DCA 1979). More specifically, the Ordinance, similar to those enacted up and down the coast, has a "logical and natural oneness of purpose"—namely to implement a variety of both general and specific revisions to the City's zoning rules—with its specific provisions having a reasonable and logical connection with each other. *See, e.g., Advisory Opinion to the Att'y Gen. re Term Limits Pledge,* 718 So. 2d 798, 802 (Fla. 1998) [23 Fla. L. Weekly S505a] (citing *Fine v. Firestone,* 448 So. 2d 984, 990 (Fla. 1984)). A careful review of Ordinance No. 07-04 leads to the inescapable conclusion that its provisions "possess a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *See In re: Advisory Opinion to Att'y Gen. re Use of Marijuana for Certain Med. Conditions,* 132 So. 3d 786, 796 (Fla. 2014) [39 Fla. L. Weekly S45a]. Specifically, and albeit at the risk of redundancy, the entire topic of Ordinance No. 07-04 involves revisions to the City's zoning rules. Thus, the Court finds that Ordinance No. 07-04 clearly satisfies the statutory single-subject requirement, and Defendant City is entitled to judgment as a matter of law on Count I.

Count II - Ordinance No. 07-04 and the Due Process Clause of the Florida Constitution.

As to their violation of due process claim, Plaintiffs argue, "By using the phrase 'providing for a comprehensive amendment of Part III, Land Development Code', [sic] without anything further, the Title fails to fairly appraise the people of the substance of the proposed legislation." Plaintiffs further argue that "[t]he Title to City of Holmes Beach Ordinance No. 07-04, which violates the mandatory provisions of Section 166.041(2), Florida Statutes, fails to be reasonably sufficient to inform the public of the essence and scope of the proposed changes under consideration, and is not so clear and unambiguous as to be readily intelligible to the average citizen at large." Thus, Plaintiffs conclude that "Ordinance No. 07-04, which includes the 50 foot setback provisions of Article VII, Division 2, Section 7.2, City of Holmes Beach Code, must be deemed null and

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void."

Defendant City counters that the "title was sufficient to alert City residents and other interested parties of which part of the zoning code was to be revised." The City further points out that "[t]he statute's ordinance adoption process does not require that often complex zoning regulations be understandable by every casual reader. It only requires that the content of the regulatory language being created or amended be fully set forth."

Like their argument that Ordinance No. 07-04 violates the "single subject" rule, Plaintiffs' claim that it violates the due process clause of the Florida Constitution is also wholly without merit. Recalling, among other things, the Third District Court's rationale in *Kuvin* that "ordinances in Florida . . . enjoy a presumption in favor of constitutionality," as well as the mere "substantial compliance" standard applicable to ordinances challenged more than five years after their adoption as provided in § 166.041(7), Fla. Stat., this Court finds Plaintiffs' suggestion (i.e., that the title of the ordinance was not specific enough or in some way was deficient in informing the public of the essence and scope of the modifications to the City's Land Development Code) is simply unpersuasive. Due process only requires that the subject of the amendment or modification be clearly stated in the title and does not require particularized notice to each and every landowner who may potentially be impacted by its enactment. As the First District Court of Appeal observed in *Stone v. Town of Mexico Beach,* 348 So. 2d 40 (Fla. 1st DCA 1977),

> **Florida decisions have repeatedly stated that statutes will be upheld against constitutional attacks alleging title defects unless there are plain and substantial violations of organic constitutional requirements.** *E.g., King Kole Inc. v. Bryant,* 178 So. 2d 2 (Fla. 1965); *Farabee v. Board of Trustees, Lee County Law Lib.,* 254 So. 2d 1 (Fla. 1971); *City of Naples v. Moon*, 269 So. 2d 355 (Fla. 1972). As stated in the *Bryant* decision, **"The title is sufficient if it fairly gives such notice as will reasonably lead to inquiry into the body thereof."** (178 So. 2d at 4).

Stone, 348 So. 2d at 43 (emphasis added).

The title of Ordinance No. 07-04, in relevant part here, states:

> AN ORDINANCE OF THE CITY OF HOLMES BEACH, FLORIDA, PROVIDING FOR A COMPREHENSIVE AMENDMENT OF PART III, LAND DEVELOPMENT CODE, OF THE CITY CODE.

Contrary to Plaintiffs' assertions, that title is, in fact, sufficient to put City residents and any other interested parties on notice of which zoning code was being revised and fairly gave sufficient notice to reasonably lead a member of the general public to inquire into the body of the Ordinance for details about zoning code amendments. Based on the foregoing, it cannot be reasonably said that the City violated Plaintiffs' procedural due process rights. This is not a close call, and Defendant City is entitled to judgment as a matter of law on Count II.

Count III - Ordinance No. 07-04 and Plaintiffs' Substantive Due Process Rights Under the Florida Constitution.

As to this count, Plaintiffs raise a "facial challenge" to the constitutionality of Ordinance No. 07-04, particularly alleging that "Part III, Article VII, Division 2, Section 7.2, City of Holmes Beach Code is an absolute prohibition against all construction ***landward*** of the State's Erosion Control Line." In support of such challenge, Plaintiffs argue that "Part III, Article VII, Division 2, Section 7.2, City of Holmes Beach Code which prohibits all construction upon private property within 50 feet of the Erosion Control Line, without any provision for a variance, constitutes a taking, thereby reducing the value of all property landward of the Erosion Control Line. Accordingly, Part III, Article VII, Division 2, Section 7.2, City of Holmes Beach Code, on its face is a substantive due process violation of the State of Florida constitution, and therefore is void."

Defendant City counters that "Plaintiffs should not prevail on [their] substantive due process claim based on manipulation of the relevant provision of the Ordinance, ignoring its plain meaning and canons of construction to manufacture a substantive due process claim unsupported by the law." Specifically, Defendant City points out that, contrary to Plaintiffs' allegations, "The Code Provision does not ***completely*** bar development ***landward*** of the E[rosion] C[ontrol] L[ine]." Rather, Defendant City alleges, "It allows for limited development within the area landward of the ECL, just not the kind Plaintiffs desire."

"In the context of land use ordinances and unconstitutional conditions, the basis of a *facial* constitutional challenge 'is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed.' " *Manatee County v. Mandarin Development, Inc.,* 301 So. 3d 372, 376 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D616a].

Despite Plaintiffs' contentions, a close reading of Ordinance No. 07-04 establishes that it *does not* completely bar coastal development, either landward or seaward. Rather, Ordinance No. 07-04 allows for some limited construction within the prohibited coastline area, with a list of exempted structures outlined in Section 7.2.A.2 of the Ordinance. The Court agrees with the City's assessment that "the plain language of the Code prohibits the construction of any structure or building within 50 feet of the erosion control line, whether landward ***or*** seaward, ***unless*** constructing a seawall, groin, revetment, dune walkover, or similar structure, approved by the building official, whose purpose is to protect, establish, and maintain beach areas or the existing landward buildings or structures." The Court further agrees, "This enactment is rationally or reasonably related to furthering the City's legitimate objectives"—such as regulating coastal development, which includes consideration of societal welfare and safety policies. In light of such concerns, the Court finds the limitation in Ordinance 07-04 of certain structures, such as a large treehouse attached to an Australian Pine tree, within 50 feet of the erosion control line is certainly not unreasonable, arbitrary, or capricious. Such a limitation is clearly reasonably related to the City's need to control development at the water's edge. Finally, this Court has previously rejected Plaintiffs' "taking" argument as far back as November of 2019, when the Court dismissed Plaintiffs takings claim from the Second Amended Complaint.

In light of all this, the Court finds that Ordinance No. 07-04 does not, on its face, violate Plaintiffs' substantive due process rights. Defendant City is entitled to judgment as a matter of law on Count III.

Count IV - Ordinance No. 07-04 and Sections 161.141 and 161.053, Fla. Stat.

In their fourth and final Count, Plaintiffs allege, "Part III, Article VII, Division 2, Section 7.2, City of Holmes Beach Code directly conflicts with the provisions of *Section 161.053*, Florida Statutes because it absolutely prohibits all structures within 50 feet landward of the Erosion Control Line, except those for the sole purpose of which is the protection, establishment, maintenance or nourishment of beach areas, or for the sole purpose of protection of existing buildings or structures from the waters of the Gulf of Mexico, without any regard as to whether such structures qualify for a permit from the FDEP or are otherwise exempt from permitting requirements." Plaintiffs further argue, "The City's adoption of Part III, Article VII, Division 2, Section 7.2, City of Holmes Beach Code[,] which deprives upland owners of the use and enjoyment of their property, directly conflicts with the provisions of *Section 161.141*, Florida Statutes. As a consequence, Part III, Article VII, Division 2, Section 7.2, City of

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Holmes Beach Code, on its face violates the provisions of Article VIII, Section 2(b), Florida Constitution and is therefore void."

Defendant City counters, "Though Plaintiffs have altogether failed to forthrightly disclose it in their June 30 M[emorandum] o[f] L[aw], this Court already held that § 7.2 of the H[olmes] B[each] L[and] D[evelopment] C[ode] does not impermissibly conflict with Section 161.053, Fla. Stat., while sitting in its appellate capacity in 2014." The City further argues, "Even if this Court is not persuaded the Plaintiffs are collaterally estopped from challenging the facial constitutionality of § 7.2 of the HB LDC, the City should still prevail as a matter of law. As a matter of law, the City is not preempted from regulating in the subject area."

In addressing this issue, the Court points to pages twenty-two (22) through twenty-four (24) of Judge Janette Dunnigan's September 16, 2014 Opinion AFFIRMING the City of Holmes Beach Code Enforcement Board's Final Administrative Order. In it, under the heading **Constitutionality of City of Holmes Beach Code Provision**, Judge Dunnigan wrote:

> In sum, the Court finds section 161.053, Florida Statute (2010), is not inconsistent with Part III, Article VII, Division 2, Section 7.2 of the City of Holmes Beach Land Development Code because both allow exemptions for construction of certain structures upon proper permitting. Appellants have failed to show that the City code is unconstitutionally more restrictive than Chapter 161, Florida Statutes.

In light of Plaintiffs' previous appellate arguments and Judge Dunnigan's 2014 Opinion, the Court finds that Plaintiffs are collaterally estopped by the doctrine of *res judicata* from further challenging the constitutionality of Ordinance No. 07-04, at the very least to the extent the Court has previously held it does not impermissibly conflict with Section 161.053. *See, e.g., Topps v. State,* 865 So. 2d 1253, 1254-56 (Fla. 2004) [29 Fla. L. Weekly S21a] (discussing nuances between doctrine of *res judicata* and doctrine of collateral estoppel).

Moreover, beyond argument, Plaintiffs offer no support for their claim that the ordinance here is "in direct conflict with the provisions of Sections 161.141 and 161.053 Fla. Stat." On the other hand, Defendant City argued in its Memo in Opposition that the case of *Pace v. Board of Adjustment, Town of Jupiter Island,* 492 So. 2d 412 (Fla. 4th DCA 1986), is "particularly instructive in this regard." The Court agrees. As the Fourth DCA noted in *Pace,* application of the local ordinance "did come into conflict with the general state policy of combatting beach erosion in this particular instance. But *this conflict does not invalidate the ordinance since the ordinance does not contravene the statutory requirements in any way*; in other words, it does not require the petitioner to take any action which would violate the state law or forbid him from taking action which the state law requires. *State and local provisions reflect conflicting policy considerations all the time, but this does not render the local provisions unenforceable.*" *Id.* at 415 (emphasis added). Similarly, relevant to the instant action, Sections 161.141 and 161.053 do not, in fact, preempt a municipality from enacting reasonable legislation in support of its land development code or limit a city's legitimate authority over the areas landward of the erosion control line. In sum, neither Section 161.141 nor Section 161.053 preempt the provisions of Ordinance No. 07-04 within the City of Holmes Beach Land Development Code.

As a final observation, while it is certainly true that the treehouse has withstood a number of significant storms and coastal weather events over the last dozen years, the fact remains that "[Plaintiff]s' decision to build a uniquely elaborate structure along the shoreline of the Gulf of Mexico, without formal permit application and subsequent City approval, subjected their tree house to inevitable violations of the City of Holmes Beach Land Development Code" (again, *see* Judge Dunnigan's September 16, 2014 Appellate Opinion).

Based on the foregoing, it is hereby,

ORDERED AND DECLARED that Defendant City is entitled to judgment, as a matter of law, on Counts I, II, III, and IV of Plaintiffs' Third Amended Complaint, filed January 7, 2020. Final Judgment is hereby entered for Defendant City. Plaintiffs take nothing by this action, and Defendant City goes hence without day. The Court reserves jurisdiction to determine an award of attorney's fees and costs, if appropriate.

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[1]At that time, Judge Dunnigan detailed the factual background of the Hazen/Tran tree house litigation in her appellate opinion as follows:

> While looking out his window at the Gulf of Mexico, Appellant Hazen decided he wanted to build a tree house in the Australian pine located on the waterside of their property at 103 29th Street in Holmes Beach, Florida. He spoke with his wife, Appellant Tran, about his idea, and in April or May 2011, he went to the City of Holmes Beach Building and Zoning Department to discuss his idea. Once there, Hazen asked Robert Shaffer, then Building Inspector for the City of Holmes Beach, whether the city had any regulations for building a tree house. Mr. Shaffer then consulted with Joe Duennes, the City's then-Building Official. The inquiry and discussions were nonspecific as Appellants had not yet started drafting their plans; nor did Appellant Hazen give the location of the property or the intended tree whereupon the tree house would be situated. At their meeting, Shaffer informed Hazen that the City of Holmes Beach had no regulations involving construction of a tree house. Mr. Shaffer did not advise Appellant Hazen either way whether a permit would be necessary for the building of a tree house. However, Shaffer cautioned Appellant Hazen to make the tree house safe and to limit its access for liability purposes. Later, Mr. Shaffer essentially admitted that he did not anticipate that the tree house would be so elaborate. Appellant Hazen admitted at the Board hearing that if Mr. Shaffer had questioned him about details like how big, how extensive, or how many windows the tree house would have, Hazen would not have been able to answer such questions when he met with Mr. Shaffer.
>
> Relying on Mr. Shaffer's generally nonspecific representation that the City had no regulations pertaining to a tree house, Appellants developed ideas, hired carpenters, and in May 2011, began construction of a tree house in the Australian pine located on the waterside of their property. At no time prior to construction did Appellants discuss their ideas with city officials or submit sketches or plans for the tree house to the City. Rather, they made no further contact with the City prior to construction. The resultant tree house has been compared to a "Swiss Family Robinson tree home" and is supported by both the Australian pine tree and wooden posts. It consists of two elevated decks with removable windows, but it is not fully enclosed. The tree house is secured with hurricane brackets and straps. It does not have electric or plumbing service, but it does have solar paneling. The tree house has been furnished with two hammocks, light-weight chairs, a small picnic table, one folding chair, and one Rubbermaid storage bin. Including both decks, the tree house is somewhere between 400 and 500 square feet.
>
> In November 2011, Appellants received a Notice of Violation, which halted their construction on the project. In the six months since they began the project in May 2011, Appellants had spent approximately $30,000 to $50,000 on the cost of the construction. Indeed, according to the testimony about the tree house and the photo exhibits submitted, it is an elaborate and impressive structure, and has even been decorated to blend in with the tree and its surrounding environment.
>
> On July 30, 2013, a properly-noticed Code Enforcement Board hearing was held to address the alleged code violations. The same day, the Board entered a Final Administrative Order finding Appellants in violation of building code permit requirements. Specifically, the Board found Appellants "in violation of the Building Permit requirements found in Article III, 3.3, Division 1, Required Zoning Compliance, Section 3.2 Permits required, and Section 3.3 Building Permits, for failing to obtain a building permit prior to constructing within the erosion control line setback a multi story assembly structure." Also, the Board found the structure was constructed in violation of the Land Development Code Sections 3.4; 3.5A; 3.6A(1); 3.7A(2); 3.8B; 6.6E2b(9); 9.8; and 9.13A and B.
>
> The Board ordered that Appellants must come into compliance by August 28, 2013, or subject themselves to a fine of up to two hundred fifty dollars ($250.00) per day. Appellants were ordered to comply by doing the following:
>
> 1. Pay the City of Holmes Beach all fines, penalties and the like due as a result of constructing or substantially altering a structure upon the real property without a building permit.
> 2. Contact the city building department and begin the process for removing all of the violations and diligently progressing in good faith *or* if the structure cannot be constructed in accordance with code, obtain a demolition permit and remove the structure.
> 3. Pay the City's costs incurred in this action in the amount of $4,271.40.
>
> On August 26, 2013, Appellants timely filed a Notice of Appeal of the Board's Final Administrative Order, initiating this appeal in the Circuit Court of Manatee County. Simultaneously, Appellants also moved the Board for a stay of proceedings, particularly any imposition of fines, which was denied by the Board on September 12, 2013, by an order which also imposed a $100 per day fine.

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Appellants also appealed that denial, and this Court, by order entered on March 17, 2014, ordered the Board to vacate its order denying stay and imposing fines and directed the Board to grant Appellants' motion for stay *nunc pro tunc* September 12, 2013.

Opinion issued September 16, 2014, in Twelfth Judicial Circuit Court of Appeal for Manatee County Appeal Case No. 2013-AP-0297 (internal footnotes omitted).

[2]*See Bondar v. Town of Jupiter Inlet Colony*, 321 So. 3d 774 (Fla. 4 DCA 2021) [46 Fla. L. Weekly D1034a], discussing property rights in relation to constitutional "fundamental rights" as follows:

> In *rejecting the argument that "the right to freely use one's property is fundamental* and implicit in the concept of ordered liberty," the Eleventh Circuit has said:
>
> It is true that property rights have been important common law rights throughout history and that they are protected in many situations by procedural due process. Nevertheless, *common law rights are not equivalent to fundamental rights, which are created only by the Constitution itself. See, e.g., Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L. Ed. 2d 523 (1985) (Powell, J., concurring); *McKinney v. Pate,* 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied,* 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995). Any right in the nonconforming use is a state-created right.

Bondar, 321 So. 3d at 783-84 (emphasis added).

* * *

Torts—Premises liability—Apportionment of fault—Governmental non-parties—Action seeking damages for injuries sustained when wall in commercial space owned by defendant collapsed on plaintiff and loss of consortium damages by plaintiff's wife—Defendant's motion to amend affirmative defenses to apportion fault to non-party local governments and their inspectors involved in review of building plans and permits is denied—Granting motion to amend defenses to apportion fault to governmental non-parties where that defense had been precluded at onset of litigation and was not raised again during six years of litigation and discovery would severely prejudice plaintiffs by causing delay and disruption at late stage of litigation—Furthermore, amendment would be futile as there has never been a common law duty of care owed by governmental body with respect to issuance of building permits and inspections—Statutes enacted to protect public safety, health, and general welfare of all people of state do not change common law rule—Undertaker doctrine, which involves governmental entity negligently providing general service to a specific individual, does not recede from common law rule that governmental entity's discretionary actions while enforcing building code for public health and safety do not create private duty of care to individual citizens

DARREL WILSON and JUDITH WILSON, Plaintiffs, v. HARLAND PROPERTIES, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE 14-001797 (03). December 27, 2022. Barbara McCarthy, Judge. Counsel: Ben Murphey, Lawlor White & Murphey, LLP, Ft. Lauderdale, for Plaintiffs. Gregg Weiser, Law Offices of James Kehoe, West Palm Beach; and Jack Reiter, Gray Robinson, Miami, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO SUPPLEMENT AFFIRMATIVE DEFENSE AS TO FAULT OF NON-PARTIES PURSUANT TO SECTIONS 468.604 AND § 553.79 OF THE FLORIDA STATUTES

On July 12, 2022, this Court heard oral argument on Defendant's Motion for Leave to Supplement Affirmative Defense as to Fault of Non-Parties pursuant to Florida Statute Sections 468.604 and 553.79 (Motion). The Court having carefully reviewed the subject Motion, applicable case law, and being fully advised and finds as follows:

1. Plaintiff, Mr. Wilson, alleges he was injured in a commercial space owned by Defendant when part of a wall collapsed on him. Plaintiff, Mrs. Wilson alleges loss of consortium damages. Plaintiffs' operative pleading is their Third Amended Complaint filed on August 15, 2016.

2. Defendant filed its Answer and Affirmative Defenses to that pleading and claimed, among others, the affirmative defense of apportionment of fault to governmental non-parties involved in the review of the building plans, permitting, and inspection of the work done in Defendant's commercial space that allegedly injured Mr. Wilson.

3. On July 7, 2016, this Court granted Plaintiffs' Motion for Partial Summary Judgment prohibiting Defendant from apportioning fault to governmental non-parties involved in the review of the building plans, permitting, and inspection of the work done in Defendant's commercial space that allegedly injured Mr. Wilson. The Courts ruling of July 7, 2016 ruling cited, among other authorities, *Trianon Park Condominium Ass'n v. City of Hialeah*, for the rule: "The government clearly has no responsibility to protect personal property interests or to ensure the quality of buildings that individuals erect or purchase." 468 So. 2d 912, 923 (Fla. 1985).

4. The parties conducted extensive discovery and litigated the case for six (6) years. Harland filed three more motions for summary judgment (Harland's Motion for Summary Judgment on Count III 12/10/19; Harland's Motion for Summary Judgment on Liability 1/7/20; Harland's Renewed Motion for Summary Judgment under the new summary judgment standard 12/8/21). None of Harland's Motions for Summary Judgment requested of the Court to reconsider its 2016 Order granting summary judgment on its affirmative defenses.

5. Defendant's present Motion before the Court asks to supplement its affirmative defenses to apportion fault to the local governments and their inspectors who were involved in the review of the building plans and permits involved in this case. Defendant bases that proposed amendment on sections 468.604 and 553.79 of the Florida Statutes and the undertaker doctrine. Defendant argues that since sections 468.604 and 553.79 were enacted after the decision issued in *Trianon Park Condominium Ass'n v. City of Hialeah,* 468 So. 2d 912 (Fla. 1985) that *Trianon* does not prevent Defendant's proposed amendment.

6. This Court denies Harland's Motion as an amendment at this late stage would prejudice plaintiffs and be futile. *See, e.g., DiGiacomo v. Mosquera,* 322 So. 3d 734, 738-39 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1390e]; *Horacio O. Ferrea N. Am, Div., Inc. v. Moroso Performance Prods., Inc.,* 553 So. 2d 336, 337 (Fla. 4th DCA 1989) (explaining the "crucial consideration" in a motion to amend is "the test of prejudice"). "[T]he liberality typically associated with amendments to pleadings diminishes as the case progresses." *Levine v. United Cos. Life Ins.,* 659 So. 2d 265, 266-67 (Fla. 1995) [20 Fla. L. Weekly S444c].

7. This case is set for the trial docket in April, 2023. If this Court allowed Harland to reassert this affirmative defense at this point, plaintiffs would be forced to conduct additional discovery, including deposing the building inspectors. Due to Harland's delay, there has been too much time elapsed in which it would be difficult to find these witnesses, assuming they remain alive, and able to testify. This delay and disruption would severely prejudice plaintiffs.

8. In addition, this Court denies defendant's motion because amendment would be futile. There has never been a common law duty of care owed by a governmental body with respect to how it issues licenses, permits, variances, etc. *Trianon,* 468 So. 2d at 919. Those types of actions are "inherent in the act of governing." *Id.* The government does not owe the public a duty to find and order corrections of building code and safety code violations. *Trianon,* 468 So. 2d at 922. The government is not liable for negligently issuing a certificate of occupancy or inspecting construction. *Victoria Village G Condo. Ass'n, Inc. v. City of Coconut Creek,* 488 So. 2d 900, 900 (Fla. 4th DCA 1986); *Hummel v. Stenstrom- Strump Constr. & Dev. Corp.*, 648 So. 2d 1239, 1240 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D232a] (holding *Trianon* bars claims against a governmental entity for negligently approving building plans, inspecting construction, and issuing a certificate of occupancy). Instead, the property owner must

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ensure its property complies with all applicable building and safety codes. *Grant v. Thornton,* 749 So. 2d 529, 531-32 (Fla. 2d DCA 1999) [25 Fla. L. Weekly D26a].

9. Defendant argues that sections 468.604 and 553.79 of the Florida Statutes are defenses to Plaintiffs' claims. However, "legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens." *Trianon,* 468 So. 2d at 917. And the purpose of section 468.604 is to protect "public health and safety." § 468.601, Fla. Stat. The purpose of section 553.79 is also to protect "public safety, health, and general welfare for all the people of Florida." § 553.72, Fla. Stat.

10. Sections 468.604 and 553.72 do not state that they change the common law rule of no governmental liability for handling of building permits, inspections, etc. Sections 468.604 and 553.72 do not create a cause of action against any governmental body/employee for handling of building permits, inspections, etc. Therefore, sections 468.604 and 553.79 are not defenses to Plaintiffs' claims and the amendment must be denied as futile. *See Marquesa at Pembroke Pines Condo. Ass'n v. Powell,* 183 So. 3d 1278, 1279 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D312b] (futile amendment must be denied).

11. Defendant argues the undertaker doctrine allows it to apportion fault to the government and/or its employees for their handling of the building permits, inspections, etc. in this case. The undertaker doctrine arises under the common law. *E.g., Wallace v. Dean,* 3 So. 3d 1035, 1050 (Fla. 2009) [34 Fla. L. Weekly S52b]. Unlike in *Wallace,* which involved a government entity negligently providing a general service to a specific individual, Harland alleges government officials negligently issued building permits, inspected property, and issued the certificate of occupancy. Nothing in *Wallace* recedes from the holding of *Trianon* that a government entity's discretionary actions while enforcing the building code to protect public health and safety do not create a private duty of care to individual citizens. *Trianon,* 468 So. 2d at 922; *Hummel,* 648 So. 2d at 1240; *Victoria Village,* 488 So. 2d at 900.

IT IS HEREBY **ORDERED** AND **ADJUDGED**:

1. Defendant's Motion for Leave to Supplement Affirmative Defense as to Fault of Non-Parties pursuant to sections 468.604 and 553.79 of the Florida Statutes is DENIED.

2. This Court's July 7, 2016 Order Granting Plaintiffs' Motion for Partial Summary Judgment stands and Defendant is prohibited from apportioning fault to governmental non-parties involved in the review of the building plans, permitting, and inspection of the work done in Defendant's commercial space that allegedly injured Mr. Wilson.

* * *

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COUNTY COURTS

Consumer law—Debt collection—Florida Consumer Collection Practices Act—Because plaintiff consumer collection agency was not registered with Office of Financial Regulation when it instituted debt collection suit, summary judgment is entered in favor of defendant—Registration is condition precedent that cannot be cured after filing suit

PERSOLVE RECOVERIES, LLC, Plaintiff, v. ARMIA CRUMITY, Defendant. County Court, 2nd Judicial Circuit in and for Leon County. Case No. 2020 CC 2115. November 30, 2022. Monique Richardson, Judge. Counsel: Michael A. Gold, Walters, Levine DeGrave, Tampa, for Plaintiff. Willie J. Brice, Loan Lawyers, LLC, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court for a hearing on November 21, 2022, on Defendant's Motion for Summary Judgment. The Court having reviewed the pleadings, considered the arguments of counsel, and being otherwise fully advised in the premises, finds as follows:

It is undisputed that Plaintiff is a "consumer collection agency" as defined in Section 559.55(3), Florida Statutes, and is therefore subject to the provisions of the Florida Consumer Collection Practices Act. It is also undisputed that when Plaintiff instituted this suit, Plaintiff was not registered as a "consumer collection agency" with the Office of Financial Regulation of the Florida Financial Service Commission, as required by Section 559.553, Florida Statutes. The plaintiff argued that the registration is curable, and has now been cured. Defendant argued that registration is a condition precedent and cannot be cured after filing the Complaint. The plain language of the statute is clear and prohibits a consumer collection agency from debt collection practices in the state without first registering. It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is **GRANTED**. The plaintiff shall take nothing from this action. The court reserves jurisdiction to enter additional orders it deems appropriate and just.

* * *

Insurance—Homeowners—Insured's action against insurer—Conditions precedent—Ten-day notice—Retroactive application of statute—Statute requiring that homeowners file ten-day notice of intent to initiate litigation under property insurance policy applies to suit arising under policy that predates effective date of statute—Motion to dismiss is granted

BOBBY AND STEPHANIE REYES, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 4th Judicial Circuit in and for Clay County. Case No. 2022-CC-489. Division C. October 20, 2022. Timothy R. Collins, Judge. Counsel: Samuel Eisenstein, Cohen Law Group, Maitland, for Plaintiffs. Gina Glasgow, Glasgow Law Firm, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on the Defendant's Motion to Dismiss Plaintiff's Complaint for the Plaintiff's failure to comply with Section 627.70152, Florida Statutes, which now requires the Plaintiff to file a written Notice of Intent to Initiate Litigation.

The Plaintiff argues that the statutory requirement is not necessary because that date of the policy predates the effective date of the statutory requirement.

This Court finds this requirement to be procedural, and therefore, the Notice is a condition precedent to filing this suit.

The Court does not find three (3) cases, *Security First Insurance Company v. Jerry Fields*, No. 2D21-3645, May 20, 2022; *Security First Insurance Company v. Donald Stokely and Meikah Stokely*, No. 2D21-3609, May 20, 2022; *Security First Insurance Company v. Edwina Peyton*, No. 2D21-3607, May 20, 2021; binding and persuasive.

Therefore, it is

ORDERED AND ADJUDGED:

1. The Defendant's Motion to Dismiss is Granted.

2. The Plaintiff shall have sixty (60) days hereafter to file an amended complaint if the issue is not settled after the proper notice.

* * *

Attorney's fees—Contracts—Prevailing party—Mutuality or reciprocity of obligation—Defendant who prevailed as result of dismissal of plaintiff's action for account stated and unjust enrichment seeking monies due on credit card account was entitled to award of attorney's fees under attorney's fees provision of underlying credit card agreement, made reciprocal to apply to defendant pursuant to section 57.105(7)—Choice of law—No merit to argument that credit card agreement's South Dakota choice-of-law provision does not permit reciprocity of attorney's fees where plaintiff failed to plead and prove application of foreign law—Defendant's citation to Rule 1.525 instead of Rule 7.175 when rules of civil procedure had not been invoked in small claims case is viewed as typographical error that has no bearing or effect on defendant's substantive basis for award of attorney's fees

CITIBANK, N.A., Plaintiff, v. LUIS RODRIGUEZ, Defendant. County Court, 6th Judicial Circuit in and for Pasco County. Case No. 2021-CC-1141. January 9, 2023. Joseph F. Justice, Judge. Counsel: Michael Debski, Debski & Associates, P.A., Jacksonville, for Plaintiff. Bryan A. Dangler, The Power Law Firm, Winter Park, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR ENTITLEMENT TO ATTORNEY FEES AND COSTS AND DENYING PLAINTIFF'S MOTION TO STRIKE

THIS CAUSE came before the Court during an evidentiary hearing on December 14, 2022, on Defendant's Motion for Entitlement to Attorney's Fees and Costs ("fee motion") and Plaintiff's Motion to Strike Defendant's Motion for Entitlement to Attorney Fees and Costs ("motion to strike"), and the Court having reviewed the file, heard argument from counsel, and being otherwise fully advised in the premises, hereby finds:

On February 26, 2021, Plaintiff filed a two-count action against the Defendant for Account Stated and Unjust Enrichment to collect monies allegedly owed on a credit card account. Plaintiff included only one exhibit with its complaint—an account statement from May 2020. No contract or other written agreement was attached to the complaint. Defendant filed an Answer and Affirmative Defenses that included his notice and intent to seek attorney fees should he prevail in the action. A non-jury trial was subsequently held at which Plaintiff failed to appear. The Court involuntarily dismissed the action for failure to prosecute on October 11, 2021. Defendant timely moved as prevailing party for an award of attorney fees and costs pursuant to the Card Agreement between the parties and Florida Statute § 57.105(7). Seven months later, Plaintiff moved to strike Defendant's fee motion on the sole grounds that the relief sought was prohibited because the motion cited Florida Rule of Civil Procedure 1.525 rather than Florida Small Claims Rule 7.175 where the Florida's civil rules had not been invoked. Plaintiff also filed a written response to Defendant's fee motion, relying heavily[1] on the holdings in *Giles v. Portfolio Recovery Assoc., LLC,* 317 So. 3d 1287 (Fla. 1st DCA 2022) [46 Fla. L. Weekly D1354a] and *First Fin. Servs. v. Edwards,* 47 Fla. L. Weekly D2306a (Fla. 1st DCA 2022) for the contention that the Card Agreement's choice-of-law provision applying the laws of South Dakota does not

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permit reciprocity of attorney's fees and therefore, Defendant is not entitled to recover his attorney fees under the Card Agreement. This Court disagrees with both arguments.

First, Plaintiff's motion to strike is unsubstantiated. Florida Rule of Civil Procedure 1.525 and its Small Claims counterpart [Rule 7.715] do not create a substantive basis for awarding attorney fees but rather, prescribe a procedure and deadline for requesting them—filing a motion no later than 30 days from judgment or dismissal. *See Norris v. Treadwell,* 907 So. 2d 1217 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D1579a] ("We conclude that the purpose of Rule 1.525 is fully accomplished by an interpretation that establishes the latest point at which a prevailing party may serve a motion for fees and costs."); *Fla. R. Civ. P.* 1.525; *Fla. Sm. Cl. R.* 7.715. Indeed, the purpose of these rules is to establish a bright-line time requirement for filing a motion for costs and attorney fees to cure the "evil" of uncertainty created by tardy motions, *see Norris* at 918, and to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court. *Barco v. Sch. Bd. of Pinnellas Cty.,* 975 So. 2d 1116, 1123 (Fla. 2008) [33 Fla. L. Weekly S87b]. Defendant timely filed its fee motion in this action irrespective of whether its motion was to be construed under the Florida Rules of Civil Procedure or Florida Small Claims Rules, because the language and intent of both rules are identical and therefore, Defendant's citing of Rule 1.525 instead of 7.175 is viewed as nothing more than an inadvertent typographical error which has no bearing or effect on Defendant's substantive basis for attorney fees.

As to Plaintiff's contention that the Card Agreement's South Dakota choice-of-law provision prohibits Defendant's recovery of reciprocal attorney fees and costs, the Court finds Plaintiff's arguments unpersuasive and both *Giles* and *Edwards* inapposite and distinguishable where the Florida Supreme Court together with all other District Courts of Appeal have unequivocally held that a party ***must plead and prove*** the application of foreign law. *Mills v. Barker,* 664 So. 2d 1054 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D2643a]; *Columbian Nat'l Life Ins. Co. v. Lanigan,* 19 So. 2d 67, 68 (Fla. 1944) ("The general rule is that when the law of a foreign state is relied on as governing a given transaction it ***must be pleaded and proved*** as any other issue of fact. . .") (emphasis added); *Schubot v. Schubot,* 363 So. 2d 841 (Fla. 4th DCA 1978) ("The law of the foreign state cannot be the basis for a trial court's ruling unless such law has been raised through the ***pleadings***.") (emphasis added); *Coyne v. Coyne,* 325 So. 2d 407 (Fla. 3d DCA 1976); *See Motzer v. Tanner,* 561 So. 2d 1336, 1337-38 (Fla. 5th DCA 1990) (the phrase "***must be pled***" is to be construed in accordance with Florida Rule of Civil Procedure 1.100 that, qualifies complaints, answers, and counterclaims as pleadings.") (emphasis added); *see also Stockman v. Downs,* 573 So.2d 835 (Fla. 1991) (finding that attorney's fees "***must be pled***" and that "[a] party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him.") (emphasis added).

The First DCA's short opinion in *Giles* does not address whether that agreement's choice-of-law provision was pled and proven as required by the Florida Supreme Court, but rather, that public policy in Florida underlying reciprocal attorney's fee awards was insufficient to outweigh the application of the choice-of-law provision in the agreement. *Giles v. Portfolio Recovery Assoc., LLC*, 317 So. 3d at 1287. Conversely, in *Edwards,* where plaintiff brought an action for breach of a Retail Installment Sales Contract, the First DCA held that in most contexts, a party ***must plead and prove*** that foreign law applies before a trial court may consider its applicability, citing to the Florida Supreme Court's opinion in *Kingston v. Quimby,* 80 So. 2d 455, 456 (Fla. 1955) (emphasis added). *Edwards* is also factually distinguishable from this case because contract in that case was attached to the Complaint. *First Fin. Servs. v. Edwards,* 47 Fla. L. Weekly D2306a (Fla. 1st DCA 2002) ("To the extent that it needed to ***plead and prove*** the application of foreign law, Florida First's attachment of the contract to the complaint containing the choice-of-law provision to the complaint at the outset of the lawsuit was sufficient.") (emphasis added)

This Court is bound by the holdings of the Florida Supreme Court and the Second DCA in *Kingston v. Quimby,* 80 So. 2d at 456 and *Mills v. Barker,* 664 So. 2d at 1054, respectively, each of which hold that when the law of a foreign state is relied on as governing a given transaction it ***must be pleaded and proved*** as any other issue of fact. In this case, Plaintiff did not attach the Card Agreement to its Complaint and did not plead and prove that South Dakota law applied in this action. Plaintiff operated under Florida's procedural and substantive laws during the entirety of this action and did not assert the Card Agreement's choice-of-law provision until its post-dismissal response to Defendant's motion for attorney fees and costs that was filed on December 13, 2022, over 365 days following Defendant's fee motion and only one-day prior to the hearing on Defendant's fee motion. Because Plaintiff did not plead and prove reliance on South Dakota law, this matter is determined by Florida law. *Owens-Corning Fiberglass Corp. v. Engler,* 704 So. 2d 594 (Fla. 4th DCA 1997) [21 Fla. L. Weekly D1629a] (a party cannot rely on foreign law without ***pleading*** reliance in the trial court.) (emphasis added)

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Motion for Entitlement to Attorney Fees and Costs is **GRANTED**. Plaintiff's Motion to Strike same is **DENIED**.

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[1]Plaintiff also cited to a *per curium affirmance* ("PCA") from the Second DCA in *Wood v. Portfolio Recovery Assoc.,* No, 2d21-1455, 2022 Fla. App: LEXIS 8672 (Fla. 2d DCA 2022) in support of its choice-of-law argument. However, Florida law is explicit that a PCA does not constitute authority for any position and cannot stand for any general pronouncement of principles of law that might have been urged by the parties. *Acme Specialty Corp. v. City of Miami,* 292 So. 2d 379, 380 (Fla. 3d DCA 1974).

* * *

Insurance—Personal injury protection—Arbitration—Medical provider's action against insurer—Under New Jersey law that governs PIP policy that was issued in New Jersey, any party to PIP dispute may choose arbitration rather than court action—Because policy at issue requires arbitration as initial forum to resolve PIP disputes, medical provider must complete arbitration before initiating any litigation under policy—Florida PIP statute's requirement that nonresident owner of motor vehicle physically present in state for more than 90 of preceding 365 days obtain security within state has no impact on arbitration agreement in policy—Arguments that Florida's minimum PIP coverage and PIP reimbursement methodologies should apply are related to benefits to be resolved within arbitration forum and do not negate arbitration clause

AMERICAN REHAB KARE, LLC, a/a/o Tracy Alexandre, Plaintiff, v. PLYMOUTH ROCK ASSURANCE PREFERRED CORPORATION, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-018083-O. December 12, 2022. Andrew Cameron, Judge. Counsel: William S. England, Chad Barr Law, for Plaintiff. Sean P. Greenwalt, Marshall Dennehey Warner Coleman & Goggin, Tampa, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND COMPELLING PLAINTIFF TO ARBITRATION

THIS CAUSE having come before the Court on December 6, 2022 at 3:00 p.m., regarding Defendant's Motion to Dismiss and to Compel Arbitration, and the Court having reviewed the file and hearing argument of counsel, it is found that:

Plaintiff, American Rehab Kare, LLC, as the assignee of Tracy Alexandre, brought this Complaint for breach of contract for failure to pay Personal Injury Protection (PIP) Benefits against Defendant,

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Plymouth Rock Assurance Preferred Corporation.

At the time of the accident, Tracy Alexandre was insured under an automobile policy issued in the state of New Jersey. Florida follows the doctrine of *lex loci contractus* to determine the choice of law governing contract disputes. Under this doctrine, the law of the state where the contract was made will apply to any dispute. *State Farm Mutual Automobile Insurance Co. v. Roach,* 945 So.2d 1160, 1163 (Fla. 2006) [31 Fla. L. Weekly S840b]. Here, the insured obtained a contract for insurance coverage in New Jersey. The Defendant issued said policy in New Jersey pursuant to New Jersey law. Therefore, New Jersey law applies to this dispute.

The Court finds the policy is within the four corners of the complaint for purposes of a Motion to Dismiss given the Complaint's incorporation of the policy and being premised upon the policy in order to seek the policy's PIP benefits. *Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D164a].

The New Jersey Automobile Reparation Reform Act (AICRA), N.J. Stat. Ann. §§ 39:6A-1 to 6A-35, requires every automobile liability insurance policy to provide personal injury protection benefits. Further, the AICRA scheme permits not only the claimant, but "*any party*" to a personal injury protection (PIP) dispute to choose dispute resolution rather than a traditional court action. *Coalition for Quality Health Care v. N.J. Dept. of Banking and Ins.,* 348 N.J. Super. 272, 280 (App. Div. Mar. 4, 2002) (*emphasis added*). Either the insurer or the claimant (including a medical provider) can submit their claims to the AICRA arbitration scheme. *See id.*

The Court finds that Defendant's policy requires arbitration as the "sole initial forum to resolve" personal injury protection disputes. *See Defendant's Policy Page 36.* The Court finds that this is a valid bargained for provision of the agreement that insured entered into as a condition of obtaining its policy of insurance from Plymouth Rock Assurance Preferred Corporation. Plaintiff, as the assignee, is bound to this provision and must complete arbitration prior to initiating any litigation regarding the policy at issue. *Lois G. Johnson v. Allstate Ins. Co.,* 961 So.2d 1113 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1855a].

Finally, the Court is not persuaded by Plaintiff's argument that the policy's arbitration clause is invalid pursuant to § 627.733(2) Fla. Stat. or the out of state coverage provisions in Defendant's policy. § 627.733(2) Fla. Stat. mandates a nonresident owner or registrant of a motor vehicle, who has been physically present within the state for more than 90 days during the preceding 365 days obtain security in the state of Florida during the period such motor vehicle remains in the state. This obligation is upon the insured and not the insurer and would have no impact on Defendant's arbitration agreement. Further, in the least, the Court finds arguments that Florida's minimum PIP coverage or PIP methodologies should apply to the policy are arguments related to benefits, which should be resolved within the forum of arbitration and do not negate the bargained for arbitration clause itself.

Accordingly, it is **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion to Dismiss is hereby **GRANTED**. Plaintiff's suit shall be dismissed immediately, without prejudice. Defendant shall go hence without day in this matter and the clerk is directed to close this matter.

2. Plaintiff is ordered to engage and complete arbitration pursuant pursuant to New Jersey's Automobile Reparation Reform Act (AICRA), N.J. Stat. Ann. §§39:6A-1 to 6A-35 and the policy via the State of New Jersey's selected Forthright Arbitration Forum.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reimbursement—Medicare budget neutrality adjustment is not applicable when determining reimbursement amounts under Florida PIP law

UNIVERSITY DIAGNOSTIC INSTITUTE WINTER PARK, PLLC., a/s/o Doris Cobb, Plaintiff, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-SC-47783-O. January 9, 2023. Andrew Bain, Judge. Counsel: Dave T. Sooklal, Anthony-Smith Law, P.A., Orlando, for Plaintiff. Megan Lindsey, Law Office of Jeffrey Hickman, Orlando, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ENTRY OF FINAL JUDGMENT IN FAVOR OF PLAINTIFF

This matter came before the Court on Plaintiff's and Defendant's Motions for Summary Judgment Regarding Defendant's Improper Reimbursement For CPT 72148. After having reviewed Plaintiff's and Defendant's Motions and summary judgment evidence; having heard argument of counsel; and after having reviewed the applicable legal authority and otherwise being fully advised in the premises, this Court hereby GRANTS Plaintiff's Motion for the reasons set forth below. Based on this Court's Order and rationale below, the Court further hereby enters a Final Judgment in favor of the Plaintiff.

LEGAL ISSUE

The sole issue raised by the parties in their competing motions for summary judgment is whether GEICO properly apply the PFS payment formula pursuant to section 627.736, Florida Statutes when the Defendant applied a Budget Neutrality Adjustment to Plaintiff's charge.

FACTUAL BACKGROUND

The underlying facts of this case are not in dispute. The Defendant issued a policy of insurance that provided Personal Injury Protection ("PIP") benefits to the Defendant's insured, Doris Cobb, for a motor vehicle accident that occurred on April 19, 2017. Ms. Cobb received an MRI from Plaintiff which was related and necessary as a result of the injuries sustained by Ms. Cobb. Plaintiff billed Defendant the appropriate CPT code 72148 for the MRI, and the parties don't dispute that the appropriate amount on which payment should be based is Medicare Part B's 2007 limiting charge. The parties dispute whether the Defendant's utilization of the Budget Neutrality Adjustment ("BNA") in calculating the 2007 limiting charge is proper.

With respect to the 2007 BNA at issue here, pursuant to section §1848(c)(2)(B)(i) of the Social Security Act, work RVUs are to be reviewed no less than every five years. The first review was initiated in 1997, followed by a second review in 2002, and a third review that went into effect in 2007, finalized in the final as rule stated in Federal Register published December 1, 2006. As part of this 5-Year study, the work RVUs were reviewed and ultimately revised, reflecting "changes in medical practice, coding changes, and new data on relative value components that affect the relative amount of physician work required to perform each service, as required by the statute . . . Work RVU revisions will be fully implemented for services furnished to Medicare beneficiaries on or after January 1, 2007." 71 Fed. Reg. 69629. HHS further explained that

> Section §1848(c)(2)(B)(ii)(II) of the Act provides that increases or decreases in RVUs for a year may not cause the amount of expenditures for the year to differ by more than $20 million from what expenditures would have been in the absence of these changes. If this threshold is exceeded, we must make adjustments to preserve BN. The 5-Year Review of work RVUs would result in a change in expenditures that would exceed $20 million if we made no offsetting adjustments to either the CF or RVUs.

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To reign in payments made by Medicare to providers treating Medicare beneficiaries, and thereby bring Medicare expenditures back within the federal budget, CMS instituted a plan to offset the increased expenditures by applying a budget neutrality adjustment to the calculation of payments to providers treating Medicare patients. The distinction between the allowable amounts under the Medicare Physician Fee Schedule and the budget neutral payment amounts to Medicare beneficiaries was made clear in the Federal Register final rule published on December 1, 2006:

> To calculate the payment for every physician service, the components of the fee schedule (physician work, PE, and malpractice RVUs) are adjusted by a geographic practice cost index (GPCI). The GPCIs reflect the relative costs of physician work, PEs, and malpractice insurance in an area compared to the national average costs for each component. Payments are converted to dollar amounts through the application of a CF, which is calculated by the Office of the Actuary and is updated annually for inflation. (the "General Formula").

The General Formula is the formula referenced in *Sunrise Chiropractic and Rehabilitation Center, Inc. (a/a/o Bichenet Louis) v. Security National Insurance Company,* 321 So.3d 786, 788 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a] that produces the allowable amount under the participating physicians fee schedule of Medicare Part B as referenced in the Florida PIP statute. But, to meet its budget neutrality requirements, for purposes of determining what Medicare actually pays to Medicare providers—as reflected in the CMS payment files—HHS explained:

> However, as discussed in section IV.D of this final rule with comment period, due to the need to meet the budget neutrality (BN) provisions of 1848(c)(2)(B)(ii), we are applying a BN adjustor to the work RVUs in order to calculate payment for a service. Therefore, payment for services will now be calculated as follows: Payment = [(RVU work x BN adjustor x GPCI work) + (R VU PE x GPCI PE) + (R VU malpractice x GPCI malpractice)] x CF.) (The "Modified Formula").

The Modified Formula includes a budget neutrality adjustment of 0.8994 that is applied to the work RVU. To ensure that the Modified Formula was used only for Medicare fee-for-service claims by Medicare providers treating Medicare beneficiaries, as opposed to other payors for different purposes, HHS explained:

> We share the commenters' concerns about transparency and recognize the Medicare PFS is used by other payors and for other purposes than just Medicare payments. To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will show the RVUs without the BN adjustment applied. This will serve as a reference for any interested party and should help to minimize any confusion about the unadjusted codes.

CMS also released a statement reiterating that the Modified Formula was only to be used for payment of claims by Medicare to Medicare Providers:

> "Medicare law requires that CMS impose a budget neutrality adjustment if changes in RVUs will cause an increase or decrease in overall fee schedule outlays of more than $20 million, compared with what they would have been in the absence of the changes. CMS estimates that the proposed work RVU changes would increase expenditures by approximately $4.0 billion. CMS is proposing to create a separate budget neutrality adjuster that can be applied just to the work RVUs for Medicare purposes, without changing the number of work RVUs assigned to a particular service. This would preserve the integrity of the existing work RVU structure, which is often adopted by other payers."[1]

Each party detailed the simple arithmetic behind their arguments in their respective motions, the only difference being whether the Modified Formula using the 0.8994 BNA should be applied to the work portion of the calculation for the services at issue in this case. It is undisputed that the Defendant is not Medicare and Plaintiff is not a Medicare provider.

SUMMARY JUDGMENT STANDARD

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

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

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

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). In *Anderson,* the Supreme Court of the United States made clear:

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

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

In *Matsushita,* the Supreme Court of the United States expounded that to survive a motion or summary judgment there must be a "genuine" issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Thus, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *See id.* In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." *See id.* (quoting Fed. Rule Civ. Proc. 56(e)). Thus, "where the record taken as a whole could not lead a rational trier of fact to find for the

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nonmoving party, there is no genuine issue for trial. *Id.* As the Florida Supreme Court explained in adopting the new standard, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d at 193 *citing Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) [20 Fla. L. Weekly Fed. S225a].

Thus, under the new Rule 1.510, "unsupported speculation . . . does not meet a party's burden of producing some defense to a summary judgment motion. Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment" *Cordoba v. Dillard's, Inc.,* 419 F.3d 1169, 1181 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C778a] (quoting *Hedberg v. Ind. Bell Tel. Co.,* 47 F.3d 928, 931-32 (7th Cir. 1995)).

ANALYSIS

"In interpreting [a] statute, we follow the 'supremacy-of-text principle'—namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' " *Forrester v. Sch. Bd. of Sumter Cnty.,* 316 So. 3d 774, 776 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D930a] (quoting *Ham v. Portfolio Recovery Assocs., LLC,* 308 So. 3d 942, 946 (Fla. 2020) [46 Fla. L. Weekly S9a]). The plain language of § 627.736(5)(a)1, which clearly allows an insurer to limit reimbursement to medical care to the treating chiropractor to "200 percent of the allowable amount under" the "participating physicians fee schedule of Medicare Part B." *See* Fla. Stat. § 627.736(5)(a)1.f.(I). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Sunrise Chiropractic & Rehab. Ctr., Inc. v. Sec. Nat'l Ins. Co.,* 321 So. 3d 786, 789 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1150a] Ultimately, budget neutrality adjustments—like the one at issue in *Sunrise Chiropractic* and the one at issue here—were designed to recoup costs borne by the federal government when it exceeds its budget. Defendant, as a private payor who is statutorily bound to pay the full fee schedule amounts, does not get the benefit of a Medicare-only reduction imposed to bring the federal government's budget back in line.

In *Sunrise Chiropractic and Rehabilitation Center, Inc. v. Security National Insurance Company,* 321 So.3d 786 (Fla. 4th DCA 2021), the Fourth DCA held that insurers were not entitled to apply a budget neutrality adjustment in making PIP payments pursuant to §627.736. *Sunrise Chiropractic and Rehab. Ctr. Inc. v. Sec. Nat'l Ins. Co.* 321 So.3d 786 (Fla. 4th DCA 2021). In *Sunrise Chiropractic,* the Fourth DCA rejected the insurer's argument that it was permitted to use a 2% budget neutrality adjustment, which Medicare utilized to pay Medicare claims. *Id.* Instead, the Court held that insurance carriers were required by the plain language of §627.736(5)(a)1 Fla. Stat. to calculate PIP reimbursement pursuant to the General Formula. *Id.* ("Regardless of whether it was easier for a private payer to use those values rather than calculate the formula once a year, such reduction is contradicted by the plain language of §627.736(5)(a)1, which clearly allows an insurer to limit reimbursement to medical care to the treating chiropractor to "200 percent of the allowable amount under" the "participating physicians fee schedule of Medicare Part B."). In essence, the Fourth DCA held that 200% of the allowable amount under the Medicare Part B Fee Schedule does not include a budget neutrality adjustment.

The Fourth DCA relied on the following guidance from the Department of Health and Human Services ("HHS") in reaching its decision regarding the application of the 2010-2014 BNA:

> Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. **Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs.**

Sunrise Chiropractic and Rehab. Ctr. Inc. v. Sec. Nat'l Ins. Co., 321 So.3d at 789. The above-mentioned language is almost identical to the following guidance provided by CMS for the application of the 2007 BNA in this case:

> We. . .recognize the Medicare PFS is used by other payors for other purposes than just Medicare payments. **To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will show the RVUs without the BN adjustment applied**.

Id.

This language was also relied on by the only order provided to this Court regarding the exact issue in this case where a Broward County Court ruled in Plaintiff's favor. *See Chiropractic USA of Plantation Inc. v. United Automobile Insurance Company,* Case No.: COINX21052809 (Fla. Broward Cty. Ct. December 19, 2022) [30 Fla. L. Weekly Supp. 650a]. In fact, the Broward County Court put the language regarding the 2007 and 2010-2014 BNA side by side as reflected below to show their similarities in holding that insurers cannot utilize the 2007 BNA in making PIP reimbursements pursuant to §627.736(5)(a)1 Fla. Stat.

2010-2014 BNA	2007 BNA
"Consistent with the proposed rule, for this final rule with comment period, we are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the RVUs. **Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs."** (emphasis in original). *Sunrise Chiropractic,* 321 So.3d at 789 (quoting 74 Fed. Reg. 61927)(E.S.).	CMS is proposing to create a separate budget neutrality adjuster that can be applied just to the work RVUs for Medicare purposes, without changing the number of work RVUs assigned to a particular service. **This would preserve the integrity of the existing work RVU structure, which is often adopted by other payers.** (emphasis added) "CMS Announces Proposed Changes to Physician Fee Schedule Methodology"—June 21, 2006 "We. . .recognize the Medicare PFS is used by other payors and for other purposes than just Medicare payments. To maintain a high level of transparency in the fee schedule, the Addendum B published in this rule will **show the RVUs without the BN adjustment applied. This will serve as a reference for any interested party and should help to minimize any confusion about the unadjusted codes."** (emphasis added). 71 Fed. Reg. 69736 (December 1, 2006)(E.S.)

With respect to the 2007 BNA that is applicable to this case, the Court finds Plaintiff's argument compelling. Plaintiff argued that the BNA in effect from 2010-2014 with respect to chiropractic services is identical or at worst substantially similar to the BNA that was in effect for the 2007 fee schedule. In response, the Defendant claims it can utilize the 2007 BNA because it is a Medicare coding and payment methodology and is integrated into the Medicare RVU formula.

Plaintiff's argument is supported by the plain language reading of 42 U.S.C.A. § 1395w-4(c)(2)(F). The statute requires "The Secretary" to make BNAs so to comply with the Omnibus Budget Reconciliation Act of 1993. The Defendant cannot make such a claim, as they are a private payer and not an agent of the federal government. This

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interpretation is further bolstered by a reading of 42 U.S.C.A. § 1395w-4(c)(2)(B) whereas BNAs have a host of exceptions including subsection (v)(II) "OPD payment cap for imaging services", which references subsection (b)(4) that includes magnetic resonance imaging. The Defendant argument that the BNA is automatically included fails on the plain language of the statute. Additionally, when asked about the Plaintiff's agreement, the Defendant could only cite to *State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Raton, P.A.,* 322 So. 3d 87, 96 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1210a] where the Fourth DCA held "that State Farm's policy provided sufficient "notice" of its intent to utilize "Medicare coding policies and payment methodologies of the federal Centers for Medicare and Medicaid Services, including applicable modifiers," such as the MPPR [Multiple Procedure Payment Reduction]." BNA and MPPR are not the same in any manner expect that it is a method of limiting payments to providers. The chief difference is the purpose behind the reduction in BNA is used as a method to balance the federal budget for Medicare. MPPR is a reduction focused on limiting cost for multiple treatments on the same day, but even this limitation in the "payment methodology. . .(can)not constitute a utilization limit" §627.736(5)(a)3 Fla. Stat.

The Fourth DCA thought it was important enough that Medicare was not adjusting the RVUs themselves to preserve the integrity of the fee schedule that they bolded the language. In reference to the 2007 BNA currently at issue before this Court, Medicare again stated they were not changing the actual RVUs themselves to preserve the integrity of the existing structure. The subject BNA is intended to be utilized by Medicare in paying Medicare claims—not private payers. In this case, the Defendant is not Medicare and Plaintiff is not a Medicare provider, thus the Court is not persuaded by Defendant's argument that it can utilize the BNA.

Based upon this Court's interpretation of the PIP statute and the case law presented, there is no genuine issue that the Plaintiff is correct, the 2007 BNA at issue here is identically or at least substantially similar to the 2010-2014 BNA and is not applicable in calculating PIP reimbursements under the Florida PIP Statute.

CONCLUSION

Based on the foregoing analysis Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED**. Defendant shall pay Plaintiff the outstanding benefits of $9.93 plus applicable interest together with costs and reasonable attorney's fees for which let execution issue. This Court retains jurisdiction over this matter to determine the amount of attorney's fees and costs owed to the Plaintiff by Defendant.

[1]*See*: https:www.cms.gov/newsroom/press-releases/cms-announces-proposed-changes-physician-fee-schedule-methodology

* * *

Insurance—Personal injury protection—Demand letter that demanded amount that did not match amount sought in litigation and stated total amount billed without accounting for prior payments by insurer did not satisfy statutory condition precedent—Case abated to allow plaintiff to submit compliant presuit demand

DOCTOR REHAB CENTER, INC., a/a/o Andre Rostami, Plaintiff, v. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-024259-SP-25. Section CG04. January 3, 2023. Scott M. Janowitz, Judge. Counsel: Adriana de Armas, Pacin Levine, P.A., Miami, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON SUMMARY JUDGMENT REGARDING PRE-SUIT DEMAND AND ABATING CASE

THIS CAUSE came before the Court on Allstate's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-suit Demand and Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses Regarding Defective Presuit Demand Letter; and the Court, having reviewed the Motions, having heard argument of Counsel on September 21, 2022, and being sufficiently advised in the premises, finds as follows:

The PIP Statute is designed to ensure the "swift payment of PIP benefits." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.,* 961 So.2d 328, 331-32 (Fla. 2007) [32 Fla. L. Weekly S453a] (*quoting State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So.2d 1067, 1077 (Fla. 2006) [31 Fla. L. Weekly S358a]). Section 627.736(10), Fla. Stat., ("Section (10)") effectuates this purpose by obligating would-be Plaintiffs to submit a letter before they can file suit, advising the insurer of any claims that remain overdue, thereby providing insurers one last chance to pay any overdue benefits and avoid a lawsuit and exposure for fees. *MRI Assocs. of America, LLC (Ebba Register) v. State Farm Fire and Casualty Co.,* 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b] ("*Ebba Register*"). The legislature described the obligation imposed on potential PIP Plaintiffs stating their overdue claims within the Demand with the following words: "specificity," "itemized," "specifying," "each" and "exact." *See* Section (10)(b)(3).

FACTS

The Plaintiff rendered medical services to the Plaintiff from May 10, 2017 through June 13, 2017 in the total amount of $7,205. See Exhibit B to Affidavit of Adjuster. Allstate reimbursed Plaintiff in the total amount of $4,166.39. See *id.*

Thereafter, Plaintiff submitted a presuit demand letter, claiming a total of $5,764 remained overdue for the same dates of service. See Exhibit C to Affidavit of Adjuster. Plaintiff calculated this amount by taking 80% of the total allegedly billed for all services ($7,205.00) and subtracting nothing for services previously reimbursed. *Id.* The demand asked Allstate to pay the allegedly overdue amount or a lawsuit would be filed against Allstate, exposing Allstate to attorneys' fees. Allstate responded to the demand, noting that the dates of service at issue had previously been paid in accordance with the fee schedules incorporated into the PIP Statute. See Exhibit D to Affidavit of Adjuster.

Plaintiff initiated litigation, filing a Complaint that claimed $210.00 in damages. In its Amended Complaint, Plaintiff claimed only $26.40 due. Plaintiff's Answers to Interrogatories disclosed the same $26.40 as the overdue amount, calculated by claiming that certain codes should not have been reimbursed at the amount requested in the demand, 80% of the amount billed, but rather at 100% or at the applicable fee schedule rate.

ANALYSIS

In this case, the demand failed to account for payments received. As set forth in greater detail below, the controlling case law from two District Courts of Appeal invalidates demands that do not match the amount sought in litigation. It is no surprise that there was a mismatch in this case considering the defects in the demands.

The Third District Court of Appeal recently construed the language of Section (10), rejected a "substantial compliance" standard and concluded that a provider must strictly comply with the plain language of Section (10). *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a] ("*Rivera*"). Like the case before the Court, the *Rivera* Court was confronted with a demand and lawsuit claiming entitlement to different amounts. The *Rivera* Court initially notes:

> The statute is very specific regarding the detailed information the insured is required to furnish to the insurer before the insured can proceed to file a lawsuit. . . . As the statute clearly states, the letter "shall state with specificity. . . an itemized statement specifying ***each* exact amount**. . . ." **[T]he purpose of the demand letter is not just**

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> **notice of intent to sue.** ***The demand letter also notifies the insurer as to the exact amount for which it will be sued*** *if the insurer does not pay the claim.*

Rivera at 204 (emphasis in original and added). The *Rivera* Court invalidated the demand because it did not provide Defendant the requisite notice of the amount for which it would be sued. To arrive at this conclusion, the Third District Court of Appeal adopted the rationale of the Eleventh Circuit, Appellate Division, in *Venus Health Center (Joaly Rojas) v. State Farm Fire & Cas. Co.,* 21 Fla. L. Weekly Supp. 496a (Fla. 11th Cir. Ct. (App.) Mar. 13, 2014) ("*Venus Health*") and held:

> If the intent of § 627.736(10) is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to **make a precise demand** so that the insurer can pay and end the dispute before wasting the courts and the parties' time and resources. **If the provider simply includes in its demand letter a statement of all the charges incurred—as Venus did here—without even deducting the amount the insurer already paid then it is not stating an exact amount that the insurer owes**. If the PIP insurer must guess at the correct amount and is wrong, then the provider sues and exposes the insurer to attorneys' fees. *Before being subject to suit and attorney's fees, the insurer is entitled to know the exact amount due as fully as the provider's information allows.*

Rivera at 204 (*quoting Venus Health*) (emphasis added). The facts considered and quoted by *Rivera* are the same as before the Court: 1) a demand that did not state the amount sought in the litigation; 2) a demand that merely reiterated the purported total billed amount without accounting for payments received. The Court is bound by the Third District Court of Appeal's invalidation of demands with these deficiencies.

More recently, the Fourth District Court of Appeal in *Chris Thompson, PA (Elmude Cadau) v. GEICO Indemnity Co.,* Case Nos. 4D21-1820 and 4D21-2310 (Fla. 4th DCA July 27, 2022) [47 Fla. L. Weekly D1588b] ("*Chris Thompson*") considered a situation where the amounts sought in the demand letter did not match the amount sought in litigation. The Fourth DCA adopted the holdings in *Rivera* and *Venus Health* and concluded: **"[T]he purpose of the demand letter is not just notice of intent to sue. The demand letter also notifies the insurer as to the exact amount for which it will be sued if the insurer does not pay the claim."** *Chris Thompson* at p. 2. Like the demand in *Chris Thompson,* the demand before the Court did not advise the Defendant of the amount for which it would be sued and was therefore invalid in violation of Section (10).

This Court is bound by the Third and Fourth District Courts of Appeal's interpretations of Section 10 and finds that both cases are applicable here. In *Rivera* and *Chris Thompson,* as in the case before the Court, the Plaintiff submitted a demand for one amount and then filed suit for a different amount. *Rivera* and *Chris Thompson* interpreted Section 10 to prohibit this practice. The amounts in the demand did not match the amounts in suit notwithstanding that there was no additional exchange of information between the demand and the filing of the Complaint. When it drafted its demands, Plaintiff had at its disposal the same Explanations of Benefits it used to calculate the amount due more specifically in the Complaints and Answers to Interrogatories. There is no evidence before the Court to consider that the Plaintiff lacked any information to state the **precise** amount due at the demand stage.

The demand before the Court as well as the demands in *Rivera* and *Chris Thompson* were confusing or inconsistent as to the amount claimed to be due, thereby depriving Defendant of notice of the amount to pay to avoid litigation. In the case before the Court, the demand claimed no payments had been received by the Plaintiff when the record evidence shows that Plaintiff had in fact received payments in accordance with the terms of the policy and the PIP statute before the demand. Failure to account for payments received alone can render a demand deficient. See *Rivera* at 204; *Venus Health; Government Employees Ins. Co. v. Open MRI of Miami-Dade, Ltd.,* 18 Fla. L. Weekly Supp. 337a (Fla. 11th Cir. (App.) February 16, 2011); *State Farm Mut. Auto. Ins. Co. v. Douglas Diagnostic Center, Inc. (Jainek Perez),* 25 Fla. L. Weekly Supp. 942b (Fla. 17th Cir. App. December 18, 2017); *Medical Therapies, Inc. d/b/a Orlando Pain Clinic (Sonja M. Ricks) v. State Farm Mut. Auto. Ins. Co.,* 19 Fla. L. Weekly 1033a (Fla. 9th Cir. August 10, 2012), *aff'd* 22 Fla. L. Weekly Supp. 34a (Fla. 9th Cir. App. July 1, 2014) *Chambers Medical Group, Inc. (Marie St. Hilaire) v. Progressive Express Ins. Co.,* 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. App. December 1, 2006). The payments a Plaintiff **receives** is knowledge that is in the exclusive possession of the Plaintiff. Plaintiff is required to disclose this information and the failure to do so is not stating "the exact amount due as fully as the provider's information allows." *Rivera* at 204 (*quoting Venus Health*). These deficiencies deprived Allstate of notice with "specificity" of the "exact" "amount claimed to be due as mandated by Section 10. *See* Section (10)(b)(3).

The Court finds the recent case of *Bain Complete Wellness, LLC v. Garrison Prop. & Cas. Ins. Co.,* 2D21-259, 2022 WL 17657840 (Fla. 2d DCA Dec. 14, 2022) [47 Fla. L. Weekly D2623a] to also not be ultimately helpful to Plaintiff. First of all, to the extent the 2nd DCA disagrees with the 3rd DCA, this Court is bound by the 3rd DCA. Secondly, the analysis in *Bain Complete* is different than the instant case. This is not a scenario where there is confusion over which related carrier actually had the policy. The issue here is one of the sufficiency of the demand. Notably there is a lot of Defendant's argument that the Court disagrees with, but § 627.736(10) does require "with specificity. . . an itemized statement specifying each exact amount. . . claimed to be due" *Id.* The Court does not take *Rivera* and *Chris Thompson* to mean that the medical provider must read insurer's mind in terms of which methodology or fee schedule it is using. The provider need not know the deductible and what other providers have been paid and whether benefits have beeen exhausted. However, a provider does know at the time it makes a demand which line item charges have been paid (and whether in full or in part), have been denied, or have been reduced. With *Rivera* and *Chris Thompson,* and even *Bain Wellness,* the appellate courts are clear the burden is on the provider to provide specific details as to what charges and amounts the provider is seeking. If the insurer simply resubmits its HCVA forms and puts a total, it does not comply with the statute. The plain meaning of the statute, as expressed by *Rivera* and *Chris Thompson,* is for the insured to get specific list of itemized grievances to either pay or not pay. The Court does not believe a carrier has to sue for the full amount, as nothing in the statute requires it, but the provider must put the insurer on notice as to what line items have been paid to the provider's satisfaction and which ones might end up in litigation.

CONCLUSION

The *Rivera* Court ruled that a demand letter is "not just notice of intent to sue. . . but **the exact amount for which it will be sued.**" *Rivera* at 204. As set forth herein, Plaintiff had all the information at its disposal to itemize its claim and state "**each exact amount**" claimed overdue. *Rivera* at p. 14 (emphasis in original). Plaintiff failed to do so. Instead the demand failed to deduct what was already paid and did not specify the specific line item disagreements.

The Court is bound by *Rivera* and *Chris Thompson* to find that the Plaintiff failed to strictly comply with Section 10. The presuit demand was not precise as required by *Rivera.* It failed to provide Allstate notice and an opportunity to avoid this litigation. For the foregoing

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reasons and consistent with authorities binding on this Court, the Court finds that the Plaintiff's presuit demand is invalid for failure to comply with Section (10). Consistent with the purpose of Section (10) to provide notice of the claim in suit and with the overall purpose of the PIP Statute to ensure the swift payment of PIP benefits, the Court will abate this case to allow the Plaintiff to submit a new demand compliant with Section (10).

THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that:

1. Allstate's Motion for Summary Judgment regarding Deficient Demand is GRANTED and Plaintiff's Motion for Summary Judgment regarding Allstate's Presuit Demand Affirmative Defenses is DENIED.

2. This case is abated for ninety (90) days for Plaintiff to submit a compliant presuit demand. Plaintiff shall have thirty (30) days to submit a new demand and copy Allstate's undersigned counsel. Allstate shall have thirty (30) days to respond to the demand.

3. Payment in response to the demand will not be deemed a confession of judgment in this case and will not subject Allstate to attorneys' fees or costs.

* * *

Insurance—Personal injury protection—Demand letter that demanded amount that did not match amount sought in litigation and stated total amount billed without accounting for prior payments by insurer did not satisfy statutory condition precedent

WEST KENDALL REHAB CENTER, a/a/o Julio Belmonte, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-024246-SP-25. Section CG04. January 3, 2023. Scott M. Janowitz, Judge. Counsel: Adriana de Armas, Pacin Levine, P.A., Miami, for Plaintiff. Manuel Negron, Shutts & Bowen LLP, Miami, for Defendant.

ORDER ON SUMMARY JUDGMENT REGARDING PRE-SUIT DEMAND AND ABATING CASE

THIS CAUSE came before the Court on Allstate's Motion for Summary Judgment or Disposition as to Plaintiff's Deficient Pre-suit Demand and Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses Regarding Defective Presuit Demand Letter; and the Court, having reviewed the Motions, having heard argument of Counsel on September 21, 2022, and being sufficiently advised in the premises, finds as follows:

The PIP Statute is designed to ensure the "swift payment of PIP benefits." *Allstate Ins. Co. v. Holy Cross Hosp., Inc.,* 961 So.2d 328, 331-32 (Fla. 2007) [32 Fla. L. Weekly S453a] (*quoting State Farm Mut. Auto. Ins. Co. v. Nichols,* 932 So.2d 1067, 1077 (Fla. 2006) [31 Fla. L. Weekly S358a]). Section 627.736(10), Fla. Stat. (2017), ("Section (10)") effectuates this purpose by obligating would-be Plaintiffs to submit a letter before they can file suit, advising the insurer of any claims that remain overdue, thereby providing insurers one last chance to pay any overdue benefits and avoid a lawsuit and exposure for fees. *MRI Assocs. of America, LLC (Ebba Register) v. State Farm Fire and Casualty Co.,* 61 So. 3d 462 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D960b] ("*Ebba Register*"). The legislature described the obligation imposed on potential PIP Plaintiffs stating their overdue claims within the Demand with the following words: "specificity," "itemized," "specifying," "each" and "exact." *See* Section (10)(b)(3).

FACTS

The Plaintiff rendered medical services to the Plaintiff from December 3, 2014 through December 4, 2014 in the total amount of $1,665. See Exhibit B to Affidavit of Adjuster. By September 18, 2017, Allstate had reimbursed Plaintiff in the total amount of $742.51. See *id.*

Thereafter, Plaintiff submitted a presuit demand letter, claiming a total of $2,532 remained overdue for dates of service December 2, 2014 through February 23, 2015. See Exhibit C to Affidavit of Adjuster. Plaintiff calculated this amount by taking 80% of the total allegedly billed for all services ($3,165.00) and subtracting nothing for services previously reimbursed. *Id.* This demand included many dates of service that had not been previously billed or received by Allstate. Even though these bills were noncompensably late, in an effort to avoid litigation, Allstate considered the late bills and made payment in compliance with the terms of policy and the statute.

Notwithstanding the additional payment, a second demand was submitted by Plaintiff, claiming the same exact amounts billed and owed for the same dates of service. Like the prior demand, this demand failed to account for any payments received, including the more recent payment. Both demands asked Allstate to pay the overdue amounts or a lawsuit would be filed against Allstate, exposing Allstate to attorneys' fees. Allstate responded to the second demand, noting that the dates of service at issue had previously been paid in accordance with the fee schedules incorporated into the PIP Statute. See Exhibit D to Affidavit of Adjuster.

Plaintiff initiated litigation, filing a Complaint that claimed $14.00 in damages. In its Amended Complaint, Plaintiff claimed only $0.03 due. Plaintiff's Answers to Interrogatories disclosed the same $0.03 as the overdue amount, calculated by claiming that certain codes should not have been reimbursed at the amount requested in the demand, 80% of the amount billed, but rather at 100% or at the applicable fee schedule rate.

ANALYSIS

In this case, the demand failed to account for payments received. As set forth in greater detail below, the controlling case law from two District Courts of Appeal invalidates demands that do not match the amount sought in litigation. It is no surprise that there was a mismatch in this case considering the defects in the demands.

The Third District Court of Appeal recently construed the language of Section (10), rejected a "substantial compliance" standard and concluded that a provider must strictly comply with the plain language of Section (10). *Rivera v. State Farm Mut. Auto. Ins. Co.,* 317 So.3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a] ("*Rivera*"). Like the case before the Court, the *Rivera* Court was confronted with a demand and lawsuit claiming entitlement to different amounts. The *Rivera* Court initially notes:

> The statute is very specific regarding the detailed information the insured is required to furnish to the insurer before the insured can proceed to file a lawsuit. . . . As the statute clearly states, the letter "shall state with specificity. . . an itemized statement specifying ***each* exact amount**. . . ." **[T]he purpose of the demand letter is not just notice of intent to sue. *The demand letter also notifies the insurer as to the exact amount for which it will be sued*** *if the insurer does not pay the claim.*

Rivera at 204 (emphasis in original and added). The *Rivera* Court invalidated the demand because it did not provide Defendant the requisite notice of the amount for which it would be sued. To arrive at this conclusion, the Third District Court of Appeal adopted the rationale of the Eleventh Circuit, Appellate Division, in *Venus Health Center (Joaly Rojas) v. State Farm Fire & Cas. Co.,* 21 Fla. L. Weekly Supp. 496a (Fla. 11th Cir. Ct. (App.) Mar. 13, 2014) ("*Venus Health*") and held:

> If the intent of § 627.736(10) is to reduce the burden on the courts by encouraging the quick resolution of PIP claims, it makes sense to require the claimant to **make a precise demand** so that the insurer can pay and end the dispute before wasting the courts and the parties' time and resources. **If the provider simply includes in its demand letter a statement of all the charges incurred—as Venus did here—without**

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> **even deducting the amount the insurer already paid then it is not stating an exact amount that the insurer owes**. If the PIP insurer must guess at the correct amount and is wrong, then the provider sues and exposes the insurer to attorneys' fees. *Before being subject to suit and attorney's fees, the insurer is entitled to know the exact amount due as fully as the provider's information allows.*

Rivera at 204 (*quoting Venus Health*) (emphasis added). The facts considered and quoted by *Rivera* are the same as before the Court: 1) a demand that did not state the amount sought in the litigation; 2) a demand that merely reiterated the purported total billed amount without accounting for payments received. The Court is bound by the Third District Court of Appeal's invalidation of demands with these deficiencies.

More recently, the Fourth District Court of Appeal in *Chris Thompson, PA (Elmude Cadau) v. GEICO Indemnity Co.*, Case Nos. 4D21-1820 and 4D21-2310 (Fla. 4th DCA July 27, 2022) [47 Fla. L. Weekly D1588b] ("*Chris Thompson*") considered a situation where the amounts sought in the demand letter did not match the amount sought in litigation. The Fourth DCA adopted the holdings in *Rivera* and *Venus Health* and concluded: **"[T]he purpose of the demand letter is not just notice of intent to sue. The demand letter also notifies the insurer as to the exact amount for which it will be sued if the insurer does not pay the claim."** *Chris Thompson* at p. 2. Like the demand in *Chris Thompson,* the demand before the Court did not advise the Defendant of the amount for which it would be sued and was therefore invalid in violation of Section (10).

This Court is bound by the Third and Fourth District Courts of Appeal's interpretations of Section 10 and finds that both cases are applicable here. In *Rivera* and *Chris Thompson,* as in the case before the Court, the Plaintiff submitted a demand for one amount and then filed suit for a different amount. *Rivera* and *Chris Thompson* interpreted Section 10 to prohibit this practice. The amounts in the demand did not match the amounts in suit notwithstanding that there was no additional exchange of information between the demand and the filing of the Complaint. When it drafted its demands, Plaintiff had at its disposal the same Explanations of Benefits it used to calculate the amount due more specifically in the Complaints and Answers to Interrogatories. There is no evidence before the Court to consider that the Plaintiff lacked any information to state the **precise** amount due at the demand stage.

The demand before the Court as well as the demands in *Rivera* and *Chris Thompson* were confusing or inconsistent as to the amount claimed to be due, thereby depriving Defendant of notice of the amount to pay to avoid litigation. In the case before the Court, the demand claimed no payments had been received by the Plaintiff when the record evidence shows that Plaintiff had in fact received payments in accordance with the terms of the policy and the PIP statute before the demand. Failure to account for payments received alone can render a demand deficient. See *Rivera* at 204; *Venus Health; Government Employees Ins. Co. v. Open MRI of Miami-Dade, Ltd.*, 18 Fla. L. Weekly Supp. 337a (Fla. 1 1th Cir. (App.) February 16, 2011); *State Farm Mut. Auto. Ins. Co. v. Douglas Diagnostic Center, Inc. (Jainek Perez),* 25 Fla. L. Weekly Supp. 942b (Fla. 17th Cir. App. December 18, 2017); *Medical Therapies, Inc. d/b/a Orlando Pain Clinic (Sonja M. Ricks) v. State Farm Mut. Auto. Ins. Co.*, 19 Fla. L. Weekly 1033a (Fla. 9th Cir. August 10, 2012), *aff'd* 22 Fla. L. Weekly Supp. 34a (Fla. 9th Cir. App. July 1, 2014) *Chambers Medical Group, Inc. (Marie St. Hilaire) v. Progressive Express Ins. Co.*, 14 Fla. L. Weekly Supp. 207a (Fla. 13th Cir. App. December 1, 2006). The payments a Plaintiff **receives** is knowledge that is in the exclusive possession of the Plaintiff. Plaintiff is required to disclose this information and the failure to do so is not stating "the exact amount due as fully as the provider's information allows." *Rivera* at 204 (*quoting Venus Health*). These deficiencies deprived Allstate of notice with "specificity" of the "exact" "amount claimed to be due as mandated by Section 10. *See* Section (10)(b)(3).

The Court finds the recent case of *Bain Complete Wellness, LLC v. Garrison Prop. & Cas. Ins. Co.*, 2D21-259, 2022 WL 17657840 (Fla. 2d DCA Dec. 14, 2022) [47 Fla. L. Weekly D2623a] to also not be ultimately helpful to Plaintiff. First of all, to the extent the 2nd DCA disagrees with the 3rd DCA, this Court is bound by the 3rd DCA. Secondly, the analysis in *Bain Complete* is different than the instant case. This is not a scenario where there is confusion over which related carrier actually had the policy. The issue here is one of the sufficiency of the demand. Notably there is a lot of Defendant's argument that the Court disagrees with, but § 627.736(10) does require "with specificity. . . an itemized statement specifying each exact amount. . . claimed to be due" *Id*. The Court does not take *Rivera* and *Chris Thompson* to mean that the medical provider must read insurer's mind in terms of which methodology or fee schedule it is using. The provider need not know the deductible and what other providers have been paid and whether benefits have beeen exhausted. However, a provider does know at the time it makes a demand which line item charges have been paid (and whether in full or in part), have been denied, or have been reduced. With *Rivera* and *Chris Thompson,* and even *Bain Wellness,* the appellate courts are clear the burden is on the provider to provide specific details as to what charges and amounts the provider is seeking. If the insurer simply resubmits its HCVA forms and puts a total, it does not comply with the statute. The plain meaning of the statute, as expressed by *Rivera* and *Chris Thompson,* is for the insured to get specific list of itemized grievances to either pay or not pay. The Court does not believe a carrier has to sue for the full amount, as nothing in the statute requires it, but the provider must put the insurer on notice as to what line items have been paid to the provider's satisfaction and which ones might end up in litigation.

CONCLUSION

The *Rivera* Court ruled that a demand letter is "not just notice of intent to sue. . . but **the exact amount for which it will be sued**." *Rivera* at 204. As set forth herein, Plaintiff had all the information at its disposal to itemize its claim and state "**each exact amount**" claimed overdue. *Rivera* at p. 14 (emphasis in original). Plaintiff failed to do so. Instead the demand failed to deduct what was already paid and did not specify the specific line item disagreements.

The Court is bound by *Rivera* and *Chris Thompson* to find that the Plaintiff failed to strictly comply with Section 10. The presuit demand was not precise as required by *Rivera.* It failed to provide Allstate notice and an opportunity to avoid this litigation. For the foregoing reasons and consistent with authorities binding on this Court, the Court finds that the Plaintiff's presuit demand is invalid for failure to comply with Section (10). Consistent with the purpose of Section (10) to provide notice of the claim in suit and with the overall purpose of the PIP Statute to ensure the swift payment of PIP benefits, the Court will abate this case to allow the Plaintiff to submit a new demand compliant with Section (10).

THEREFORE, IT IS HEREWITH ORDERED AND ADJUDGED that:

1. Allstate's Motion for Summary Judgment regarding Deficient Demand is GRANTED and Plaintiff's Motion for Summary Judgment regarding Allstate's Presuit Demand Affirmative Defenses is DENIED.

2. This case is abated for ninety (90) days for Plaintiff to submit a compliant presuit demand. Plaintiff shall have thirty (30) days to submit a new demand and copy Allstate's undersigned counsel. Allstate shall have thirty (30) days to respond to the demand.

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3. Payment in response to the demand will not be deemed a confession of judgment in this case and will not subject Allstate to attorneys' fees or costs.

* * *

Insurance—Declaratory action—Petition seeking declaration that medical provider's bills were timely submitted and received by insurer is properly pled

ADVANCED WELLNESS & REHABILITATION CENTER, CORP., a/a/o Olanrewaju Afolabi, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-093421. January 23, 2023. James Giardina, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION FOR DECLARATORY JUDGMENT AND/OR MOTION TO STRIKE FEE CLAIM

THIS MATTER having come before the court on January 19, 2023 on Defendant's Motion to Dismiss Plaintiff's Petition for Declaratory Judgment and/or Motion to Strike Fee Claim. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action seeking a declaration that Plaintiff's medical bills were timely submitted and received by Defendant.

2. Defendant's Motion to Dismiss alleges that Plaintiff has failed to state a cause of action for which relief may be granted because Plaintiff cannot show that there is a bona fide, actual, and present need for the declaration, or that the Plaintiff is unsure of some power, immunity, or privilege. Defendant's Motion also alleges that Plaintiff's Petition is essentially a cloaked breach of contract action.

3. In making this determination, the trial court must confine its review to the four corners of the complaint, draw all reasonable inferences in favor of the pleader, and accept as true and accurate all well pleaded allegations.

4. The Court finds that based upon the allegations in the Petition, Plaintiff has alleged sufficient doubt as to whether the medical bills were timely submitted and received by Defendant pursuant to *Colby v. Colby*, 120 So.2d 797 (Fla. 2d DCA 1960). As such, Plaintiff has properly plead its Petition for Declaratory Judgment and Defendant's Motion to Dismiss Plaintiff's Petition for Declaratory Judgment is **HEREBY DENIED.**

5. The Court took no action on Defendant's Motion to Strike Fee Claim.

6. Defendant has 20 days to file an answer to said Petition.

* * *

Insurance—Personal injury protection—Duplicative suits—Motion to dismiss action for declaratory judgment based on dismissal of prior breach of contract action between same parties requires consideration of matters outside four corners of complaint—Motion denied

AJ THERAPY CENTER, INC., a/a/o Marbey Hernandez Piedra, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-038228. January 16, 2023. Michael J. Hooi, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS DUPLICATIVE SUIT AND GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

On January 4, 2023, the Court heard Defendant's Motion to Dismiss Duplicative Suit and Plaintiff's Motion for Sanctions for failing to appear at a deposition. This order will address each motion in turn.

Defendant's Motion to Dismiss

1. Defendant's motion to dismiss references two separate lawsuits, 20-CA-4341 (13th Judicial Circuit) and 20-CC-49889 (Hillsborough County). The first lawsuit was between the insured, who is not a party to this case, and the insurer, who is the Defendant here. Plaintiff is the insured's assignee. Both the first and second lawsuits were voluntarily dismissed. The second lawsuit, which involves the same plaintiff and defendant as this third lawsuit, 22-CC-38228 (Hillsborough County), alleges breach of contract. The second lawsuit was dismissed because the parties had settled.

2. The matters for which Plaintiff seeks a declaratory judgment may well be inextricably intertwined with the second lawsuit's breach-of-contract claim. Even so, the applicable legal standard prevents the Court from dismissing this third lawsuit, which seeks a declaratory judgment. In resolving a motion to dismiss, the Court must stick to the complaint's four corners and assume that the nonmoving party's allegations are true. *Meadows Community Ass'n v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1495a]. The Florida Rules of Civil Procedure lack a rule equivalent to Federal Rule of Civil Procedure 12(d). That rule allows a federal district court to treat a motion to dismiss as a motion for summary judgment when "matters outside the pleadings are presented to and not excluded by the court." Fed. R. Civ. P. 12(d); *cf.* Fla. R. Civ. P. 1.140. The Florida rules, by contrast, leave it to the moving party to decide how it wants to tee up the matter for a court decision. Under the four-corners rule applicable here, the Court must deny the motion to dismiss. Defendant has 10 days to answer.

Plaintiff's Motion for Sanctions

3. Plaintiff's Motion for Sanctions alleges that Defendant's corporate representative and counsel failed to appear for a duly noticed deposition on August 23, 2022, at 1:00 PM, and that Defendant failed to set its Motion for Protective Order for hearing at any time.

4. Under these circumstances, Plaintiff may recover the reasonable expenses caused by Defendant's failure to appear at the deposition. Fla. R. Civ. P. 1.380(d). The motion is thus granted.

5. The parties have 20 days to resolve the total amount of fees and costs to be awarded under rule 1.380(d). Plaintiff must submit through the E-Portal an agreed proposed order within those 20 days. If the parties cannot reach an agreement, Plaintiff may seek to schedule an evidentiary hearing on the matter.

6. The deposition of Defendant's Corporate Representative must occur no later than 60 days after January 4, 2023.

* * *

Insurance—Automobile—Material misrepresentations on application—Parties' motions for summary judgment are denied where there are questions of fact as to whether insured's actions or statements constituted misrepresentations and whether any misrepresentations were material

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. SAMANTHA PETERS, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-081878. Division V. January 6, 2023. Jessica G. Costello, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant.

ORDER ON PLAINTIFF AND DEFENDANT'S MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS MATTER, having come before the Court on August 23, 2022 on Plaintiff's Motion for Final Summary Judgment, Defendant's Motion for Final Summary Judgment, and the Court having considered the Motion, record evidence, heard the argument of Counsel and otherwise being advised in the premises is it hereby **ORDERED AND ADJUDGED** as follows:

The Court finds that the affidavit of Rose Chrustic should be

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STRICKEN IN PART. All evidence contained in the Affidavit based upon hearsay or a lack of personal knowledge shall be stricken.

The Court finds that there is a question of fact regarding whether or not Defendant's actions and/or statements during the course of completing the insurance application constitute a misrepresentation

The Court finds that there is a question of fact regarding whether the aformentioned actions and/or statements of Defendant are material.

1. Plaintiff's Motion for Final Summary Judgment is DENIED

2. Defendant's Motion for Final Summary Judgment is DENIED.

3. Pursuant to Administrative Order, this case is TRANSFERRED to County Civil Division V, for all future matters. Any future hearings previously scheduled in County Civil Division K are STRICKEN.

* * *

Civil procedure—Dismissal—Failure to prosecute—Relief from judgment—Good cause—Excusable neglect—Motion for rehearing denied and order dismissing case for lack of prosecution stands—Good cause standard in failure-to-prosecute cases is much stricter than excusable neglect standard utilized to vacate default judgments—Plaintiff's assertion that deadline was incorrectly calendared because of a miscommunication was insufficient good cause for plaintiff's failure to prosecute—Allowing a dismissal order to be vacated under rule 1.540(b) based on a plaintiff's excusable neglect, even if uncontradicted, would eviscerate application of rule 1.420(e)'s bright-line deadlines

COLBY STAUBS, D.C., P.A., d/b/a ST. PETERSBURG CHIROPRACTIC INJURY & REHAB, a/a/o Berklee White, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 19-CC-006578. December 12, 2022. James Giardina, Judge. Counsel: Kristina M. Georgieu, White & Twombly, P.A., Miami, for Plaintiff. John R. Hittel, Mimi L. Smith & Associates, Orlando, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING OF FWOP HEARING DATED AUGUST 19, 2022

THIS CAUSE having come on before the Court at hearing on December 5, 2022, on Plaintiff's Motion for Rehearing of FWOP Hearing Dated August 19, 2022 (hereinafter "Plaintiff's Motion"), the Court having reviewed the file, heard argument of counsel, and otherwise being fully advised in the premises, finds as follows:

1. Plaintiff filed this motion seeking a rehearing of this Court's August 19, 2022 hearing under Florida Rule of Civil Procedure 1.530 and relief under Florida Rule of Civil Procedure 1.540(b). Plaintiff argued that it failed to timely comply with the Court's notice "due to a miscommunication with Plaintiff's staff." Plaintiff's Motion, 3. Plaintiff filed an Affidavit alleging that the deadline was incorrectly calendared. Velasquez Aff., ¶ 4-5.

2. On August 19, 2022, this case was dismissed for lack of prosecution after hearing. The hearing was held following this Court's June 7, 2022 notice of lack of prosecution. No record activity occurred within the sixty-day period following the June 7, 2022 notice and Plaintiff failed to file its showing of good cause within five days of the August 19, 2022 hearing.

3. Plaintiff relied upon two cases in its motion to support its argument for rehearing: *Mitshke-Collande v. Skipworth Props. Ltd.*, 201 So. 3d 660, 663 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D757b] and *Suntrust Mortg. v. Torrenga*, 153 So. 3d 952, 954 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2552a]. This Court finds that both cases are factually and legally distinguishable from the instant case. The issue in *Mitshke-Collande* is whether good cause or excusable neglect was shown to overcome the 120-day requirement for service under Fla. R. Civ. P. 1.070(j). The second case, *Suntrust Mortg. v. Torrenga*, 153 So. 3d 952, 954 (Fla. 4th DCA 2014), involved a Plaintiff seeking relief under Fla. R. Civ. P. 1.540(b) from a clerical error that resulted in the absence of Plaintiff and counsel, leading the court to dismiss the case at trial. Neither *Mitshke-Collande* nor *Suntrust* address whether excusable neglect can be relied upon for relief from a dismissal under Florida Rule of Civil Procedure 1.420(e).

4. The Court agrees with the court in *Paedae v. Voltaggio*, 427 So. 2d 768, 769 (Fla. 1st DCA 1985), in which the First DCA stated that: "The 'good cause' standard applied in failure to prosecute cases is much stricter than the 'excusable neglect' standard utilized to vacate a default judgment."

5. This Court finds that the purported "good cause" offered by Plaintiff for its failure to prosecute is not sufficient. The Fourth DCA addressed a similar set of facts in *Lesinski v. S. Fla. Water Dist.*, 226 So. 3d 964 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1950a]. In *Lesinski*, like the current case, no record activity occurred within the sixty-day period after the notice and the showing of good cause was not filed at least five days before the hearing.

6. This Court agrees with the court's analysis in *Lesinski*, which opined that "allowing the circuit court's rule 1.420(e) dismissal order to be vacated under rule 1.540(b)(1) due to the plaintiff's counsel's excusable neglect, even if uncontradicted, would eviscerate the application of rule 1.420(e)'s bright-line deadlines in this case." *Id.* at 966.

7. This Court is not persuaded by Plaintiff's argument that its relief should be granted because the statute of limitations had run on the underlying claim. In *Havens v. Chambliss*, 906 So. 2d 318 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1518a], the Fourth DCA recognized "the harsh result" caused by dismissing a case for failure to prosecute where there was an absence of good cause when the statute of limitations had expired. However, the court affirmed the dismissal, stating that "our hands . . . are tied." 906 So. 2d at 320. *See also F.M.C. Corp. v. Chatman*, 368 So. 2d 1307 (Fla. 4th DCA 1979) (reversing an order showing good cause and remanding for dismissal of a case after the statute of limitations expired).

ORDERED AND ADJUDGED as follows:

8. Plaintiff's Motion for Rehearing of FWOP Hearing Dated August 19, 2022 is hereby, **DENIED**.

9. This Court's August 19, 2022 Order of Dismissal stands and this case is to remain dismissed.

* * *

Insurance—Automobile—Windshield repair—Appraisal—Where only issue in dispute is cost of repair or replacement of windshield, not coverage, plaintiff was required to comply with appraisal provision of policy before filing suit—No merit to argument that dismissing action would require court to go outside of four corners of complaint because complaint does not allege that appraisal process has been completed or that plaintiff has complied with mandatory appraisal provision or no action clause—Staying case while parties complete appraisal process is not appropriate remedy—Motion to dismiss is granted

DNS AUTO GLASS SHOP, LLC, a/a/o Christopher Baker, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, and STATE FARM GENERAL INSURANCE COMPANY, Defendants. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 22-CC-040207. January 2, 2023. Leslie Schultz-Kin, Judge. Counsel: Bruce H. Kauffman, Kauffman & Amorginos, P.A., Longwood, for Plaintiff. Cameron Frye, De Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Tampa, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STAY AND COMPEL APPRAISAL

THIS MATTER came before the Court at 1:30 p.m. on November 30, 2022, on Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY's ("Defendant" or "State Farm"), Motion to Dismiss, or in the Alternative, Motion to Stay and Compel Ap-

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praisal, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereupon:

ORDERED and **ADJUDGED** as follows:

1. Defendant's Motion to Dismiss is **GRANTED**. The Court finds that the State Farm Policy, including the appraisal provisions found in the 6910A Amendatory Endorsement, are incorporated by reference into the Complaint. The subject State Farm policy states in the 6910A Amendatory Endorsement, in relevant part, "[i]f there is a disagreement as to the cost of repair, replacement, or recalibration of glass, an appraisal will be used as the first step toward resolution." The State Farm Policy also includes a "no action clause," which states that legal action may not be brought against State Farm until there has been full compliance with the terms of the Policy. The Policy is clear and unambiguous and requires a party filing a lawsuit against State Farm to comply with the appraisal provision prior to filing the lawsuit. Plaintiff has not alleged that an appraisal has occurred in this case and Plaintiff has not alleged that it complied with the no action clause. Based on the allegations in the Complaint, the only issue in dispute is the cost of repair or replacement and not coverage. There is, therefore, an appraisable issue in this action, and Plaintiff was required to comply with the appraisal provision prior to filing this lawsuit, which it failed to do, and failed to allege.

2. The Court relies on the binding opinion from Florida's Second District Court of Appeal in *Progressive Amer. Ins. Co. v. Glassmetics, LLC a/a/o Devan Hammond*, 343 So. 3d 613 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1106b] ("*Glassmetics*") in reaching its ruling. In *Glassmetics*, the Second District Court of Appeal held that the appraisal provision in Progressive's policy was not ambiguous, nor against public policy, provided sufficient procedures and methodologies, did not conflict with a retained rights clause, and did not violate assignee's rights of access to courts. *Id.* at 621-626.

3. Following the Second District Court of Appeal's decision in *Glassmetics*, the Fifth District Court of Appeal issued its opinion in *NCI, LLC, f/k/a Auto Glass Store LLC a/a/o Dora Noe v. Progressive Select Ins. Co.*, Case No. 5D21-1282 (Fla. 5th DCA Nov. 4, 2022) [47 Fla. L. Weekly D2235f] ("*NCI*"). In *NCI*, the Fifth District Court of Appeal affirmed the trial court's dismissal without prejudice of the plaintiff's complaint due to the plaintiff's failure to comply with the policy's appraisal provision prior to filing suit. *Id.* at *2. The *NCI* court also found that the appraisal provision (which is similar to the provision in the subject State Farm Policy) was unambiguous, provided sufficient procedures, was not void against public policy, and appraisal had not been waived.

4. As stated on the record, Plaintiff agrees that appraisal is the appropriate method to resolve the dispute over the cost of repair or replacement at issue in this case. Plaintiff, however, argues this Court cannot dismiss the Complaint because Plaintiff has pled a facially sufficient cause of action for breach of contract, and dismissing the case would require the Court to go outside the four corners of the Complaint. The Court disagrees for the reasons stated on the record and herein.

5. It is well-settled law in Florida that the purpose of an appraisal provision in an insurance policy is specifically to avoid litigation by providing the parties with a mechanism for resolving the dispute. *See Glassmetics,* 343 So. 3d at 619 ("[r]esolving disputes without litigation is the goal of the appraisal process."); *see also United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994) (reversing denial of motion to dismiss declaratory judgment action for failure to comply with condition precedent of appraisal).

6. In this case, it is undisputed that Plaintiff did not comply with the Policy's appraisal provision prior to filing the lawsuit. Plaintiff does not allege in the Complaint that the appraisal process has been completed. There is no allegation in the Complaint that Plaintiff has complied with the mandatory appraisal provision. There is no allegation that Plaintiff has complied with the no action clause. Therefore, this Court bases its ruling within the four corners of the Complaint in determining that dismissal is the appropriate remedy. *See United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994).

7. The Court also disagrees that staying the case and ordering the parties to complete appraisal is an appropriate remedy. As indicated above, appraisal is a mandatory policy provision, and simply staying the lawsuit while the appraisal takes place would be to side-step the purpose of the appraisal process, which is to resolve the dispute outside of the court system and avoid litigation. *See Glassmetics,* 343 So. 3d at 619. Based on the applicable binding precedent in Florida, Plaintiff should have never filed this lawsuit prior to the appraisal.

8. Based upon the foregoing, the Court grants State Farm's Motion to Dismiss, and this case is dismissed without prejudice.

* * *

Insurance—Personal injury protection—Evidence—Judicial notice—Court records that contain QR code providing link for verification of seal on first page do not meet requirement for self-authentication under section 90.902(1)(b) that document bear signature of custodian attesting to authenticity of seal—Presence of digital signature at bottom of subsequent pages does not self-authenticate records—Provision of section 90.902(2) allowing for self-authentication by signature of document custodian only applies to documents not bearing seal—Motion to take judicial notice of court records is denied

PROBEK CHIROPRACTIC CLINIC, INC., a/a/o Michael Miller, Plaintiff, v. USAA GENERAL INDEMNITY COMPANY, a foreign corporation, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-041039, Division L. December 20, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Kelly A. Blum, FL Legal Group, Tampa, for Plaintiff. Stephen B. Farkas, Dutton Law Group, P.A., Tampa, for Defendant.

AMENDED ORDER DENYING DEFENDANT'S REQUEST FOR JUDICIAL NOTICE OF THE CERTIFIED COURT RECORDS

THIS CAUSE came before the Court at a hearing on August 4, 2022, on Defendant's Request for Judicial Notice of the Certified Court Records, filed on June 13, 2022. Doc. 41. The Court filed an order denying Defendant's Motion (Doc. 63), however, the Court files this amended order which gives more details of the Court's ruling but does not change the result of the previous order. Having reviewed and considered the Request, the arguments of counsel, the applicable law, and being otherwise fully advised in the premises, the Court rules as follows:

I. BACKGROUND

a. Factual

Plaintiff is a medical provider specializing in chiropractic services. Doc. 5, p. 3. Defendant is an insurance company that provided a policy of insurance to the assignee/insured, Michael Miller, that included coverage for personal injury protection, medical payment benefits, and other first party benefits. *Id*. at 2. On or about April 28, 2017, Michael Miller was involved in a motor vehicle accident. *Id*. at 3.

Because of said motor vehicle accident, Michael Miller sustained personal injuries and received treatment for said injuries from the Plaintiff. *Id*. In exchange for receiving treatment from Plaintiff, Michael Miller signed an assignment of benefits agreement (AOB) in favor of Plaintiff, in which Plaintiff claims "M[ichael] M[iller] absolutely assigned his/her personal injury protection, medical payment benefits, and other first party benefits under the insurance contract to Plaintiff. . ." *Id*. at 2. Thus, Plaintiff charged all costs incurred for its treatment of Michael Miller directly to Defendant. *Id*. at 4.

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b. Procedural

Plaintiff filed a Complaint against Defendant on April 28, 2021, alleging breach of contract due to unpaid and overdue PIP and possibly MPC coverage, as well as interest thereon. *Id.* at 1. Plaintiff did not attach the AOB to the complaint, arguing that doing so is not required because the breach of contract claim is founded upon the Defendant's policy of insurance, and not the AOB. *Id.* at 3.

Defendant filed an answer and affirmative defenses on May 28, 2021, where Defendant states, *inter alia*, that it has paid the appropriate amount for all bills properly received from the Plaintiff. Doc. 9, p. 4. Defendant also denies Plaintiff's statement that the breach of contract claim is founded upon the Defendant's policy insurance, and not the AOB. *Id.* at 2.[1] As an affirmative defense, Defendant argues, *inter alia*, that Plaintiff's action is barred by res judicata because Plaintiff previously filed suit for the same date of loss and involving the same parties on January 22, 2021, in Broward County under case no. CONO-21-002231. *Id.* at 5.

Defendant further alleges that Plaintiff voluntarily dismissed the Broward County case with prejudice on April 24, 2021, and that a dismissal with prejudice functions as an adjudication on the merits. *Id.* at 6. The parties filed various other motions, including the instant Defendant's Request for Judicial Notice. Doc. 41.

i. Defendant's Request for Judicial Notice of Court Records

The sole issue in Defendant's Request for Judicial Notice is whether the Florida Evidence Code permits the Court to take judicial notice of the court records that Defendant alleges support the affirmative defense of res judicata. Doc. 41, p. 2-6. With its request for judicial notice, Defendant attaches three exhibits, labeled "Exhibit A, B, & C."[2] *Id.* The first page of each of the three exhibits are similar, they are titled "Electronically Certified Court Record." *Id.* Each page contains a seal purporting to be from the Clerk of Circuit and County Court of Broward County. *Id.* The page also gives details about the agency, the Clerk of Courts, the date the document was issued, a unique reference number, requesting party code, and a requesting party reference number. *Id.* Additionally, there is a QR code and a URL link where the reader can click to get more information. *Id.*

The subsequent pages after the "Electronically Certified Court Record" page of each exhibit purport to be documents from the case file. *Id.* At the bottom of the first page of each case file document are the words, "I HEREBY ATTEST THAT THIS CERTIFIED DOCUMENT IS A TRUE AND CORRECT COPY AS SAME APPEARS ON RECORD WITH BROWARD COUNTY CLERK OF COURTS." *Id.* The page also has a seal purporting to be from the Clerk of Circuit and County Court of Broward County. *Id.* Finally, there is language that says, "Digitally signed by the Honorable Brenda D. Forman." *Id.*

Defendant argues that the Florida Evidence Code authorizes the Court to take judicial notice of the court records under section 90.202, Florida Statutes (2022), and quotes the following sections of the statute in support of its argument:

> A court may take judicial notice of the following matters, to the extent that they are not embraced within § 90.201:
>
> . . .
>
> (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.
>
> . . .
>
> (12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.
>
> (13) Official seals of governmental agencies and departments of the United States and of any state, territory, or jurisdiction of the United States.

Id. at 3 (quoting § 90.202(6), (12), (13), Fla. Stat. (2022)).

Defendant also argues that the court records do not fall under the "general" definition of hearsay, as stated in section 90.801(1)(c), Florida Statutes (2022), as the certified court records are "nontestimonial" and "certified copies of nontestimonial records such as these are properly admissible and may be judicially noticed." *Id.* at 4-5. Defendant further argues that even if the Court finds the records to be hearsay, they would fall under an exception to the rule against hearsay. *Id.* at 5 (citing § 90.803(8), (18), Fla. Stat. (2022)).

ii. Plaintiff's Oral Argument in Response to Defendant's Request

At a hearing on August 4, 2022, Plaintiff argued that the Court should deny Defendant's Request for Judicial Notice of the Certified Court Records. Plaintiff, citing section 90.801, Florida Statutes (2022), "hearsay; definitions; exceptions," contends that the court records at issue are statements—specifically, written assertions—being offered in evidence to prove the truth of the matter asserted. Such statements are inadmissible. § 90.802, Fla. Stat. (2022).

In response to Defendant's argument that the court records fall under an exception to the rule against hearsay, Plaintiff argues that the court records in question do not meet the requirements of sections 90.901 and 90.902, Florida Statutes (2022), which deal with authentication or identification of evidence.

Plaintiff buttresses this argument by claiming that the court records do not contain a signature by the custodian of the document attesting to the authenticity of the seal, as required by section 90.902(1)(b), Florida Statutes (2022), as the court records are merely stamped with a QR code. Said QR code instructs one to click on a link to verify what was represented to be an alleged electronic signature. Plaintiff contends that section 90.902 requires that a signature be within the document and not elsewhere, and because one must click on the link to verify the authenticity of the document, that means that there is not a signature within the four corners of the document. When asked by the Court what authority allows the Court to click the link and go outside of the four corners of the document, the Defendant failed to identify any sources. Thus, the Defendant's Request for Judicial Notice of the Court Records was denied.

On August 16, 2022, the Court filed an order denying Defendant's Request for Judicial Notice but noted it would file an amended order detailing its findings. Doc. 64. This instant order serves as the amended order.

II. STANDARD

The Florida Evidence Code states that a court may take judicial notice of "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction in the United States." § 90.202(6), Fla. Stat. (2022). However, documents contained in a court record are "still subject to the same rules of evidence to which all evidence must adhere." *Stoll v. State*, 762 So. 2d 870, 877 (Fla. 2000) [25 Fla. L. Weekly S591a].

As the Florida Supreme Court explained:

> [W]hile the court may take judicial notice of documents in a court file that were properly placed there, this notice would not make the contents of the documents admissible if they were subject to challenge, such as when a document is protected by privilege or constituted hearsay. In addition, taking judicial notice of an entire prior proceeding may be expeditious for the current proceedings, but it does not allow the substance of the underlying materials to be entered into evidence without compliance with the rules of evidence.

Dufour v. State, 69 So. 3d 235, 254 (Fla. 2011) [36 Fla. L. Weekly S476a].

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

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truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2022). Hearsay is inadmissible unless there is an applicable exception. *See* §§ 90.802, 90.803, Fla. Stat. (2022).

Additionally, under section 90.901, "[a]uthentication or identification of evidence is required as a condition precedent to its admissibility." However, section 90.902 provides exceptions to this requirement—stating in relevant part that:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:
> (1) a document bearing:
> (a) A seal purporting to be that of the United States or any state, district, commonwealth, territory, or insular possession thereof; the Panama Canal Zone; the Trust Territory of the Pacific Islands, or a court, political subdivision, department, officer, or agency of any of them; and
> (b) A signature by the custodian of the document attesting to the authenticity of the seal.

§ 90.902(1)(a)-(b), Fla. Stat. (2022).

A document that fails to comply with the seal and signature requirements of this section is inadmissible under statutory self-authentication provisions. *See T.A. v. State*, 553 So. 2d 1310, 1311 (Fla. 3d DCA 1989).

III. DISCUSSION

a. Authentication Determination

The Florida Supreme Court analyzed the interplay between judicial notice under section 90.202 and authentication under section 90.902 in *Stoll v. State*, 762 So. 2d 870 (Fla. 2000). In *Stoll*, a handwritten statement contained in a court record that had been judicially noticed was found to be inadmissible hearsay. *Id*. at 877. Defendant argues that the court records at issue fall under the "public records and reports" exception to hearsay. § 90.803 (8), Fla. Stat. (2022) ("PUBLIC RECORDS AND REPORTS.—Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report. . ."). However, as stated *supra*, authentication of evidence is required for it to be admissible. § 90.901, Fla. Stat. (2022).

Thus, the Court must determine whether the court records are self-authenticating. Specifically, the Court must determine whether the court records at issue contain a signature by the custodian of the document attesting to the authenticity of the seal, as required for self-authentication by section 90.902(1)(b). Said court records contain a QR code prompting one to click on a link to view the verification on a webpage. The Court must analyze whether the QR code is a "signature" in accordance with the plain meaning of the statute.

i. The Plain Meaning of the Word "Signature"

To determine whether a QR Code constitutes a signature under section 90.902(1)(b), we must first define the word "signature." "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Lee v. CSX Transp., Inc*., 958 So. 2d 578, 580 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1572b] (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 84 (2006) [20 Fla. L. Weekly Fed. S19a]). Courts can look to dictionaries to ascertain the plain and ordinary meaning of a word used in a statute. *Broward County v. Florida Carry, Inc*., 313 So. 3d 635, 639 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D642a] (citing *Nunes v. Herschman*, 310 So. 3d 79 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D112b]). As section 90.902 does not contain any definition for "signature," we look to its dictionary definition. *Merriam-Webster* defines "signature" in relevant part as "the act of signing one's name to something" or "the name of a person written with his or her own hand."[3]

The Court may also look to related statutory provisions to determine the meaning of a term. *See State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980). Section 673.4011, Florida Statutes (2022), "Signature," states that "[a] signature may be made by use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing."

Section 668.003(4), Florida Statutes (2022), provides a definition for "electronic signature," stating that " '[e]lectronic signature' means any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing." Section 668.004, Florida Statutes (2022), states "[u]nless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature." Section 668.50, Florida Statutes (2022), the Uniform Electronic Transaction Act, further explains the effect of an electronic signature as follows:

> (9) Attribution and effect of electronic record and electronic signature—.--
> (a) An electronic record or electronic signature is attributable to a person if the record or signature was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.
> (b) The effect of an electronic record or electronic signature attributed to a person under paragraph (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

ii. Whether a QR Code Constitutes a Signature

Having defined signature, the Court must now determine whether a QR code constitutes a signature under the plain meaning of the statute. As section 90.902 does not mention nor provide a definition for "QR code," the Court looks to other relevant sources for a definition. *Broward County*, So. 3d at 639. Lawyers Desk Reference defines QR codes as follows:

> [A] quick response code (QR) is a specific matrix barcode (or two-dimensional code). It's a symbol, much like a UPC code, that can be placed on any surface. The code consists of black modules arranged in a square pattern on a white background. By taking a picture of a QR code with a cellphone camera, users gain instant access to a Uniform Resource Locator (URL) that can describe a product in detail. They are prominent in magazines and other media to promote all kinds of items. It is being used in a wide variety of applications, such as manufacturing, logistics, and sales applications.

§ 9:33. QR codes, Lawyers Desk Reference 10th Edition (Oct. 2021).

An additional definition has been provided by the United States District Court for the Middle District of Pennsylvania. In *Styer v. Professional Medical Management, Inc*., 114 F. Supp. 3d 234, 236 (M.D. Pa. 2015) the Court defined a QR code as "a specific type of barcode. The QR code contains encoded information, and can be scanned by certain devices, such as a smartphone, to decode the information and reveal its contents. Many consumers have these scanner applications installed on their smartphones." (internal citations omitted).

Although a QR Code has been defined as a symbol, scanning one leads to a webpage or URL with more detailed information. *Id*. Therefore, it is not synonymous with a signature, which is self-contained and does not serve as a means of accessing information stored elsewhere. Additionally, accompanying the QR code on the filed documents is a statement directing the reader to click on a link to verify the document, thus reiterating that the QR code itself is not a signature attesting to the authenticity of the seal—it is a means to view

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the verification, outside of the four corners of the document. Doc. 41, pp. 8, 12, 19.

Section 90.902 states that the document must "bear" the signature attesting to the authenticity of the seal. As there is no definition of "bear" provided in the statute, the Court looks to its dictionary definition. *Broward County*, 313 So. 3d at 639. Black's Law Dictionary defines "bear" in relevant part as follows: "1. To support or carry <bear a heavy load>."[4] As the QR code is not the signature of the custodian, the court records do not carry or support a signature as required for self-authentication under section 90.902(1)(b).

In the instant case, the Court cannot rely on the QR code or click the link provided to determine if the court records are properly attested. The QR code is not a signature associated with any official, custodian or otherwise. Additionally, the documents do not have any language that attests to the authenticity of the seal purporting to be from Broward County's Clerk of Court pursuant to section 90.902(1)(b).

Section 90.902(2), Florida Statutes (2022), allows self-authentication of a document "**not** bearing a seal but purporting to bear a signature of an officer or employee of any entity listed in subsection (1), affixed in the officer's or employee's official capacity." (emphasis added). Even assuming *arguendo* that the language in the attestation and digital signature at the bottom of the subsequent pages of each exhibits satisfied the language of section 90.902(2), the exhibits would still not be properly authenticated. The words of the statute are clear and unambiguous, section 90.902(2) only applies when the document does not bear a seal. *See Houston v. City of Tampa Firefighters & Police Officers' Pension Fund Bd. of Tr.*, 303 So. 3d 233, 240 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1178a], *review denied sub nom. City of Tampa Firefighters v. LaJoyce Houston*, SC20-861, 2020 WL 5908972 (Fla. Oct. 6, 2020) ("When [the court] interpret[s] a statute, [the court] start[s] with the plain meaning of the actual language that the legislature chose. If that language is unambiguous, its plain meaning controls and there is nothing left for [the court] to interpret." (Internal citations omitted).

Since the "Exhibits A, B, and C" have seals and no signature by the custodian of the document attesting to the authenticity of the seal, the exhibits do not self-authenticate pursuant to section 90.902(1)(a) and (b). Therefore, the Court cannot take judicial notice of these exhibits pursuant to section 90.202.

IV. CONCLUSION

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Defendant's Request for Judicial Notice of the Certified Court Records filed on June 13, 2022 is hereby **DENIED.**

---

[1]The full rules of Florida Civil Procedure and the Florida Evidence Code have been invoked.

[2]The exhibits are titled as follows: (1) "Exhibit 'A', electronically certified Court Record of Plaintiff's Summons, Broward County case no. CONO-21-002231, court stamped 1/22/2021"; (2) "Exhibit 'B', electronically certified Court Record of Plaintiff's Complaint, Broward County case no. CONO 21-002231, court stamped 1/22/2021"; and (3) "Exhibit 'C', electronically certified Court Record of Plaintiff's Notice of Filing Voluntary Dismissal With Prejudice, Broward County case no. CONO-21-002231, court stamped 4/24/2021."

[3]"Signature." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/signature. Accessed 18 Nov. 2022.

[4]BEAR, Black's Law Dictionary (11th ed. 2019).

* * *

Insurance—Personal injury protection—Reconsideration—Court declines to consider argument that policy allowed insurer to send suspicion-of-fraud letter to insured rather than to assignee where argument could have been, but was not, raised in initial motion for summary judgment—Declaratory actions—Mootness—Confession of judgment doctrine does not apply to action seeking declaration of PIP coverage, which is nota suit to recover benefits—Entry of summary judgment in favor of provider was error where insurer's mid-litigation payment of disputed benefits mooted declaratory action

FLORIDA WELLNESS CENTER, INC., a/a/o Justin Fernandez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-052807. Division J. January 10, 2023. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, Tampa, for Plaintiff. Cameron Frye, De Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR REHEARING AND DISMISSING CASE WITHOUT PREJUDICE AS MOOT

[Original Opinion at 30 Fla. L. Weekly Supp. 300a]

BEFORE THE COURT is Defendant's Motion for Rehearing of Court's Order Granting in Part Plaintiff's Amended Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment. Doc. 73. Plaintiff responded (Doc. 79), and the parties appeared for a lengthy hearing on November 28, 2022. Upon consideration, the motion is granted because the confession-of-judgment doctrine does not apply to this declaratory judgment action. Because the doctrine does not apply, Defendant's payment of PIP benefits rendered this case moot, so it must be dismissed.

I. INTRODUCTION.

My August 16, 2022 order (Doc. 72) recounts the history of this case in detail, but a brief review is helpful. Justin Fernandez assigned to Florida Wellness his benefits under an insurance policy issued by Progressive. After Progressive received the first set of medical bills from Florida Wellness, it sent a suspicion-of-fraud letter to Fernandez's attorney, but not to Florida Wellness.[1]

When 30 days passed without payment, Florida Wellness sued for a declaration that Progressive failed to timely investigate and pay its claim. Progressive did not deny coverage and contends that its suspicion-of-fraud letter successfully extended for 60 days the time to pay benefits. During those 60 days, Progressive paid all PIP benefits, accrued interest, penalties, and postage. The parties then filed cross-motions for summary judgment. Florida Wellness argued that Progressive confessed judgment by paying benefits mid-litigation. Progressive argued it properly extended its time to pay, so the case was moot.

Following extensive briefing and argument, I granted summary judgment in part to Florida Wellness and denied Progressive's motion. The analysis contained several steps, chief among them the conclusion that the term "claimant" in § 627.736(4)(i) refers to Florida Wellness, not Fernandez. Accordingly, Progressive's suspicion-of-fraud letter did not properly invoke the statute's 60-day extension. But the order also passed on several threshold matters, one of them being Progressive's mid-litigation payment of benefits does not moot the case because the confession-of-judgment doctrine applies. Part of that analysis noted, "The parties seem to agree that the confession-of-judgment doctrine applies to declaratory judgment actions, and the case law supports that assumption." Doc. 72 at 19 n.8. Progressive questions that reasoning.

II. STANDARD.

Though titled one for rehearing, Progressive's motion is better addressed as one for reconsideration, since I never entered a judgment. *See* Fla. R. Civ. P. 1.530(a). Motions for reconsideration apply to nonfinal, interlocutory orders, including orders granting summary judgment. *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1988); *Siegler v. Bell*, 148 So. 3d 473, 478 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2012c]; *AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123, 1125 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1412c]. Reconsideration is based on the trial court's "inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment." *Silvestrone*, 721

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So. 2d at 1175. In other words, a trial court has inherent authority to reconsider, modify, or retract a nonfinal order. *AC Holdings*, 985 So. 2d at 1125; *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744, 745 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D857b].

The grounds for reconsideration are broad. *VME Grp. Int'l, LLC v. Grand Condo. Ass'n, Inc.*, 347 So. 3d 461, 467 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1819b]; *Richmond v. State Title & Guar. Co., Inc.*, 553 So. 2d 1241, 1242 (Fla. 3d DCA 1989). They include contentions that "the final order conflicts with governing law and is otherwise simply wrong on the merits." *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D174b]. But a trial court need not consider an issue or argument that could have been, but wasn't, raised in the initial motion or at the initial hearing. *Chris Thompson, P.A. v. GEICO Indem. Co.*, 349 So. 3d 447, 448-49 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1899b] (citing *Bank of Am., N.A. v. Bank of N.Y. Mellon*, 338 So. 3d 338, 341 n.2 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D659a]; *Kovic v. Kovic*, 336 So. 3d 22, 25 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D130a]; *Best v. Educ. Affiliates, Inc.*, 82 So. 3d 143, 146 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D479a]; *Trinchitella v. D.R.F., Inc.*, 584 So. 2d 35, 35 (Fla. 4th DCA 1991)).

III. ANALYSIS.

Progressives makes five arguments in its motion, but pursued only two at the hearing. Because I disagree with the three not discussed and adequately addressed them in my original summary judgment order, they are summarily denied. I will address only the two arguments discussed at the hearing.

A. I decline to consider Progressive's argument that the policy allows Progressive to send its suspicion-of-fraud letter to Fernandez.

First, Progressive argues that its policy allows it to send the suspicion-of-fraud letter to the "insured person"—Fernandez—rather than the "claimant," as required by § 627.736(4)(i). I agree that parties may contract around statutory requirements, even those in Chapter 627. *See Green v. Life & Health of Am.*, 704 So. 2d 1386, 1390 (Fla. 1998) [23 Fla. L. Weekly S42a]; *Universal Prop. & Cas. Ins. Co. v. Johnson*, 114 So. 3d 1031, 1035 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D950a]. But this is an argument based on the record that was available and readily apparent when Progressive filed its motion for summary judgment and during the intervening months before my order. I decline to consider it. *Chris Thompson, P.A.*, 349 So. 3d at 448-49.

B. The confession of judgment doctrine does not apply to actions seeking declarations of PIP benefits.

Progressive's second argument is more persuasive. It argues that the confession-of-judgment doctrine does not apply because Florida Wellness did not file an action seeking PIP benefits.

As explained in my initial order, "declaratory relief generally is not appropriate where the alleged controversy is moot." *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So. 3d 851, 859 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D600c] (citing *Ashe v. City of Boca Raton*, 133 So. 2d 122, 124 (Fla. 2d DCA 1961)). That is true even when the case becomes moot during litigation. *See Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192-93 (Fla. 1995) [20 Fla. L. Weekly S536c]; *Marco Island Cable, Inc. v. Comcast Cablevision of the S., Inc.*, 509 F. Supp. 2d 1158, 1163 (M.D. Fla. 2007) [20 Fla. L. Weekly Fed. D607a].

Except, mid-suit payment of disputed benefits does not moot litigation when the confession-of-judgment doctrine applies and remains disputed. *Synergy Contracting Grp., Inc. v. Fednat Ins. Co.*, 343 So. 3d 1257, 1259-60 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1623a]. A question therefore arises: Does the confession-of-judgment doctrine apply in a declaratory judgment action? The parties acted as if it did. Indeed, neither party disputed applying the doctrine to this type of case before I granted summary judgment. *See* Doc. 72 at 19 n.8 ("The parties seem to agree that the confession-of-judgment doctrine applies to declaratory judgment actions, and the case law supports that assumption.").

My error was framing the question too broadly. The issue is not whether the confession-of-judgment doctrine applies in a declaratory judgment action, but whether it applies in an action seeking a declaration of PIP coverage. And as Progressive persuasively argues, it does not. In two recent decisions, the Fourth District has construed § 627.736 to allow attorney fees only when the plaintiff recovers *benefits*. *Liberty Mut. Ins. Co. v. Pan Am Diagnostic Servs., Inc.*, 347 So. 3d 7, 10 (Fla. 4th DCA 2022) [47 Fla. L. Weekly D1724a]; *S. Fla. Pain & Rehab. of W. Dade v. Infinity Auto Ins. Co.*, 318 So. 3d 6, 11 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D915a]. Awards for statutory penalties, postage, and interest are not covered. *S. Fla. Pain*, 318 So. 3d at 11 (penalties and postage); *Pan Am*, 347 So. 3d at 10 (statutory interest on overdue payments).

If attorney fees are not available in suits to recover penalties, postage, or interest, then they are certainly not available in a declaratory judgment action merely seeking a determination of PIP coverage—especially one that is moot. Florida Wellness's declaratory judgment action is "not a dispute as to benefits payable for *medical, surgical, funeral, and disability insurance benefits.* Thus, litigation over [mere coverage] does not trigger entitlement to attorney's fees for the claimant." *Pan Am*, 347 So. 3d at 10 (emphasis in original).

Both *Pan Am* and *South Florida Pain* reached their results by interpreting the plain language of § 627.736(8) and related statutes, which address entitlement to attorney fees in PIP claims. *See Pan Am*, 347 So. 3d at 9; *Liberty Mut.*, 318 So. 3d at 11. An appellate court's plain-meaning construction of a statute is a definitive interpretation of that statute at the time it was passed. So, *Pan Am* and *South Florida Pain* express the authoritative and binding reading of § 627.736(8)'s plain meaning at the time I granted summary judgment. My order reaches a legal conclusion directly contradictory to those cases, so it was error. I should have concluded that the confession-of-judgment doctrine does not apply to Florida Wellness's declaratory judgment action. I now do so.

Because the confession-of-judgment doctrine does not apply, Florida Wellness's case is moot. *Santa Rosa Cnty.*, 661 So. 2d at 1192-93; *Rhea*, 109 So. 3d at 859; *Ashe*, 133 So. 2d at 124; *Marco Island Cable*, 509 F. Supp. 2d at 1163.

Progressive contends that it is entitled to summary judgment because the case is moot. I disagree. Even when the case becomes moot mid-litigation, the insurer is not entitled to a judgment. Instead, the case should be dismissed without prejudice. *Synergy Contracting Grp., Inc. v. Fednat Ins. Co.*, 332 So. 3d 62, 66 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2625b] ("[I]f this case did indeed become moot upon its payment of the appraisal award, then the proper disposition of the case would have been a dismissal, not a judgment in Fednat's favor.").

Accordingly,

1. Defendant's Motion for Rehearing (Doc. 73) is GRANTED.

2. The August 16, 2022 Order Granting in Part Plaintiff's Amended Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment is VACATED.

3. Plaintiff's Amended Motion for Summary Judgment is DENIED.

4. Defendant's Motion for Summary Judgment is GRANTED in part.

5. This case is INVOLUNTARILY DISMISSED without prejudice as moot. The Clerk may CLOSE the file.

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[1]*See* § 627.736(4)(i), Fla. Stat. (allowing "an additional 60 days" for the carrier to conduct its fraud investigation after notifying "the claimant" that the claim "is being investigated for suspected fraud").

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Untimely bills—Bills that were submitted to insurer more than 35 days after medical services were rendered are not eligible for PIP reimbursement—Because amount of only timely submitted bill is less than PIP deductible, insurer has no obligation to pay benefits

SPINE HEALTH CENTER, INC., a/a/o Robin Gorgoll, Plaintiff, v. INFINITY INDEMNITY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. CONO20005566. Division 73. December 26, 2022. Steven P. DeLuca, Judge. Counsel: Christian Kribbs, for Plaintiff. Charlene Eligon, Law Offices of Leslie M. Goodman, Doral, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION ON ITS AFFIRMATIVE DEFENSES OF UNTIMELY BILLING AND INVALID DEMAND LETTER

This Cause having come before the Court on December 14, 2022, on Defendant's Motion for Summary Disposition on its Affirmative Defenses of Untimely Billing and Invalid Demand Letter and the Court having reviewed the Motion for Summary Disposition, Affidavit in support, and entire Court file; reviewed the relevant legal authorities; having heard arguments by the parties, and been sufficiently advised in the premises the Court thereby makes the following findings:

STATEMENT OF FACTS

1. On or about May 30, 2022, Robin Gorgoll sustained personal injuries related to the operation, maintenance or use of a motor vehicle in the State of Florida.

2. Spine Health Center, Inc. ("Plaintiff") filed the instant action seeking benefits for treatment allegedly rendered to Robin Gorgoll ("Insured").

3. Defendant issued a policy of automobile insurance which provided Personal Injury Protection ("PIP") benefits to the Insured.

4. The policy provided PIP benefits in accordance with the requirements of Florida Statue §627.736

5. The Policy had a $1,000 deductible, applicable to the named insured.

6. Plaintiff's bills for dates of service April 5, 2019, April 9, 2019, April 11, 2019, and April 18, 2019 were not timely mailed to Infinity as they were submitted over 35 days after the medical services were allegedly rendered.

7. The only timely submitted bill from Plaintiff was for date of service April 17, 2019.

8. On December 20, 2019, in its response to Plaintiff's demand letter dated November 22, 2019, Defendant advised Plaintiff that the bill for date of service April 17, 2019, was applied toward the policy's $1,000 deductible.

9. On or about April 17, 2020, despite being aware of the fact that Plaintiff had failed to timely submit most of its bills, and that the only timely submitted bill fell below the policy's deductible, Plaintiff filed the subject lawsuit.

10. At no point in time has Plaintiff submitted any proof of timely mailing the bills for dates of service April 5, 2019, April 9, 2019, April 11, 2019, and April 18, 2019 or proof of timely mailing a Notice of Initiation of Treatment.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to Florida Small Claims Rule 7.135 "At pretrial conference or at any subsequent hearing, if there is no triable issue, the Court shall summarily enter an appropriate Order or Judgment."

A. Defendant is entitled to summary disposition because it has no obligation to pay the bills which were not timely submitted to the Defendant and thus do not comply with Fla. Stat. 627.736.

The Florida No-Fault Statute requires that bills from providers to be submitted to an insurer on the proper form. Specifically, section 627.736(5)(d) states in pertinent part:

> (d) All statements and bills for medical services rendered by a physician, hospital, clinic, or other person or institution shall be submitted to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) 1500 form, UB 92 forms, or any other standard form approved by the office or adopted by the commission for purposes of this paragraph.
>
> . . .
>
> For purposes of paragraph (4)(b), an insurer is not considered to have been furnished with notice of the amount of covered loss or medical bills due unless the statements or bills comply with this paragraph and are properly completed in their entirety as to all material provisions, with all relevant information being provided therein.

§ 627.736(5)(d), Fla. Stat.

Moreover, in regard to timing, the Florida Motor Vehicle No-Fault Statute requires bills from providers other than hospitals or emergency providers to be submitted (i.e. postmarked or electronically submitted) within 35 days of the dates on which the billed medical services were provided. § 627.736(5)(c), Fla. Stat. The timeframe for submission can be extended to 75 days from the dates of service if a notice of initiation of treatment is provided. *Id*. These timeframes are detailed in section 627.736(5)(c), which states in relevant part as follows:

> (c) With respect to any treatment or service, other than medical services billed by a hospital or other provider for emergency services and care as defined in s. 395.002 or inpatient services rendered at a hospital-owned facility, the statement of charges must be furnished to the insurer by the provider and may not include, and the insurer is not required to pay, charges for treatment or services rendered more than 35 days before the postmark date or electronic transmission date of the statement, except for past due amounts previously billed on a timely basis under this paragraph, and except that, if the provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement. The injured party is not liable for, and the provider may not bill the injured party for, charges that are unpaid because of the provider's failure to comply with this paragraph. Any agreement requiring the injured person or insured to pay for such charges is unenforceable.

§ 627.736(5)(c), Fla. Stat.

In addition to these statutory timeframes, providers may receive an additional 15 days to resubmit an otherwise valid claim if an insurer reduces or rejects a claim due to an error in the claim. § 627.736(4)(b), Fla. Stat. Insurers that do not receive properly submitted claim forms are not responsible for any charges incurred, and the claims do not become overdue unless a provider resubmits a valid claim within the allowed time period. This is detailed in section 627.736(4)(b), which states as follows, in relevant part:

> (b) Personal injury protection insurance benefits paid pursuant to this section are overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. However:
>
> ***
>
> 2. If an insurer pays only a portion of a claim or rejects a claim, the insurer shall provide at the time of the partial payment or rejection an itemized specification of each item that the insurer had reduced, omitted, or declined to pay and any information that the insurer desires the claimant to consider related to the medical necessity of the denied

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treatment or to explain the reasonableness of the reduced charge if this does not limit the introduction of evidence at trial. The insurer must also include the name and address of the person to whom the claimant should respond and a claim number to be referenced in future correspondence.

3. If an insurer pays only a portion of a claim or rejects a claim due to an alleged error in the claim, the insurer, at the time of the partial payment or rejection, shall provide an itemized specification or explanation of benefits due to the specified error. Upon receiving the specification or explanation, the person making the claim, at the person's option and without waiving any other legal remedy for payment, has 15 days to submit a revised claim, which shall be considered a timely submission of written notice of a claim.

4. Notwithstanding the fact that written notice has been furnished to the insurer, payment is not overdue if the insurer has reasonable proof that the insurer is not responsible for the payment.

§ 627.736(4)(b), Fla. Stat.

"Under section 627.736(5)(c)(1), an insurer has no obligation to pay late-filed bills." *United Auto. Ins. Co. v. Eduardo J. Garrido, D.C., P.A.*, 990 So. 2d 574, 575 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1846b]. The Legislature first expressly imposed a limitation on medical provider billing when it amended section 627.736 (5) in 1998 to require bills be furnished to PIP insurers within 30 days or "be subject to automatic claim denial by the insurer." *Warren v. Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005) [30 Fla. L. Weekly S197b]. In 2001, the Legislature slightly increased the time frame during which medical providers had to provide their bills to PIP insurers, now allowing providers 35 days to submit their bills. See 2001 Fla. Sess. Law Serv. Ch. 2001-271 (C.S.C.S.S.B. 1092). Regardless of any small changes made to the allowed time frame, from its inception, it was "apparent by its plain language that the intent of the statutory provision at issue was to impose statutory time limits on the submission of medical bills under the no-fault scheme. . ." *Warren*, 899 So. 2d 1090, 1095.

In *Coral Imaging Services v. Geico Indem. Ins. Co*. ("*Coral Imaging*"), 955 So. 2d 11 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a], the Third District examined the time limit on billing imposed by the 1999 version of section 627.736 (5), which at that time was still 30 days. The insurer in *Coral Imaging* claimed it had exhausted benefits because it counted payments made on untimely bills received beyond the statutory billing deadline in determining the benefit maximum had been reached. *Coral Imaging Services*, 955 So. 2d at 12. The Third District found that the statutory deadline for submitting a medical bill is a firm one, and untimely bills are not subject to payment of PIP benefits. *Id*. at 14-15. Accordingly, under *Coral Imaging Services,* if an insurer chooses to pay a late bill, it cannot count those payments against the $10,000 statutory limit on an insured's PIP benefits. *Id*.

The Third District's decision in *Coral Imaging* made it clear that untimely bills are exempt from PIP payments, and that it is the sole responsibility of medical providers to comply with the statutory deadlines. If a provider fails to submit a timely bill statement, it will be "prohibited from including in its statement of charges any services which were rendered more than 30 days ago. . .Therefore, the provider is not even permitted to submit a bill for untimely services." *Id*. at 14 (emphasis in original). The Third District emphasized this point, stating as follows:

> The 30-day time limitation requires a provider to submit its bill on a timely basis and, if the provider does not do so and the insurer does not pay, the provider cannot bill the insured for its services. This provision is intended to put teeth into the 30-day time limitation by placing the provider on notice that it will have no recourse against the insured if it fails to meet the time requirements under the statute.

Id. at 15.

There is only one exception to when a provider may submit a bill beyond the statutory time limit and still be covered by PIP law, but this exception imposes its own strict time requirements: If a "provider submits to the insurer a notice of initiation of treatment within 21 days after its first examination or treatment of the claimant, the statement may include charges for treatment or services rendered up to, but not more than, 75 days before the postmark date of the statement." § 627.736(5)(c), Fla. Stat.

B. Plaintiff cannot meet its burden of demonstrating a breach of contract, because it has no damages.

Plaintiff has not sustained damages due to any breach of contract such that it can recover against Infinity. There is no dispute that Florida law requires that the deductible be subtracted from the provider's charges before any reimbursement limitation is applied. *See Progressive Select Ins. Co. v. Fla Hosp. Med. Ctr.*, 260 So. 3d 219, 223 (Fla. 2018) [44 Fla. L. Weekly S59a] ("the *Parent* decision" or "*Parent*"); *Allstate Fire & Cas. Ins. Co. v. Sports, Spine, Occupational, Rehab., Inc. aao June Richards,* 335 So. 3d 725 (Fla. 4th DCA March 16, 2022) [47 Fla. L. Weekly D638b]. However, because the billed amount was less than the Policy's deductible, whether the calculation was made pre-*Parent* or post-*Parent* (i.e., under any theory of applying the deductible), the deductible is applied to the entirety of Plaintiff's bill and any amount is solely the responsibility of the insured. *See Allstate Fire & Cas. Ins. Co. v. Sports, Spine, Occupational, Rehab., Inc. aao June Richards,* 335 So. 3d 725 (Fla. 4th DCA March 16, 2022). Plaintiff's April 17, 2019 bill of $519.64 was under the $1,000.00 deductible, and, therefore, under no circumstances would Plaintiff be entitled to Personal Injury Protection benefits from Infinity.

In *Parent*, the Florida Supreme Court held that the insurer was required to subtract the deductible from the plaintiff/provider's charges, prior to applying any reimbursement limitations, such as the statutory fee schedule or 80%. 260 So. 3d at 223-4. It has long been recognized by that court that "[t]he functional purpose of a deductible, which is frequently referred to as self-insurance, is to alter the point at which an insurance company's obligation to pay will ripen." *Int'l Bankers Inc. Co. v. Arnone*, 552 So. 2d 908, 911 (Fla. 1989). The insured is responsible for the payment of the deductible amount. The *Parent* court explained:

> Before the deductible is satisfied, 'the insurer is not reimbursing the medical provider'; rather, the policyholder is compensating the provider. There is no basis for concluding that the reimbursement limitation applies to charges included in the deductible, 'which the insured alone is obligated to pay and which are not recoverable as benefits under the policy.'

260 So. 3d at 224 (citations omitted).

In this case, whether the deductible is applied pre-*Parent* or post-*Parent*, the result is the same—a judgment in favor of Infinity. There is no legal theory under which Infinity is required to pay, as there are no "benefits" under the policy that Plaintiff may recover.

Pre-*Parent* Analysis

Plaintiff billed $519.64. Pre-*Parent*, the amount would be reduced by applying the fee schedule, to $415.71. Then, the policy deductible of $1,000.00 would apply, yielding zero in potential recoverable benefits.

Post-*Parent* Analysis

Plaintiff billed $519.64. Post-*Parent*, the deductible would be applied to the full $519.64. Applying the policy deductible of $1,000.00, again, there would be zero in potential recoverable benefits.

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Because the amount of Plaintiff's bill is less than the policy deductible, Plaintiff is unable to demonstrate there are any recoverable "benefits." The insured is solely responsible for the deductible. Infinity's obligation to pay never ripened.

C. Response to Plaintiff's Motion for Summary Disposition

The sole piece of evidence Plaintiff relied upon in support of its Motion for Summary Disposition is the Affidavit of Martha Pabon, an alleged manager that "oversaw the billing department for Plaintiff." Essentially, Ms. Pabon claims that "in the normal course" of Plaintiff's business, Ms. Pabon signs bills and mails them on the date they are signed. However, Plaintiff provided no actual evidence to support when it mailed the subject bills.

Defendant, on the other hand, provided evidence of when the subject bills were mailed, including the images of the envelopes that Plaintiff mailed to Defendant with the subject bills and Notice of Initiation of Treatment that showed that the bills and the Notice of Initiation of Treatment were not timely submitted.

In conclusion, based on the legal authority presented herein, Defendant is entitled to entry of summary disposition in its favor on the basis that Plaintiff did not timely submit its bills in compliance with Fla. Stat. 627.736(5)(c) and therefore Plaintiff's bills are not eligible for PIP reimbursement and were properly denied. Defendant is therefore entitled to summary disposition on its affirmative defenses pertaining to untimely billing in regard to dates of service on April 5, 2019, through April 18, 2019.

For the reasons stated above, it is hereby ORDERED and ADJUDGED that Defendant's Motion for Summary Disposition regarding Untimely Billing is GRANTED.

* * *

Insurance—Personal injury protection—Attorney's fees—Amount—Attorneys representing prevailing medical provider are awarded fees at hourly rates below high rates requested—Number of hours claimed is reduced by hours expended in over-preparation, duplicative time spent discussing and brainstorming with other attorneys in office, and time spent on clerical tasks

WEST KENDALL REHAB CENTER, INC., a/a/o Zoravis Morales, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 15-7443 COCE 53. January 20, 2023. Robert W. Lee, Judge. Counsel: Majid Vossoughi, Miami, for Plaintiff. Christopher L. Kirwan, Fort Lauderdale, for Defendant.

[Editor's note: Order granting Final Summary Judgment in this case published at 27 Fla. L. Weekly Supp. 96a]

FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

THIS CAUSE came before the Court on January 3, 2023 for hearing of the Plaintiff's Motion for Attorneys' Fees and Costs, and the Court's having reviewed the Motion and entire Court file; received evidence; heard argument; and been sufficiently advised in the premises, the Court finds as follows:

Background. On April 5, 2017, this Court entered its Final Judgment for Plaintiff, finding that the Plaintiff is entitled to an award of fees in this PIP case involving 33 dates of treatment. The next day, the Plaintiff filed four Motions for Attorney's Fees. On May 26, 2017, the Plaintiff filed two more copies of the same Motion. For reasons that are not clear, the Plaintiff did not diligently move any of its Motions forward to hearing. Finally, on September 29, 2022, more than 5 years after the Court found Plaintiff to be entitled to an award of fees and costs, Plaintiff finally filed a breakdown of the fees sought, by time, description and hourly rate. On October 3, 2022, this Court entered its Order Preliminary to Hearing on Motion for Attorney's Fees and Costs, directing that the Defendant serve and file any specific written objections to Plaintiff's time entries. The Defendant served its response on October 21, 2022.

The Plaintiff is seeking 247.3 hours for trial level work, with Brad Blackwelder billing 80.7 hours at an hourly rate of $500.00; David Mannering billing 80.3 hours at an hourly rate of $450.00; and Majid Vossoughi billing 86.3 hours at an hourly rate of $600.00, for a total of $128,265.00. In his Notice of Filing, the Defendant's expert advised the Court that the Defendant did not object to 155.6 hours of time claimed by Plaintiff's counsel, for a total fee of $67,320.00. However, the Defendant objected to 91.7 hours of time billed, as well as the hourly rates requested. The Plaintiff agreed with 11.3 hours objected to by the Defendant, leaving 80.4 hours in dispute, as well as the hourly rates. At the hearing, the parties advised the Court that they agree that costs should be taxed in the amount of $765.00.

The Court set the matter for hearing for January 3, 2023. At the hearing both sides appeared with their capable expert witnesses, Cris Boyar, Esq. for the Plaintiff and Jonathan Brooks, Esq. for the Plaintiff. The Court has also considered the detailed written submissions of both parties, the argument of the attorneys, and the controlling case law. In addition, the Court is quite familiar with and conducted its own thorough review of all matters of record in this case. This Court has presided over thousands of insurance cases, and is quite familiar with the issues involving the pleadings, discovery, strategy, motion practice and resolution related to insurance cases litigated in South Florida.

Conclusions of Law. The Court has determined that the number of hours reasonably expended by Plaintiff's counsel in this case is a total of 209.9 hours: 68.8 hours for Mr.Vossoughi; 69.9 for Mr. Blackwelder; and 71.2 for Mr. Mannering.

Rather than awarding the higher hourly rates sought by Plaintiff's counsel, the Court has determined based upon the criteria set forth in Disciplinary Rule 4-1.5(b) of the Florida Bar Rules of Professional Responsibility that a reasonable hourly rate for the hours expended by Plaintiff's counsel is $500.00 for Majid Vossoughi; $400.00 for Brad Blackwelder; and $375.00 for David Mannering. The Defendant concurs that these hourly rates are within the range appropriate for attorneys with these levels of experience. The Court has considered all testimony presented on this issue, including Defendant and its expert.

The Court is not aware of any attorney being awarded in Broward County the high hourly rates that Plaintiff's counsel seeks. Indeed, there is no evidence that any ***client*** actually pays these high hourly rates in PIP cases, as the rates sought are strictly in the context of the insurance company paying when the plaintiff is a prevailing party. The fee award sought is in the nature of a contingency agreement—the plaintiff agrees to no fee if the plaintiff does not prevail. The insurance company has no choice here—if it loses the case, it must pay the reasonable fee as determined by the Court. The insurance company has no ability to "reject" the attorney if the hourly rate is too high. This Court is simply not willing to give Plaintiff's counsel these extraordinarily high hourly rates just because it says that's what it charges. To whom? Who willingly pays these rates? No one.

The Plaintiff argues that Miami-Dade judges have awarded him this rate. Well, this is not Miami-Dade County. Interestingly, the Plaintiff could have filed this case in Miami-Dade County, but chose not to do so. The attorney's office is in Miami-Dade, the clinic is in Miami-Dade, the treatment took place in Miami-Dade—all ties are with Miami-Dade. But for reasons beyond the understanding of this Court, the Plaintiff chose to forego filing in Miami-Dade County, and instead file here in Broward. The Plaintiff should not be heard to complain that it chose to file in Broward, and wants whatever benefits that choice entails, but it also wants the more lucrative rates awarded in Miami-Dade.

In making its ruling, the Court specifically considered the following factors in determining the reasonable hourly fee and the reason-

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able number of hours spent litigating this case:

A. The time and labor required, the novelty and difficulty of the question involved and the skill requisite to perform the legal service properly.

B. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

C. The fee customarily charged in the locality for similar legal services.

D. The amount involved and the results obtained.

E. The time limitations imposed by the client or by the circumstances.

F. The nature and length of the professional relationship with the client.

G. The experience, reputation, and ability of the lawyer or lawyers performing the services.

H. Whether the fee is fixed or contingent.

Additionally, based on controlling case law dealing with the issue of awarding of attorney's fees, the Court notes several guidelines to assist in determining whether a fee is reasonable:

• The Court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the case at issue. *Trumbull Ins. Co. v. Wolentarski,* 2 So.3d 1050, 1056-57 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D274a]; *Baratta v. Valley Oak Homeowners' Ass'n,* 928 So.2d 495, 499 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c]. In the instant case, the defense expert claims that Plaintiff's counsel was "over-thorough" in research and preparation. Indeed, Plaintiff's own fee expert conceded that he knew of no attorney other than Mr. Vossoughi who so thoroughly prepared for every aspect of this case. (Mr. Boyar referred to him as the "most prepared" lawyer he knew.) Based on the Court's own experience in these cases, similar counsel representing similar plaintiffs certainly could have achieved the same result without the level of over-preparation which is Mr. Vossoughi's ordinary practice. And while the Plaintiff may want an attorney who goes above and beyond what's usual in preparation, the Plaintiff should not expect that level of preparation to be placed on the shoulders of the non-prevailing party. As a result, the Court has made the appropriate reduction in number of hours expended in this case as follows for excessive and/or unnecessary work: for Mr. Vossoughi 16.2 hours; for Mr. Blackwelder 8.9 hours; and for Mr. Mannering 5.0 hours.

• As a general rule, duplicative time charged by multiple attorneys working on the case is usually not compensable. *Baratta,* 928 So.2d at 499. Similar to the discussion in the paragraph above, the Court finds many time entries where Mr. Vossoughi prefers to discuss and brainstorm with other attorneys in his office. These types of tasks are in essence done to provide some level of comfort to the attorneys that they are sufficiently prepared, and it is certainly beyond what is ordinarily billed by practitioners in the community. As a result, the Court has made the appropriate further reduction in number of hours expended in this case as follows for duplicative work: for Mr. Vossoughi 0.7 hours; for Mr. Blackwelder 1.0 hour; and for Mr. Mannering 3.6 hours.

• The Court notes that some of the time sought was truly no more than clerical in nature, which could have simply be handled by a secretary or assistant. As a result, the Court has made the appropriate reduction in number of hours expended in this case as follows for clerical work: for Mr. Vossoughi 0.6 hours; for Mr. Blackwelder 0.9 hours; and for Mr. Mannering 0.5 hours.

• The Court should also consider the amount of fees sought in relation to the amount in dispute. *See Progressive Express Ins. Co. v. Schultz,* 948 So.2d 1027, 1032-33 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D548b]. In determining whether the fee sought in this case is reasonable, the Court has therefore considered that this is a County Court case seeking less than $10,000.00 in damages.

• The Court should consider the nature of the defense, particularly whether the non-moving party went "to the mat" in the case. *See Progressive,* 948 So.2d at 1032. If the non-moving party took positions and actions to be litigious, it cannot now be heard to complain that it "invited the moving party to dance." *See Roco Tobacco Co. v. Div. of Alcoholic Beverages,* 934 So.2d 479, 482 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D1826b]. Up until the final judgment was entered in this case, there was extensive litigation. The docket reflects 140 docket entries prior to judgment. Although this case involved a seemingly small amount of damages in relation to the fee sought, the Court notes that both parties engaged in zealous actions in litigating this case. The Defendant appears to agree as much by conceding that a fee of $67,000.00 is reasonable for a case in which the Plaintiff recovered less than $10,000.00.

• The Court should further consider whether it has received adequate documentation to support the number of hours claimed. As stated by the Florida Supreme Court, "inadequate documentation may result in a reduction in the number of hours claimed." *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145, 1150 (Fla. 1985). This is true because "Florida courts have emphasized the importance of keeping accurate and current time records of work done and time spent on a case, particularly when someone other than the client may pay the fee." *Id.* The Court finds Plaintiff's time records, as well as the documents brought to the hearing, were adequate to support the Court's fee award.

• Finally, the Defendant objected to the failure to Plaintiff to bring Mr. Blackwelder to the hearing to testify as to the work he did and open himself to cross-examination. However, Mr. Blackwelder did not do the great bulk of the work on this case, and Mr. Vossoughi was able to get Mr. Blackwelder's time records into evidence without objection. *See Rodriguez v. Campbell,* 720 So.2d 266, 267 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2227c]. Moreover, the Defendant could have just as well issued a subpoena to have Mr. Blackwelder appear. As a result, the objection is overruled.

The ultimate goal of all the guidelines set forth above is to determine whether a fee is "reasonable." The Court therefore finds that 68.8 hours for Majid Vossoughi, Esq. at an hourly rate of $500.00 is reasonable; 69.9 hours for Brad Blackwelder, Esq. at an hourly rate of $400.00 is reasonable; and 71.2 hours for David Mannering, Esq. at an hourly rate of $375.00 is reasonable.

In sum, the Court finds that the time awarded in this case was reasonable based on the conduct of the Defendant in denying the claim for damages; the aggressive manner in which this particular case was defended; the amount of time the attorney needed to bring this case to a conclusion; the amount recovered; and the specific factors discussed in *Rowe, Bell,* and Rule of Professional Responsibility 4.1-5. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff shall recover the sum of **$89,060.00** (the reasonable attorney fee for the law firm that represented the Plaintiff, WEST KENDALL REHAB CENTER, INC.) from the Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, plus interest thereon at 5.05% per annum from April 5, 2017 to the date of this Judgment (*Clay v. Prudential,* 617 So.2d 443 (Fla. 4th DCA, 1993)), in the amount of **$26,061.03**, with costs taxed at **$765.00**, ***for a total of $115,886.03,*** that shall bear interest at the rate of 5.52% per annum until paid, for which sums let execution issue. It is also

ORDERED AND ADJUDGED that Plaintiff's attorney fee expert, Cris Boyar, Esq., shall recover the sum of **$6,000.00**, which shall bear interest at the rate of 5.52% per annum until paid, for which sum let execution issue.

* * *

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Insurance—Timeliness of service of process—Dismissal

PRECISION DIAGNOSTIC, INC., a/a/o Enoch Mere, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22026953. Division 82. December 14, 2022. Kal Evans, Judge. Counsel: Patrick Calixte, Steinger, Greene & Feiner, for Plaintiff. Sharein Wilson, Law Offices of Leslie M. Goodman, Doral, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO EFFECTUATE TIMELY SERVICE

THIS CAUSE having come before the Court on December 14, 2022 on Defendant's Motion to Dismiss for Failure to Effectuate Timely Service, and the Court being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUGED:

The Defendant's Motion to Dismiss for Failure to Effectuate Timely Service is hereby ***GRANTED,*** and Plaintiff's Complaint is hereby ***DISMISSED.***

The Court further finds that:

1. Service should have been effectuated on Defendant by August 30, 2022.

2. The court file is absent of a Motion for Extension of Time To Effectuate Service.

3. The parties do not dispute that 390 cases were served on Defendant prior to service being effectuated.

4. Regarding any information regarding possible excusable neglect, Plaintiff concedes as to not having information on how long the new process servers have been employed with the firm, how many process servers are on the team, or other information regarding excusable neglect, despite the Court allowing Plaintiff ample opportunities to provide said information.

5. Plaintiff's argument was woefully lacking for excusable neglect.

* * *

Criminal law—Plea—Motion to withdraw plea is denied where motion was not made under oath and is untimely

STATE OF FLORIDA, Plaintiff, v. ANDREW JAMES LEWIS, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2022-MM-038515-AXXX. December 6, 2022. Rhonda Babb, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Andrew James Lewis, Pro se, Defendant.

ORDER DENYING MOTION TO WITHDRAW PLEA WITHOUT PREJUDICE

THIS CAUSE came before the Court on the Defendant's *Pro Se* Motion to Withdraw Plea filed on October 20, 2022 pursuant to Fla. R. Crim. P. 3.170(1), and State's Response to Defendant's Motion to Withdraw Plea After Sentencing filed on November 28, 2022, after the Court entered an Order for the State's response on November 8, 2022. The Court having reviewed the Motion, the State's Response, and the official Court file, and being otherwise fully advised makes the following findings of fact and conclusions of law:

A. The Defendant was charged with Domestic Violence. (Exhibit A, Information). On June 16, 2022, the Defendant entered a plea on the amended charge of Battery.

B. On September 16, 2022, the Court accepted the Defendant's plea of nolo contendere on one count of Battery and on the same date, adjudicated him guilty and sentenced him to serve 60 days in the custody of the Brevard County Jail with a jail credit of three days. (Exhibit B, Judgment of Conviction).

C. On October 20, 2022, the Defendant filed the current motion to withdraw plea. (Exhibit C, Motion). The State filed a response (Exhibit D, State's Response) after the Court entered an Order. (Exhibit E, Order).

D. The Defendant's Motion to Withdraw Plea filed on October 20, 2022 is denied as untimely. *See Griffin v. State,* 114 So. 3d 890, 899 (Fla. 2013) [38 Fla. L. Weekly S329a]; *Smith v. State,* 113 So. 3d 110, 111 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1100a] (thirty day time limit under 3.170(1) is jurisdictional and dismissal is warranted).

E. The allegations of ineffective assistance of counsel in the Motion can be raised in a timely filed post-conviction motion pursuant to Fla. R. Crim. P. 3.850. The Defendant's Motion was not made under oath, as required by rule 3.850(c) and facially insufficient. *See Jones v. State,* 143 So. 3d 1102, 1103 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1610a]. Accordingly, it is

ORDERED AND ADJUDGED:

1. The Defendant's Motion to Withdraw Plea is **DENIED** without prejudice to file a timely sworn and facially sufficient motion for postconviction relief pursuant to Florida Rules of Criminal Procedure 3.850.

2. The Defendant has the right to appeal this Order within thirty (30) days of the date of its rendition.

* * *

Criminal law—Immunity—Self-defense—Motion for declaration of immunity and dismissal is denied—Defendant's testimony that he acted in self-defense in striking neighbor whom he believed was about to strike him is impeached by his omission of any mention of self-defense in pre-arrest statement to investigating officer

STATE OF FLORIDA, Plaintiff, v. ROBERT STAERK, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. Case No. 05-2022-MM-011233-A. November 12, 2022. David E. Silverman, Judge. Counsel: Christine Cavagnaro, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Patrick J. Landy, Jr., West Melbourne, for Defendant.

Order Denying Amended Motion for Declaration of Immunity and Dismissal

This cause coming before the Court for hearing on the Amended Motion for Declaration of Immunity and Dismissal filed by the Defendant and the parties and counsel having appeared upon due notice and the Court having received and considered sworn evidence adduced at the hearing and subject to cross-examination and the Court having considered the argument of the Assistant State Attorney and the Counsel for the Defendant and the Court having been otherwise advised in the premises, the Court hereby finds as a matter of fact and concludes as a matter of law, as follows.

The issue is whether the State overcame the Defendant's claim of self-defense by clear and convincing evidence, within the meaning of § 776.032(4), Fla. Stat.

The incident resulted from an argument between two neighbors over parking on the cul du sac. The evidence established that Mr. Staerk struck Mr. Leclaire, knocking Mr. Leclaire's glasses off his head.

Mr. Staerk attested that he knocked off the glasses believing that he was about to be struck, as a result of a provocative movement by Mr. Leclaire. Mr. Leclaire denied making any such movement and attested that his hands were in his pockets before he was struck. The evidence did not indicate the existence of any other eyewitness, any physical evidence or any videorecording of the incident.

In speaking with an investigating officer shortly afterward, Mr. Staerk's description of the incident omitted self-defense. Mr. Staerk failed to describe the alleged movement by Mr. Leclaire or his alleged belief that he was about to be struck.

Due process under the United States Constitution does not preclude the use of pre-*Miranda* silence, "as such silence does not stem from the state's inducement of silence through *Miranda* warnings." 14B Fla. Jur. 2d, *Criminal Law—Procedure,* § 1030 [Footnote omitted]. Under the federal constitution, "a defendant's pre-arrest, pre-*Miranda* silence about a salient, material fact may be used

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to impeach that defendant's testimony at trial." Joseph C. Bodiford, *Evidence in Florida* (12th Ed. 2022), Chapter 6, *Impeachment,* published by The Florida Bar.

Florida law is consistent with federal law in that prearrest silence can be used to impeach inconsistent trial testimony where, "the prior silence occurred at a time when it would have been natural for the defendant to deny the accusations made against him." *State v. Hoggins,* 718 So. 2d 761, 771 (Fla. 1998) [23 Fla. L. Weekly S467a]. See, *Ferrari v. State,* 260 So. 3d 295 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2593b] holding that impeaching cross-examination questions were proper where the directed at inconsistent pre-arrest, pre-*Miranda* silence. See also, *Knight v. State,* 225 So. 3d 661 (Fla. 2017) [42 Fla. L. Weekly S133a].

Mr. Staerk's silence was considered by this Court only for impeachment, however, it substantially impaired the credibility of his hearing testimony. Given this impairment, and the clarity and precision of the recollection of Mr. Leclaire and the credibility of his testimony, the Court finds and concludes that the State has overcome the defense of self-defense by clear and convincing evidence.

Therefore, the said Amended Motion for Declaration of Immunity and Dismissal is **denied**.

* * *