Volume 30, Number 12, April 28, 2023

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 713-784

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.

- **TORTS—AUTOMOBILE ACCIDENT—DERIVATIVE NEGLIGENCE. A circuit court judge granted summary judgment in favor of the defendant on plaintiffs' derivative negligence claim against a trucking company that employed the truck driver involved in the accident on which the plaintiffs' claims were based. The court concluded that a derivative negligence theory of liability was concurrent to the plaintiffs' vicarious liability cause of action against the employer and, therefore, not permitted under Florida law.** *UNGERICHT v BUTLER. Circuit Court, Second Judicial Circuit in and for Gadsden County. December 9, 2022. Full Text at Circuit Courts-Original Section, page 727a.*

- **MUNICIPAL CORPORATIONS—ORDINANCES—BEACHFRONT PROPERTY. A town was granted judgment on the pleadings on multiple counts of a complaint alleging that an ordinance prohibiting interference with beachgoers' customary use of dry sand beach areas in the town constituted an unconstitutional taking and inverse condemnation and was not properly adopted.** *DIRTY DUCK 16004 LLC v. TOWN OF REDINGTON BEACH. Circuit Court, Sixth Judicial Circuit in and for Pinellas County. February 3, 2023. Full Text at Circuit Courts-Original Section, page 735b.*

FLW SUPPLEMENT (ISSN10684050) is published monthly by Judicial and Administrative Research Associates, Incorporated, 1327 North Adams Street, Tallahassee, FL 32303. All rights reserved. Subscription price is $275 per year plus tax. Internet subscription available at www.FloridaLawWeekly.com. Periodical postage paid at Tallahassee, FL. POSTMASTER: Send address changes to FLW Supplement, P.O. Box 4284, Tallahassee, FL 32315. Telephone (800)

FLW SUPPLEMENT

CASES REPORTED.

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

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

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20CIR 10	Circuit Court - Original (20th Circuit, page 10)
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M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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MEDIATION

MUNICIPAL CORPORATIONS

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TRAFFIC INFRACTIONS

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Tyler v. State, Department of Highway Safety and Motor Vehicles. Circuit Court, Sixth Judicial Circuit (Appellate), Pasco County, Case No. 2021-CA-000068. Circuit Court Order at 30 Fla. L. Weekly Supp. 137a (July 29, 2022). Quashed at 48 Fla. L. Weekly D684a

* * *

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CIRCUIT COURTS—APPELLATE

Traffic infractions—Hearings—Nonappearance of defendant—Hearing officer erred in failing to hold hearing on motion to vacate order adjudicating defendant guilty of traffic infraction after defendant failed to appear at zoom hearing to determine whether defendant' claim that failure to appear was due to technological problems constituted excusable neglect

TIMOTHY HARRISON BOYETT, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 5th Judicial Circuit (Appellate) in and for Lake County. Case No. 2021-AP-02. L.T. Case No. 2020-TR-23045. July 1, 2022. Appeal from the County Court in and for Lake County, Hearing Officer Norman C. Polak. Counsel: Charles D. Waller, Waller Law, P.A., Dade City, for Appellant. Jonathan Olson, Assistant State Attorney, Office of the State Attorney, Tavares, for Appellee.

OPINION

(TATTI, A., J.) Appellant appeals the Hearing Officer's order denying Appellant's motion to vacate the order adjudicating Appellant guilty of violating Fla. Stat. § 316.075(1)(c)1 by failing to yield while turning on a steady red light. Because we find the Hearing Officer erred by failing to hold a hearing on Appellant's motion to vacate order, we reverse.

Appellant was cited for violating Fla. Stat. § 316.075(1)(c)1 by failing to yield while turning on a steady red light and requested a court hearing. Appellant's case was originally set for a zoom hearing on June 24, 2021; however, Appellant and the Florida Highway Patrol Trooper were unable to connect. The hearing was reset for August 12, 2021, again on zoom. At the hearing, the Florida Highway Patrol Trooper appeared while Appellant failed to appear. The Hearing Officer proceeded with the hearing, heard evidence from the Florida Highway Patrol Trooper, and, thereafter, adjudicated Appellant guilty. On August 17, 2021, Appellant, through counsel, filed a motion to vacate order, cited to Fla. R. Civ. P. 1.540, and claimed technical difficulties resulting in his inability to enter the zoom hearing constituted excusable neglect. On August 18, 2021, the Hearing Officer denied Appellant's motion.

Fla. R. Traf. Ct. 6.450(g) states if a defendant fails to appear for a hearing, the hearing official may proceed with the hearing, determine whether the infraction was committed, and impose a penalty as if the defendant had attended the hearing. "In the interests of justice, the court may vacate the judgment upon a showing of good cause by the defendant." Fla. R. Traf. Ct. 6.450(g). Although the Florida Rules of Traffic Court failed to define "good cause," Fla. R. Civ. P. 1.540(b) provides guidance. *See Perez v. State*, 16 Fla. L. Weekly Supp. 291a (Fla. 9th Cir. February 24, 2009); *McGuinness v. State*, 6 Fla. L. Weekly Supp. 468b (Fla. 11th Cir. May 7, 1999). Fla. R. Civ. P. 1.540(b) allows a court to "relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect. . . ." A party's claim that they failed to appear for a zoom hearing due to technological problems may constitute excusable neglect. *See Burke v. Soles*, 326 So. 3d 83 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1854a]. Accordingly, the Hearing Officer erred in failing to hold a hearing on Appellant's motion.

REVERSED AND REMANDED. (TAKAC, M., and EINEMAN, T., JJ., concur.)

* * *

Traffic infractions—Knowingly driving while license suspended—Dismissal—Trial court erred in granting motion to dismiss where there was disputed issue of material fact as to whether defendant lacked knowledge of suspension of her Florida driver's license because intervening issuance of Georgia license caused her to believe her Florida license was no longer suspended

STATE OF FLORIDA, Appellant, v. LASHONDA NAKEYA OWENS, Appellee. Circuit Court, 8th Judicial Circuit (Appellate) in and for Alachua County. Case No. 01-2020-AP-0003. L.T. Case No. 01-2019-CT-001719. November 25, 2020. An Appeal from the Alachua County Court, Walter M. Green, Judge. Counsel: Joseph A. Rozas, Assistant State Attorney, for Appellant. Luis D. Rodriguez, Assistant Public Defender, for Appellee.

(SUSANNE WILSON BULLARD, ROBERT K. GROEB, and DENISE R. FERRERO, JJ.)

ORDER ON APPEAL

(PER CURIAM.) Appellant seeks review of a final order of dismissal. Appellant asserts that the trial court erred by resolving a material disputed fact in favor of Appellee.

Appellee was charged with knowingly driving on a suspended license or driving privilege in the state of Florida in violation of § 322.34(2), Fla. Stat. (2019). A motion to dismiss was filed in open court alleging that Appellee did not have knowledge that her driving privilege was suspended in Florida. Appellee stated that she received a driver's license in Georgia in 2017. Since the Georgia license was obtained after the suspension of her Florida driving privilege, Appellee argued that it constituted an intervening event which led her to believe her driving privilege was no longer suspended in Florida. The trial court granted the motion to dismiss.

Florida Rule of Criminal Procedure 3.190(c)(4) permits a court to entertain a motion to dismiss at any time if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. However, "[t]he State need only establish a prima facie case and "is entitled to the most favorable construction of evidence, and all inferences should be resolved against the defendant" ". *See State v. Hinkle,* 970 So.2d 433, 434 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2825a] (citing *State v. Pasko,* 815 So.2d 680, 681 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D765c]). While it is possible to conclude that Appellee did not have knowledge of the Florida suspension based on the issuance of a Georgia license, this is a material disputed fact improperly construed in Appellee's favor by the trial court. Accordingly, the final judgment is **REVERSED** and the case **REMANDED** for further proceedings consistent with this opinion.

* * *

Counties—Ordinances—Constitutionality—State preemption—Noise control—Trial court erred in concluding that ordinance regulating nighttime operation of airboats impacted a fundamental constitutional right to use and enjoyment of Public Trust so as to be subject to strict scrutiny analysis and in declaring ordinance unconstitutional under strict scrutiny analysis—Because remaining issues are dispositive, whether ordinance passes constitutional muster under rational basis test not addressed—However, ordinance is preempted by state law—Legislature implicitly expressed will to be sole regulators of vessel engine noise through sections 327.391 and 327.65, and county ordinance regulating airboat operation does not conform to language set forth in statute for permissible county ordinances establishing additional regulations—Ordinance is in conflict with state law by adopting stricter noise pollution standard for airboats than allowed by state law and discriminating against airboats without approval by extraordinary majority of full county commission

ALACHUA COUNTY, a charter county and political subdivision of the State of Florida, Appellant, v. WILLIAM SCHAUS, Appellee. Circuit Court, 8th Judicial Circuit (Appellate) in and for Alachua County. Case No. 01-2020-AP-0002. L.T. Case No. 01-2019-IN-000247. September 30, 2020. An Appeal from the Alachua County Court, Judge Kristine Van Vorst. Counsel: Corbin F. Hanson, Senior Asst. County

Attorney, for Appellant. Jesse Smith, for Appellee.

(DAVID P. KREIDER, JAMES P. NILON, and CRAIG C. DETHOMASIS, JJ.)

ORDER ON APPEAL

(PER CURIAM.) Appellant seeks review of an order declaring that an Alachua County ordinance[1] is unconstitutional, preempted by Florida statutes, and in conflict with Florida statutes. Pure questions of law, such as the constitutionality of a law, are reviewed de novo. *Putnam Cmty. Med. Ctr. v. Florida Birth-Related Neurological Injury Comp. Ass'n,* 204 So.3d 598, 601 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2702b].

Constitutionality

Appellant argues that the trial court erred by concluding that the Nighttime Airboat Curfew Ordinance impacted a fundamental right (i.e. use and enjoyment of the Public Trust) and, therefore, was subject to strict scrutiny analysis. We agree. "Assuming that the right to navigation is a constitutional right in the sense in which [the parties] use the term, this does not automatically make it a *fundamental* right meriting strict scrutiny." *Murphy v. Department of Natural Resources,* 837 F.Supp. 1217, 1220 (S.D. Fla. 1993). Other uses of the Public Trust, such as fishing, have similarly been held not to be a fundamental right. *Lane v. Chiles,* 698 So.2d 260, 263 (Fla. 1997) [22 Fla. L. Weekly S506a]. Therefore, it was error to declare the Ordinance unconstitutional under a strict scrutiny analysis.

As this Court finds the remaining issues dispositive, we decline to consider whether the Ordinance passes constitutional muster under a rational basis test.

Preemption

"Counties in Florida are given broad authority to enact ordinances. . .The legislature can preempt that authority and may do so either expressly or by implication." *Phantom of Clearwater, Inc. v. Pinellas County,* 894 So.2d 1011, 1018 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D205a]. Appellee has conceded that the Ordinance is not expressly preempted by any statute.

"Implied preemption should be found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Tallahassee Memorial Regional Medical Center v. Tallahassee Medical Center,* 681 So.2d 826, 831 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1611g]. "The scope of the preemption should also be limited to the specific area where the Legislature has expressed their will to be the sole regulator." *Id.*

The Florida Legislature implicitly expressed their will to be the sole regulator of vessel engine noise through statutes such as § 327.391, Fla. Stat. ("Airboats regulated") and § 327.65, Fla. Stat. ("Muffling Devices"). Of particular significance is § 327.65(2)(a), Fla. Stat., which States:

> Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. 327.60(2), adopt by county ordinance the following regulations:
>
> 1. No person shall operate or give permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.
>
> 2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

While this statute allows localities to impose additional noise pollution and exhaust regulations, it specifies the exact language they must use. "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." *Moonlit Waters Apartments, Inc. v. Cauley,* 666 So.2d 898, 900 (Fla. 1996) [21 Fla. L. Weekly S41b]. By stating which regulations can be adopted by county ordinance, it implies that counties cannot adopt any other ordinances concerning noise pollution regulation. The Nighttime Airboat Curfew Ordinance at issue does not conform to the language set forth in § 327.65(2)(a), Fla. Stat.

Appellant argues that the Ordinance is not preempted because it regulates airboat operation, not noise pollution, and does not set a different maximum sound level as the one proscribed in § 327.65(2)(a)(1), Fla. Stat. Given that the stated purpose of the Ordinance is to protect "the disturbance of sleep, peace, and welfare of residents caused by the excessive noise generated by airboats," we find that Appellant's argument is disingenuous. The stated purpose and practical effect of the Ordinance is to set a maximum sound level of 0 dB A from 7PM to 7AM for airboats. Therefore, the Ordinance intrudes on this specific area where the Legislature has expressed their will to be the sole regulator and is preempted by state law.

Conflict

"[I]f an area of law is not preempted by the state law, then a city can pass ordinances concurrently on subjects regulated by state statute. But an ordinance, which is inferior to a state statute, cannot forbid what the statute expressly licenses, authorizes or requires. Nor may it authorize what the statute forbids." *F.Y.I. Adventures, Inc. v. City of Ocala,* 698 So. 2d at 584-85.

As discussed in the previous section, the Ordinance imposes a stricter noise pollution standard for airboats than that expressly allowed by § 327.65, Fla. Stat. Therefore, the full Ordinance is in conflict with state law.

Additionally, § 327.60(2)(e), Fla. Stat. prohibits adoption of any ordinance or local regulation that discriminates against airboats, unless it is adopted by a two-thirds vote of the governing body enacting such ordinance. By limiting the curfew to airboats, the Ordinance unquestionably discriminates against airboats.

The governing body of Alachua County is the five-member board of county commissioners. *Alachua County Code* Sec. 2.2(A). The Ordinance was adopted and enacted by the Commission by a vote of 4-0, which is above the two-thirds threshold required for an ordinance discriminating against airboats. The enactment of the Ordinance complies with the plain language of § 327.60(2)(e), Fla. Stat.

However, there was a second vote by the Commission in 2018 which modified Alachua County Code Sec. 114.09(b)(3)-(4), the enforcement clauses of the Ordinance. If an extraordinary majority is required by Florida Statutes, the affirmative vote of an extraordinary majority of the full Commission required, *whether all members are present or not. See* Alachua County Rules of Procedure for Meetings, Section VII(E). The vote to modify Alachua County Code Sec. 114.09(b)(3)-(4) was approved by a vote of 3-1. 3 votes out of 5 is only 60%, which is below the two-thirds required by § 327.60(2)(e). Therefore, Alachua County Code Sec. 114.09(b)(3)-(4) are in conflict with state law.

Conclusion

The Nighttime Airboat Curfew Ordinance is invalid because it is impliedly preempted by and in conflict with state law. Accordingly, the order of dismissal is **AFFIRMED**.

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[1]Alachua County Code Sec. 114.09. - Nighttime airboat curfew.
(a) The most appropriate solution to the disturbance of sleep, peace, and welfare of

residents caused by the excessive noise generated by airboats is to impose a nighttime curfew on airboats.

(b) Therefore:

(1) No person shall operate an airboat in Alachua County between 7:00 p.m. and 7:00 a.m., with exceptions for government airboats operated in the line of duty by authorized personnel, and private airboats authorized by law enforcement personnel during specific emergency incidents.

(2) Airboat means a vessel that is powered by an internal combustion engine with an airplane-type propeller mounted above the stern, used to push air across a set of rudders. Operate means to be in command of, or in physical control of, an airboat.

(3) This section shall be enforced by any code enforcement officer of Alachua County or any duly authorized law enforcement officer having authority through any enforcement mechanism authorized in the Alachua County Code, including but not limited to injunction, code violation, civil action or misdemeanor violation.

(4) As established in section 24.16, a first violation shall carry a Class IV penalty and subsequent violations shall carry Class V penalties for each violation.

(Res. No. 2010-113, § 1(Exh. A), 11-23-10; Ord. No. 2018-20, § 1, 9-25-18)

* * *

Licensing—Driver's license—Cancellation—Appeals—Certiorari—Exhaustion of administrative remedies—Because licensee never requested hearing to review cancellation of her driver's license and no final order has been rendered by Department of Highway Safety and Motor Vehicles, petition for writ of certiorari is denied

MARIAJOSE GENSOLLEN PAZOS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-48-AP-01. December 21, 2022. On Petition for Writ of Certiorari from an August 9, 2022, Order of Cancellation of Petitioner's Driver's License by the Florida Department of Highway Safety and Motor Vehicles. Counsel: Anthony M. Genova, Genova Family Law, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, for Respondent.

(Before TRAWICK, SANTOVENIA, and WALSH, JJ.)

OPINION

(TRAWICK, J.) This matter comes before this Court on a Petition for Writ of Certiorari filed by Mariajose Gensollen Pazos ("Petitioner"). Petitioner's driver's license was cancelled by the State of Florida, Department of Highway Safety and Motor Vehicles ("Department") because the Department was unable to verify her Approval Notice I-601A had been approved in the USCIS database. On September 6, 2022, Petitioner filed the instant Petition.

Factual Background

On August 9, 2022, Petitioner received the Department's Order of Cancellation informing her that "your driver license (sic) and/or identification card is cancelled indefinitely by the state (sic) of Florida, effective 9/7/2022" and explaining that "[y]our Driver License/ID (sic) is due to be cancelled because we are unable to verify your Approval Notice I-601A has been approved in the USCIS Database (sic)."

Petitioner requests a I-601A waiver because she remained in the United States for more than a year beyond a previously- authorized period of stay in nonimmigrant status. She began this process on May 27, 2020, but she contends that the process has been delayed through no fault of her own. Petitioner maintains that processing times for I-601A waiver applications have increased from 4.6 months in 2017 to 30.7 months in 2022.

Discussion

Section 322.271(1)(a). Fla. Stat. provides, in relevant part, that:

> Upon the suspension, cancellation, or revocation of the driver license of any person as authorized or required in this chapter, . . . the department shall immediately notify the licensee and, upon his or her request, shall afford him or her an opportunity for a hearing pursuant to chapter 120, as early as practicable within not more than 30 days after receipt of such request, in the county wherein the licensee resides, unless the department and the licensee agree that such hearing may be held in some other county.

Rule 15A-1.0195, Fla. Admin. Code (Department of Highway Safety and Motor Vehicles—Division of Driver Licenses) states:

> Any person whose driving privilege has been cancelled, suspended or revoked, may petition the Department for an administrative review to present evidence showing why their driving privilege should not have been cancelled, suspended or revoked. Application for such review shall be made by personal letter specifying the action for which the review is requested, and the documents in the possession of the Department which the licensee requests to review.

A petition for writ of certiorari is properly before this Court only on a final agency action after the exhaustion of administrative remedies. Pursuant to § 322.271, Fla. Stat., this Court finds that the Petitioner has failed to exhaust her administrative remedies since she has never requested a hearing. Instead, once she received a notice of suspension, she filed a motion for rehearing. Petitioner should consider the Department's suggestion that she file a request for a show cause hearing with the Bureau of Administrative Review, as authorized by Rule 15A-1.0195, Fla. Admin. Code, when she arguably has sufficient evidence to sustain her burden of proof before the hearing officer. Should the Petitioner fail to receive a timely hearing upon such a request, a petition for writ of mandamus may be appropriate.

Additionally, the law requires a party seeking certiorari relief to file the petition within 30 days after the rendition of the order to be reviewed. Fla. R.App. P. 9.100(c)(1). "An order is rendered when a signed, written order is filed with the clerk of the lower tribunal." Fla. R.App. P. 9.020(e) & (h). We have certiorari jurisdiction only to address an order rendered by the Department. As of yet, there is no order below from which we could grant certiorari relief.

For the foregoing reasons, the Petition for Writ of Certiorari is **DENIED.** (SANTOVENIA and WALSH, JJ., concur.)

* * *

Counties—Code enforcement—Business licensing—Refusal to allow inspection by county code enforcement officers—Advertising services outside scope of licenses—Hearing officer—Departure from neutrality—Hearing officer departed from neutrality by making statements indicating predisposition to rule in favor of a business owner because of hearing officer's own negative experience with county code enforcement officers—County was not afforded due process where hearing officer opted for "split-the-baby" approach, affirming one citation and reversing the other, rather than basing decision regarding each citation on evidence—Hearing officer further deprived county of due process by making statements indicating bias against county lawyer—Hearing officer departed from essential requirements of law by concluding that inspection of vehicle repair shop was complete when inspectors were able to view vehicles through open garage doors, although they were not allowed to enter garage, and by entering written decision that stated the opposite of the hearing officer's verbal ruling

MIAMI-DADE COUNTY DEPARTMENT OF REGULATORY AND ECONOMIC RESOURCES, Appellant, v. ALL CAR CENTERS ENTERPRISES, INC., Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2022-000045 AP 01. L.T. Case Nos. 2022-H007991 and 2022 H007992. February 17, 2023. On appeal from a decision of the Hearing Officer Fernando Rodriguez. Counsel: Zach Vosseler, Assistant County Attorney for Geraldine Bonzon Keenan, Miami-Dade County Attorney, for Appellant. Anthony J. Scremin, Scremin Law, for Appellee.

(Before TRAWICK, WALSH, and SANTOVENIA, JJ.)

(TRAWICK, J.) On January 27, 2022, County Enforcement Officer Max Freiria visited Appellee's motor vehicle repair shop to conduct an inspection pursuant to Miami-Dade County's Motor Vehicle Repair Ordinance, Miami-Dade County Code, Chapter 8A, Article

VIIA. Freiria was accompanied by Louis Gonzalez, an enforcement officer in training. The purpose of the inspection was to ensure that vehicle repair was being conducted within the scope of the shop's license. When Officer Freiria spoke to a shop employee, Alexander Goin, Goin would not allow access to the shop's work area to view the automobiles being repaired. The officers were only allowed access to the office of the shop, but the shop employee would not provide any records of the vehicles in the shop. When Freiria asked Goin to see the shop's licenses, Goin pointed to all of the licenses on the wall of the shop.

Rather than allow the officers to conduct an inspection, Goin called the shop owner, Luis Arboleda, who was driving to the shop and who said he was 15 minutes away. When Goin asked the officers to wait for the owner, Freiria replied that the owner did not have to be present for an inspection of the shop, and that the inspection would not be performed over the telephone. Because Freiria was not able to access the work area, he issued Appellee the Inspection Citation, Civil Violation Notice No. H007991, for violating County Code section 8A-171(a).

Licensing and Advertising Citation

In August of 2021, Arboleda completed an application for motor vehicle repair business registration on behalf of All Car Centers for the following repair categories: engine repair, automatic transmission, oil change, tire installation, and alarm radio installation. The County issued licenses through August of 2022 for automatic transmission, engine repair, muffler installation, and oil changes. The shop was not licensed to provide brake services, alignment services, or electrical work.

Freira photographed a sign hanging above the garage at the front of the shop advertising oil changes, tires, brakes, auto repair, auto accessories, wheels, alignment, and electrical work. Arboleda admitted that licenses for brake services, alignment services, and electrical work were expired at the time of the inspection. He said that he was in the process of renewing them, but was side-tracked by a COVID-related hospitalization. Freiria determined that the shop was advertising beyond the scope of its licenses, in violation of County Code section 8A-161.6, and as a result issued the Licensing/Advertising Citation, Civil Violation Notice No. H007992.

Administrative Hearing

Appellee appealed the citations, and an administrative hearing was held before Hearing Officer Fernando Rodriguez ("the HO") on July 20, 2022. Officers Freiria and Gonzalez testified as representatives of the County Department of Regulatory and Economic Resources ("the Department"). Arboleda testified on behalf of the Appellee. At the conclusion of the hearing, the HO announced his rulings. As to the inspection citation, he stated:

> Two things that I did not like, that, you know, going into the shop, getting into the office and this and that. I think—I think his business is a business for the County. They pay taxes. They pay their licenses and this and that. So I think the County overstepped their authority by doing what they did, so therefore, he's not guilty.

The HO appeared initially to find Appellee not guilty on the Licensing/Advertising Citation as well, but when the Department's representative asked a question about that, the HO reversed himself:

> I'll tell you what, let's do this, Mr. Arbolela, this is what I'm—I'm going to change my ruling. The H007991, he's guilty. And 7992, he's not guilty. How's that? Keep everybody happy. Is that okay with you? . . . The licensing, the licensing, you're not a 100—you're not 100% with the licensing, but the other stuff, I did not like their—and it's been done to me before by inspectors, so that's why I'm ruling for you, but the 991, your licensing is a little bit questionable. So let's leave it at that, and I think everybody is a winner here, okay?

In sum, the verbal rulings of the HO were that Appellee was not guilty of the Inspection Citation and guilty of the Licensing/Advertising Citation. Yet the HO told the clerk to affirm 7991 (the Inspection Citation) and reverse 7992 (the Licensing/Advertising Citation), the opposite of his verbal rulings. He did so even after the Department sought to correct his misstatements. The Department appeals the decision of the HO.

Standard of Review

A circuit court reviewing the final decision of an administrative hearing officer must determine: (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

Due Process Concerns

Here, the Appellant contends that the Department was not accorded due process because of statements made by the HO indicating that he was not neutral. The Department argues that the HO was predisposed to rule against the Department by making these types of declarations:

> 1. Before the Appellant had a chance to cross-examine Arboleda, the HO told Arboleda, "I've heard enough. I'm on your side."
>
> 2. The HO indicated that he ruled on the inspection citation in the Appellee's favor based on his own negative experience with County enforcement officers:
>
> You're not 100% with the licensing, but the other stuff, I did not like their—and it's been done to me before by inspectors, so that's why I'm ruling for you . . ."

To afford due process to a party to a quasi-judicial hearing, the quasi-judicial decision must be based on evidence submitted at the hearing. *Miami-Dade Cty. v. City of Miami,* 315 So. 3d 115, 126 (Fla. 3d DCA 2020) [46 Fla. L. Weekly D19a]. Hearing officers cannot base their decision on information that they may be privy to which is outside of the record. *Id.* Even if these comments are given a benign interpretation, and the HO was just trying to assist a pro se litigant, it still departs from an appearance of neutrality. *Marwan v. Sahmoud,* 306 So. 3d 248, 253 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1461b].

We also conclude that the Department was not afforded due process because the HO opted for a "split-the-baby" approach, affirming one citation and reversing the other, rather than basing his decision regarding each citation on the evidence before him:

> The H007991, he's guilty. And 7992, he's not guilty. How's that? Keep everybody happy. Is that okay with you? . . . So let's leave it at that, and I think everybody is a winner here, okay?

The HO's attempt to make "everybody a winner" is not proper if such a decision is not supported by the evidence on the record, *Miami-Dade Cty. v. City of Miami,* 315 So. 3d at 126.

Finally, the Department contends it was denied due process when the HO outwardly expressed animosity towards the Department's representative because she was a female attorney. At one point, he said:

> You're an attorney? I don't like attorneys, okay? I do not like attorneys. I know that.

He later referred to her derisively as "Ms. Lawyer Lady." Such statements were uncalled for and unprofessional, reflecting poorly on the HO. In sum, we conclude that the HO's partiality and unprofessional conduct deprived the Appellant of its right to due process.

Departures from the Essential Requirements of Law

We also find that the HO's decision departs from the essential requirements of the law. A decision departs from the essential requirements of law "when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " *Miami-Dade Cty. v. Omnipoint Holdings, Inc.,* 863 So. 2d 195, 199 (Fla. 2003) [28 Fla. L. Weekly S717a] (citations omitted). Also, a failure to apply the unambiguous language of a statute is a departure from the essential requirements of law. *Dep't of Hwy. Safety & Motor Vehicles v. Chakrin,* 304 So. 3d 822, 826 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2329a]. Here, the HO operated under the incorrect assumption that because the enforcement officers could see the rear ends or undersides of the vehicles in the work area from the open garage doors, that was enough for an inspection. Indeed, the HO stated that the officers had "overstepped their authority by doing what they did."

Contrary to the HO's conclusion, the Motor Vehicle Repair Ordinance provides that the premises of all motor vehicle repair shops shall be open for inspection for any purpose necessary for the enforcement and administration of the ordinance. Miami-Dade County Code § 8A-161.7(a). Freiria testified about the importance of inspecting the vehicles under repair to verify the type of repair, the work being done, and to ensure that the repairs match the records for each vehicle. Therefore, the HO erred in believing that the inspections were complete, thus departing from the essential requirements of law.

At the conclusion of the hearing, the HO verbally ruled that Appellee was guilty of the licensing/advertising citation, but not guilty on the inspection citation. But the written decision, as directed by the HO to the Clerk, states the opposite. This juxtaposition also departs from the essential requirements of the law.

Conclusion

As the Appellant was denied due process and the HO's decision departed from the essential requirements of the law, we **quash** the decision of the HO and remand for proceedings consistent with this opinion. (WALSH and SANTOVENIA, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Careless driving—Stop of licensee who swerved to avoid crashing into rear of stopped patrol vehicle and was unable to maintain single lane was lawful—Competent substantial evidence supported finding that officers had probable cause to arrest licensee after observing her swaggering and swaying, bloodshot eyes, slurred speech, and odor of alcohol—Officer's observations of licensee's impairment was not refuted by video footage depicting licensee at police station—Finding that licensee refused to sign informed consent form was supported by officer's statement on form—Hearing—Failure of subpoenaed witness to appear—Failure of breath testing officer to appear for second day of continued hearing does not require invalidation of license suspension where licensee elected to continue hearing without questioning officer—Statutory provision requiring invalidation of suspension if person who administered breath test fails to appear at hearing is not applicable since licensee refused to submit to breath test and failed to avail himself of opportunity to seek enforcement of subpoena

YUDELMIS A. LOREDO, Petitioner, v. FLORIDA DEPARTMENT OF HIGHWAY SAFETY, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-64-AP-01. L.T. Case No. L630-961-73-367-0. January 26, 2023. On Petition for Writ of Certiorari from The Florida Department of Highway Safety and Motor Vehicles Notice of Cancellation of Driver's License. Counsel: Joseph E. Nascimento, Ross Amsel Raben Nascimento, PLLC, for Petitioner. Christine Utt, General Counsel, and Elana Jones, Assistant General Counsel, DHSMV, for Respondent.

(Before TRAWICK, WALSH, and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) Petitioner Yudelmis Loredo requested an evidentiary hearing to challenge his license suspension after his arrest for driving under the influence. The following evidence was presented at hearings on September 29 and October 20, 2021.

In her arrest affidavit, Officer Melanie Alzate stated that she was standing outside of her patrol car processing a traffic stop on Ponce de Leon Boulevard when the Petitioner's car swerved to avoid striking the rear of her parked patrol car. She left the scene of the traffic infraction, drove after the Petitioner, and observed his car straddling two lanes. Officer Alzate testified that she stopped the Petitioner for careless driving.

When the Petitioner got out of his car, he looked "dazed and confused." He was swaying "side to side and front to back." He had bloodshot, watery eyes and a strong odor of alcoholic beverage coming from his mouth. He refused to perform roadside sobriety exercises and was arrested. Officer Smith, who had been called to administer DUI testing, stated in the DUI testing and Implied Consent forms that the Petitioner refused to blow into the breathalyzer and refused to sign the Implied Consent form.

The Petitioner testified that while driving, he passed by police officers who had stopped another car on the road. He testified that he swerved to avoid the officers standing by the stopped vehicle. To rebut the evidence that he was staggering, Mr. Loredo testified that he has a physical impairment that affects his gait and denied that he was impaired the night he was arrested. He testified that the video taken while he was in the police sally port and while he was under observation showed that he did not sway, stumble, or fall.

The Petitioner claimed that he did not refuse to sign the Implied Consent, nor did he refuse to give a breath sample. He admitted that when asked to give a sample, he asked the duty officer, "If I blow, will you let me go?" He explained that he was joking.

Officer Smith, the DUI testing witness, appeared pursuant to subpoena to testify at the September 29, 2021 hearing but had not seen the video footage depicting the Petitioner in the police station. The hearing officer granted the Petitioner's motion for continuance to give Officer Smith the opportunity to view the video footage. At a second hearing on October 20, 2021, Officer Smith failed to appear. The hearing officer stated that he would hold the order for two days to give the officer the opportunity to show just cause for failure to appear. If the officer showed just cause, the hearing would be continued. If not, the hearing officer offered the Petitioner a ten-day period within which to enforce the subpoena and give notice that the subpoena had been enforced. The Petitioner failed to take any further steps.

This Court's scope of review of an administrative decision is limited to "whether the administrative agency accorded the parties procedural due process, whether it observed the essential requirements of law, and whether the agency's findings and judgments are supported by competent substantial evidence." *Department of Highway Safety and Motor Vehicles v. Cochran*, 798 So. 2d 761, 762 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2569a], *citing Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000) [25 Fla. L. Weekly S461a]; *Haines City Community Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

The Petitioner makes four arguments. First, the Petitioner argues that the stop of his vehicle was unlawful. Second, the Petitioner argues that his arrest is not supported by competent, substantial evidence. Third, the Petitioner argues that there was no evidence that the Petitioner was read the Implied Consent form. Fourth, the petitioner argues that it was error to sustain his suspension when Officer Smith failed to appear at the continuation of the review hearing.

Reasonable Suspicion to Stop the Petitioner's Vehicle

The Petitioner argues that the officer's observations of his vehicle straddling a single lane does not constitute reasonable suspicion for a vehicle stop. We treat this as an argument that the hearing officer departed from the essential requirements of law in finding reasonable suspicion for the stop. We find no such departure, however, because the Petitioner's factual premise for his argument is inaccurate. The evidence presented of the Petitioner's driving pattern was far more egregious than simply failing to maintain a single lane.

The officer stopped the Petitioner for careless driving, after he swerved to avoid crashing into the rear of a stopped patrol vehicle. Then, after the officer engaged pursuit, the officer observed the Petitioner straddling two lanes and unable to maintain a single lane. There was ample evidence in the record to support the conclusion that there was reasonable suspicion for the stop.

Even without the testimony that the Petitioner almost hit a parked patrol vehicle, weaving within a single lane supports reasonable suspicion to stop a car. *See Roberts v. State*, 732 So. 2d 1127 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D533a]. So does crossing the white line on the right side of the road several times within a mile, even when there is no indication that other vehicles were affected by the driving pattern. *Yanes v. State*, 877 So. 2d 25, 26 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a]. We conclude that the hearing officer did not depart from the essential requirements of law.

Arrest for DUI Supported by Competent, Substantial Evidence

The Petitioner argues that his arrest for DUI was unsupported by competent, substantial evidence. We disagree. The record is replete with competent evidence establishing the elements of a DUI. The hearing officer may rely not only upon the testimony and evidence presented but also upon documentary evidence submitted by law enforcement, including the contents of a crash report which is deemed self-authenticating. *See* § 322.2615, Fla. Stat. (2021); Rule 15A-6.013(2), Fla. Admin. Code.

The Petitioner was observed to be swaying and staggering, with bloodshot eyes and slurred speech. He stepped outside of his car looking "dazed and confused." The officer smelled a strong odor of an alcoholic beverage. The Petitioner was driving carelessly, almost colliding with the rear of a patrol car. At the hearing, he testified that he has a disability which causes him to stagger and affects his gait. He then claimed however that the video footage shows that while he was under observation, he did not stagger or fall. Apparently, his natural condition affecting his gait is intermittent.

The test for competent substantial evidence is not whether there is competing evidence supporting a contrary conclusion for the decision maker. The test is whether there exists *any* competent substantial evidence to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.*, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]. In other words, we do not re-weigh the evidence.

The Petitioner cites *Wiggins v. Fla. Dept. of Hwy. Safety and Motor Vehicles,* 209 So. 3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a] for the principle that a circuit court in its review capacity may reject an officer's testimony as competent, substantial evidence if video footage directly contradicts such testimony. *Wiggins* is inapplicable. There was nothing in the video taken of the Petitioner in the police station that directly refuted Officer Alzate's observations of his impairment—his flushed face, slurred speech, staggering, looking "dazed and confused," driving pattern and strong smell of an alcoholic beverage. We find that the hearing officer's conclusions were supported by competent, substantial evidence.

Competent Substantial Evidence that Petitioner Refused to Sign the Implied Consent Form

The Petitioner next claims that there is no evidence to refute his testimony that he was never asked to sign the implied consent form, and therefore, the hearing officer's conclusion that he refused to sign is unsupported. Again, he is incorrect. The DUI paperwork signed by the testing officer states that the Petitioner refused to sign. This is competent, substantial evidence. *See* § 322.2615, Fla. Stat.

No Departure from the Essential Requirements of Law for Failure of Witness to Appear

The Petitioner's last argument is that the order sustaining his license suspension should be quashed because Officer Smith failed to appear for the continuation of the hearing on October 20, 2021. We treat this as an argument that the hearing officer departed from the essential requirements of law.

Petitioner argues that under section 322.2615(11), Florida Statutes, if the breath testing technician fails to appear pursuant to subpoena, the Department is required to invalidate the suspension. The statute provides as follows:

> The formal review hearing may be conducted upon a review of the reports of a law enforcement officer or a correctional officer, including documents relating to the administration of a breath test or blood test or the refusal to take either test or the refusal to take a urine test. However, as provided in subsection (6), the driver may subpoena the officer or any person who administered or analyzed a breath or blood test. If the arresting officer or the breath technician fails to appear pursuant to a subpoena as provided in subsection (6), the department shall invalidate the suspension.

First, it should be noted that the officer did appear at the duly noticed suspension hearing held on September 29, 2021. The officer was not questioned, however, by the Petitioner's counsel, because the Petitioner wanted the officer to view the video evidence. The hearing officer *granted the Petitioner's request to continue the hearing*. Thus, there is no violation of the statute because Petitioner had every opportunity to question the officer about the implied consent and refusal, but opted instead to request a continuance.

Second, Section 322.2615(11) of the DUI statute states, "the driver may subpoena the officer or *any person who administered or analyzed a breath or blood test*." (emphasis added) Here, the DUI testing officer did not administer or analyze a breath test. The Petitioner refused to submit to a breath test. The statute is therefore inapplicable. *See Muchhala v. Fla. Dept. of Hwy. Safety and Motor Vehicles,* 324 So. 3d 62 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1437a], *reh'g denied* (Aug. 12, 2021) [46 Fla. L. Weekly D1822a].

Third, since Officer Smith was merely a witness and not a witness who administered a breath test, Petitioner failed to avail himself of the statutory remedy and failed to avail himself of the opportunity offered by the hearing officer to file a notice of seeking enforcement of the subpoena with the hearing officer within 10 days of the second hearing. Section 322.2615(6)(c), Florida Statutes states that "[t]he failure of a subpoenaed witness to appear at the formal review hearing is not grounds to invalidate the suspension." A party seeking enforcement of a subpoena "may seek enforcement of a subpoena . . . by filing a petition for enforcement in the circuit court." After obtaining the remedy of a continuance, the Petitioner could have enforced the subpoena, but did not.

We thus find that the hearing officer observed the essential requirements of law in upholding the license suspension.

Finding no error, the Petition for Writ of Certiorari is denied. (WALSH, TRAWICK, and SANTOVENIA, JJ., concur.)

* * *

Municipal corporations—Zoning—Conditional use—City commission erred in denying application for conditional use for medical marijuana dispensary—City staff's recommendation that application be approved constituted competent substantial evidence of compliance with comprehensive plan and city codes, and expressions of opposition to application by commission members were subjective, speculative, and lacking foundation—Moreover, city departed from essential requirements of law by basing decision on proximity of dispensary to school because distance to school was further than that required by statute—Applicant was denied due process by personal bias of commission regarding use of corridor in which property at issue is located

TRULIEVE, INC., Petitioner, v. CITY OF OAKLAND PARK, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-006830. Admin. Hearing: April 6, 2022. January 11, 2023. Petition for Writ of Certiorari from Petitioner, Trulieve, Inc. Counsel: Ian G. Bacheikov, Akerman LLP., Miami, for Petitioner. Donald J. Doody, Coren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, for Respondent.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition and its Appendix, and the applicable law, the Petition for Writ of Certiorari is hereby **GRANTED** and the Final Order is hereby **QUASHED** for the reasons discussed below.

On July 17, 2020, Trulieve, Inc., a state licensed medical marijuana organization ("Applicant and Petitioner"), filed an application for conditional use approval for a medical marijuana dispensary facility to be located within the City of Oakland Park ("City and Respondent"). The application was reviewed by the City's Development Committee (DRC), which recommended for approval. The City, in the form of a Staff Report, confirmed the Applications compliance with the relevant codes and statutes, and recommended for approval of the same. Both the DRC and Staff Report found that the Application is consistent with the City's Comprehensive Plan and applicable City zoning regulations.

Following a denial of the Application by the Planning and Zoning Board ("the Board"), Petitioner, Trulieve, Inc., requested a hearing to appeal the decision. On April 6, 2022, the City Commission held a public hearing to address both the appeal of the Board's decision and to determine the approval or denial of Petitioner's conditional use application. Ultimately, the Commission denied the Application citing reasons thereof, failure by Applicant to establish that the use is in harmony with the purpose and intent of Section 24-165; that the purpose would not be detrimental; and that the purpose would be deemed desirable for the public convenience and welfare. As to the conclusions of law, the City concluded that the Applicant failed to establish by substantial competent evidence that the application for conditional use satisfied the criteria as set forth in Section 24-165 of the Code of Ordinances.

A Petition for Writ of Certiorari seeking review of the decision of an administrative agency is strictly limited to consideration of whether: (1) the parties were afforded procedural due process; (2) the essential requirements of law were observed; and (3) the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citing City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)).

Upon careful review of the record, this Court finds that the decision by the City's Commission in denying Petitioners Application was not supported by competent substantial evidence; did not adhere to the essential requirements of law; and violated Petitioner's procedural due process rights.

Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *See De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). The City alleges, that Applicant failed to provide competent substantial evidence that the application is in harmony with the adjacent uses. It argues that the Application did not meet the criteria of conditional use under the City's code section 24-165. The record reflects that the arguments as set forth by the City are based on a subjective vision and not on failure by Applicant to meet a particular requirement. In support of Petitioner, the record is replete with substantial competent evidence that Petitioner, within its application, followed the protocols as set therein and the same was scrutinized within the findings by the DRC and the City's Staff Report. The record demonstrates that the Staff Report contains a detail analysis of the City's four Conditional Use criteria and that an evaluation of the same resulted in the recommendation for approval of the Application. The record further shows that the recommendations for approval by both the DRC and the City's Staff Report was based upon a litany of information collected for the determination of compliance with the City's overall Comprehensive Plan, applicable codes, and various professional department opinions. In *Dusseau v. Metropolitan Dade County Bd. of County Commissioners,* 794 So. 2d 1270, (Fla. 2001) [26 Fla. L. Weekly S329a] the court held that:

> [O]nce the petitioner met the initial burden of showing that his application met the statutory criteria for granting such exceptions, "the burden was upon the [opposing party] to *demonstrate,* by *competent substantial evidence* presented at the hearing and made a part of the record, that the [special] exception requested by petitioner did not meet such standards and was, in fact, adverse to the public interest."

Id. at 1273 (citing *Irvine v. Duval County Planning Commission,* 495 So. 2d 167 (Fla. 1986). (emphasis added)

Courts have held that recommendations by city staff comprised by professional staff review constitute competent substantial evidence. Moreover, reiterate, that once compliance is confirmed the applicant has met their burden. *See Village of Palmetto Bay v. PalmerTrinity Private School, Inc.* 128 So. 3d 19, 27 (Fla. 3rd DCA 2012) [37 Fla. L. Weekly D1599c].

In contention, the City's objections are summarily based upon on ideology and idiosyncratic preference, the record shows that the reasons recited for the denial were premised upon "a feeling", a desire for "something else", the proposed project "just didn't seem to "fit"; all of which are derivative of a subjective point of view. The record is clear that the expressions in opposition to the Application, by both the City and the public, were subjective, speculative, and lacking foundation. As such, the City's decision to deny the Application was not supported by competent substantial evidence.

It is undisputed that the Application satisfied the conditions as set forth under Sec. 24-165 for Conditional uses. The record reflects that the City failed to apply the current city codes and applicable statutes in support of their denial, with particularity the Mayor, whom voiced his basis for denial as relating to that of a personal agenda. Therefore, instead of applying relevant code and mandated law, the Mayors' reasoning was more akin to that of a doctrinaire argument. In the case of *Alvey v. City of North Miami Beach,* 206 So. 3d 67 (Fla. 3rd DCA 2016) [41 Fla. L. Weekly D1028a], an appeal was sought, when the City had failed to apply its own ordinances in arriving to their decision as to the proposed application. The appellate court held that "[t]he law *inter alia,* will not and cannot approve a zoning regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will." (Citations omitted). The adverse holds true in the instant case, with the denial of the proposed application, in that, the record is clear, that individual desires without support of substantive legal reasoning, was the basis for the rejection of the project

proposal.

The City then argues that the proposed location of the dispensary would be situated 739.52 feet from a public charter school and as such was a factor in the decision to deny the Application. Admittedly, the City acknowledges that the distance of the property at issue, is beyond the statutory confines. Pursuant to Florida statute section 381.986 subsection (11) 2.(c), *Inter alia* "municipalities may not enact ordinances for locations of dispensing facilities which are more restrictive than its ordinances permitting or determining the locations for pharmacies licensed under chapter 465." Here, the City attempts to impose a more restrictive criterion. A fact-finding tribunal departs from the essential requirements of the law in applying the wrong legal standard. *Amalgamated Transit Union, Local 1579 v. City of Gainesville,* 264 So. 3d 375, 381 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D478b]. The Court held that the existence of a controlling statute constitutes "clearly established law" to permit a court granting certiorari based on a departure of the essential requirements of the law. *Id.* at 380.

It is clear from the record that the City in arriving at their denial of the Application, failed to articulate their rational on supporting law. The record shows that the City founded their decisions on personal reasons and excessive restrictions, and as such, constituted a failure and departure in faithfully adhering to the essential requirements of law.

Lastly, the record demonstrates that Petitioner was not afforded procedural due process when it's application was reviewed by the Commission. The record reflects that the Commission, the Mayor in particular, had a vision as to what he wanted for the corridor in which the property of the application was located. The record reveals that in that vision, the inclusion of a marijuana dispensary was not contemplated. The record substantiates that the decision was not weighed equitably upon the application of the criteria as set forth. Instead, the decision was based on personal subjective perspective; this again, not only demonstrates a departure from the essential requirements of law, but a manifestation of bias by the Commission. A preconceived bias that impairs the impartiality of the decision maker can impede procedural due process. The court in *Seminole Entertainment, Inc. v. City of Casselberry,* 811 So.2d 693, (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1720a], which reads in part:

> A hearing or trial in an administrative proceeding . . . must be fair. While the tribunal may not be a court or the proceeding strictly judicial, there must be an orderly and fair procedure. *Inter alia,* the presiding official should be judicial in attitude and demeanor and free from prejudgment and from zeal for or against the licensee or permittee.

Id. at 696.

The record confirms that the Application was compliant with all the conditions as set forth, and the reasons for the denial was premised on personal preference. As such, the Applicant was denied procedural due process when the Mayor's interest conflicted with his ability to impartially review the Application.

As such, having carefully considered the Petition and its Appendix, Response, Reply and the applicable law, the Petition for Writ of Certiorari is hereby **GRANTED**. (J. BOWMAN, E. KOLLRA, and M. WEEKES, JJ., concur.)

* * *

Counties—Licensing—Contractors—Due process—Swimming pool contractor waived alleged due process violations in proceedings that resulted in revocation of his permitting privileges because of building code violations where he did not raise any contemporaneous objections to alleged violations and none of alleged violations constituted fundamental error—Correct standard of proof for action permanently revoking contractor's ability to pull pool building permits in county is proof by clear and convincing evidence—Finding that contractor willfully committed building code violations by failing to remedy failed inspection of pool project was not supported by competent substantial evidence where no evidence was presented that contractor had any knowledge about the particular pool project, which was executed by a company with which he was no longer associated, or of a failed inspection of that project

BRANT M. WEBB, Petitioner, v. SARASOTA COUNTY, FLORIDA, GENERAL CONTRACTORS LICENSING AND EXAMINING BOARD, Respondent. Circuit Court, 12th Judicial Circuit (Appellate) in and for Sarasota County. Case No. 2021-CA-002616-NC. October 12, 2021.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(STEPHEN M. WALKER, J.) THIS MATTER is before the Court on a Petition for Writ of Certiorari, filed by Petitioner, Brant Webb ("Webb"), on May 28, 2021, seeking review of an April 28, 2021, Final Order issued by Respondent, Sarasota County General Contractors Licensing and Examining Board ("Board"). That order unconditionally revoked Webb's Sarasota County permitting privileges for certified pool/spa contracting.[1] After reviewing the petition, the Court directed the Board to respond, by Order filed June 11, 2021, and the Board filed a Response on August 27, 2021. Webb filed an "Updated Petition for Writ of Certiorari," on July 17, 2021, providing citations to the prepared transcript of the Board's evidentiary hearing,[2] and he filed a Reply on September 29, 2021.

This Court has jurisdiction pursuant to Art. V, § 5(b), Fla. Const., § 26.012, Fla. Stat., and Fla. R. App. P. 9.030(c). Having reviewed the filings of the parties,[3] the case file, and the applicable law, and being otherwise duly advised in the premises, the Court now finds as follows:

Factual and Procedural History

Venice residents Betty Madara and Cathy Zion filed a complaint with the Sarasota County Planning and Development Services Department,[4] in June 2020, alleging that Bluwater Pools had failed to complete all aspects of a swimming pool construction project for which they contracted in September 2018. Work on the pool commenced at their Capri Avenue residence in April 2019, but the project failed inspection on May 22, 2019, because pool equipment encroached on a property easement. Bluewater took some remedial action but the pool failed inspection again, for the same reason, on January 29, 2020. Madara and Zion informed Bluwater of the problem but received no further corrective action.[5]

As a result of Zion's complaint, Sarasota County Deputy Building Official Guy McCauley sent Webb a letter, dated August 14, 2020. Webb is a State certified pool contractor and his license was listed with the Department of Business and Professional Regulation ("DBPR") as the associated license for Bluwater Pools; Webb's license also appears as the associated license for the Capri Avenue permit.[6] In the letter, McCauley cited the relevant permit number and informed Webb that the permitting job at the Capri Avenue residence had failed inspection on January 29, 2020, without correction and/or re-inspection, and that the permit for the job had expired on February 16, 2020; and that Webb had 5 business days from receipt of the letter to correct these building code violations, have approved inspections, and respond in writing. The letter concluded as follows:

> Your failure to comply may result in your referral to the Sarasota County Contractors licensing and Examining Board for their determination of probable cause to hold a public hearing in the matter, pursuant to the Sarasota County Ordinance No. 93-63, as amended by Sarasota County Ordinance 2011-017, § 22-127,(5)(h).
>
> After a Public Hearing and weighing of the evidence produced, the Board may revoke or suspend your permitting privilege for conduct-

ing your contracting business in violation of Sarasota County Building Code.[7]

McCauley sent Webb a second letter on March 25, 2021, notifying him that the Board had met 6 months earlier, on October 15, 2020, and determined that there was probable cause to hold a public hearing on the Zion/Madara complaint; a public hearing would be conducted on April 15, 2021, "to determine whether action should or should not be taken against [Webb's] operating certificate in Sarasota County for alleged violations of the code pursuant to Sarasota County Ordinance No. 83-63, as amended by Sarasota County Ordinance 2020-007, § 22-127(5)(g)(h)."[8] The letter also enclosed a copy of the formal Administrative Complaint, dated March 29, 2021, charging as follows:

COUNT 1

The respondent has committed a violation of the Code for failed inspections dated January 29, 2020 that you did not make the necessary corrections and reschedule the inspections within five (5) days of the deficiency report for property located at 257 Capri Ave., Venice, Permit 18 169250 BP. Sarasota County Ordinance No. 83-63, as amended by Sarasota County Ordinance 2020-007, § 22-127(5)(g)(h).

COUNT 2

The respondent has committed a violation of the Code for allowing permit 18 169250BP to expire for property located at 257 Capri Ave., Venice. Sarasota County Ordinance No. 83-63, as amended by Sarasota County Ordinance 2020-007, § 22-127(5)(g)(h).[9]

At the April 15, 2021, hearing, **Mr. McCauley** presented documentary evidence that Webb was registered with the DBPR as doing business as Bluwater Pools, and that Bluwater Pools also listed Webb as its affiliated licensee with the County, commencing October 27, 2013, and expiring August 31, 2020.[10] The contract for the Capri Avenue pool project, dated September 25, 2018, was written on Bluwater Pool letterhead that included Webb's license number.[11] Rachal Berning was the Bluwater employee who submitted the internet permit request for the job,[12] and when issued, the permit listed the associated contractor as "Brant M. Webb."[13] Ms. Berning later submitted a request for a permit extension for the project on November 7, 2019,[14] and Webb remained listed as the associated licensee for Bluwater on that permit, as of July 9, 2020.[15]

Cathy Zion testified generally to the circumstances surrounding her complaint to the County. She stated that Bluwater stopped responding to her requests for remediation at the start of the CoVid pandemic, in 2020. Her contacts at Bluwater were "Mike, Rachel, Collin, and the receptionist," and Mike's daughter, Tina; she had never spoken with Webb,[16] nor did she know that anyone else had been involved with her project except for the people with whom she was communicating at Bluwater. She said she was "surprised" to see Webb that day at the Board hearing rather than one of the other people.[17]

Brant Webb testified that he associated his pool contractor license as the qualifier-license with Bluwater Pools, LLC, in 2013. Webb had a vested minority interest in Bluwater. He left the business in early 2018 based on a financial dispute with majority-interest holders Mike and Wendy Grieg and, despite his requests, he had yet to receive any monies for the work he performed for Bluwater, or a return of any portion of his investment. Upon his departure, he informed the Griegs they had to find another qualifying agent; he also retained legal counsel to help him disassociate his license from Bluwater. Counsel for the Griegs assured Webb that his license would be removed from the permits and that another license would be associated with Bluwater.[18]

Webb said he was never involved with the Capri Avenue project, he had never been to the residence, and he had never seen the work proposal, the contract, or the permitting paperwork; he also did not know if the homeowner had paid for the work. Webb stated that someone had forged his name on the permit application for Capri Avenue, and he requested that the Board consider handwriting comparators from some of his prior permits with the County, which would show the handwriting dissimilarity.[19] When Webb learned that Bluwater had continued to use his license to permit the Capri Avenue job, he initiated a civil suit against the company on August 2, 2019.[20] He also spoke to one of the homeowners as to how to pursue the Mike and Wendy Grieg for remedial action and said he assumed this was sometime around the time when the inspection failed for what he thought was a pool cage construction.

Webb testified that he was not doing business at that time as Bluwater Pools and he was unaware of any permits pulled by Bluwater for pool projects after his departure in 2018. His license was still listed as the qualifier-license for Bluwater, per the advice of his attorney, pending resolution of the civil suit to dissolve the company, because he was required to give the Griegs one year to allow them to find a qualifier to replace him. His attorney wrote to the Greigs and formally demanded that they cease and desist from using his license. Webb also wrote to the DBPR in June 2020, to notify them of the problem with Bluwater using his license.[21] Webb contacted McCauley by phone sometime in 2020 and told him he was no longer the qualifying agent for Bluwater, and he notified the State, the City, and the City of Venice.[22]

The Board resolved by majority vote that the factual allegations of willful building code violations had been proven, and that Webb's permitting privileges should be revoked.[23] The Final Order states that the facts "with respect to alleged negligence" have been established; and that "Brant M. Webb['s] permitting privileges/operating certificate are revoked in Sarasota County upon the Chairman's signature of this Board Order"; and a copy of the Final Order shall be forwarded to the State of Florida Department of Business and Professional Regulation and to the surrounding jurisdictions, and filed in the Office of the Sarasota County Building Officia1.[24]

This timely petition for certiorari followed.

Applicable Law

Common law certiorari is available to review quasi-judicial orders of local agencies and boards not made subject to the Florida Administrative Procedure Act, when no other method of review is provided. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Pursuant to Fla. R. App. P. 9.030(c)(3), certiorari review of a local administrative action is not truly a discretionary writ because the review is of right; a court operates in an appellate capacity without the authority to reweigh evidence or substitute its judgment for that of the administrative agency. *Id.* Circuit courts must employ a limited three-pronged review to determine whether (1) procedural due process was afforded to the parties; (2) the essential requirements of the law were observed; and (3) the administrative findings and judgment were supported by competent substantial evidence. *Broward County v. G.B.V. Int'l, Ltd,* 787 So. 2d 838, 845 (Fla. 2001) [26 Fla. L. Weekly S463a] (citing to *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982)); *and see, e.g., School Board of Hillsborough County v. Tenney,* 210 So. 3d 130, 133 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2149a] (finding circuit court misapplied three-pronged review standard and improperly reweighed evidence rather than reviewing for substantial competent evidence supporting county school board's administrative action).

Present Petition

Webb alleges that the Board engaged in a number of due process violations, including allowing Board member A.J. Singleton to

participate in the proceedings, despite Singleton's bias against Webb from prior business dealings; failing to give Webb timely notice of what specific county code provisions he was suspected of violating and the potential penalties that he faced; and failing to charge in the Complaint, and memorialize in the Final Order, a finding that Webb's actions were "willful," rather than merely a result of negligence. He also contends that the Board departed from the essential requirements of the law by utilizing the preponderance of the evidence legal standard, rather than the clear and convincing standard, when it made its findings. Finally, Webb claims that there is no competent, substantial evidence to support the determination that he willfully violated the building code.

A. Procedural Due Process

"Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests." *Massey v. Charlotte County,* 842 So. 2d 142, 146 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b]. Though it has no fixed rules related to time, place and circumstances, procedural due process requires that there be "fair notice and a real opportunity to be heard," as the particular situation demands. *Keys Citizens for Responsible Government, Inc., v. Fla. Keys Aqueduct Authority,* 795 So. 2d 940, 948 (Fla. 2001) [26 Fla. L. Weekly S502a]; *accord Mid-Continent Casualty Co. v. R.W. Jones Construction, Inc.,* 227 So. 3d 785, 788 (Fla. 5th DCA 2017) [42 Fla. L. Weekly D2250b]. "The notice must of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Keys Citizens for Responsible Government, Inc.,* 795 So. 2d at 948 (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citations omitted)). The opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Id.* (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)); *and see Progressive Express Ins. Co. v. Fry Enterprises, Inc.,* 264 So. 3d 1008, 1011 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D2430b] (observing that procedural due process requires that opportunity to be heard be "meaningful, full and fair, and not merely colorable or illusive") (internal citations omitted)).

Webb failed to object to any of the procedural violations he now raises, either prior to or at the time of the hearing before the Board. All issues not arising to a fundamental violation of due process are, therefore, waived. *See Yachting Arcade, Inc. v. Riverwalk Condominium Assoc., Inc.,* 500 So. 2d 202, 203 (Fla. 1st DCA 1986); *and see, e.g., Ray v. State,* 403 So. 2d 956 (Fla. 1981) (finding counsel's failure to object to erroneous jury instruction was constitutional error but not fundamental error and was, therefore, waived on appeal); *Matar v. Fla. Int'l University,* 944 So. 2d 1153 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D3130a] (finding objections to university's failure to follow written procedures were waived on review, where student failed to raise same objections in administrative proceedings below); *Anderson v. Sch. Bd. of Seminole County,* 830 So. 2d 952, 952-53 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D2542b] (per curiam) (similar); *Johnston v. Hudlett,* 32 So. 3d 700 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D752a] (finding objection to improper service of process waived); *and compare with Carrion v. State,* 235 So. 3d 1051 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D196a] (finding fact that defendant did not object to trial court's failure to conduct independent hearing and make written or oral findings as to defendant's competency did not waive issue on appeal, where trial court's violation of defendant's procedural due process rights arose to fundamental error).

The Court finds no fundamental error apparent from the record. Mr. McCauley sent Webb a letter, dated August 14, 2020, notifying him that the permitted work at the Capri Avenue residence failed inspection and that the permit for that job had expired. The permit number was included,.and the letter advised that the circumstances constituted building code violations, under § 83-63 of the Code of Ordinances of Sarasota County, Florida ("Sarasota Code") which could result in the revocation or suspension of Webb's permitting privileges. McCauley sent Webb notice of the April 15, 2021, hearing, by correspondence dated March 25, 2021, and the letter included a copy of the Administrative Complaint. The Complaint cited to the relevant permit number, address, and nature of the code violations (failed inspection/permit expiration), and cited generally to the Sarasota County Building Code. The notice was mailed on March 31, 2021,[25] within the 15 days required under § 22-127(g) and (h), Sarasota Code. Service is generally deemed completed on the date of mailing or emailing. *See* Fla. R. Jud. Admin. 2.516(b)(1)(D) (email) and (b)(2) (U.S. mail).

Webb argues that 15 days was an insufficient amount of time to prepare for the Board hearing, and that he should have been given precise citations to which code provisions he was charged with violating. The record, however, reveals that Webb appeared at the hearing at the appropriate time and location, he apparently understood why he was there, and he had forty-plus documents in hand, ready to submit into evidence. Webb never informed the Board—nor does he argue now—that he could have presented additional evidence if given more time; he also did not dispute that the Administrative Complaint involved legitimate code violations, even though he denied committing them. Therefore, the Court cannot say that either the 15 days' notice or the content of the Complaint deprived him of the fundamental right to adequate notice of the charges. *See, e.g., Walbridge Contracting, Inc. v. Miami-Dade County Bd of Rules and Appeals,* 8 Fla. L. Weekly Supp. 153a (11th Jud. Cir. Ct., Miami-Dade County, Nov. 14, 2000) (finding no due process violation where issue was unpreserved for appeal, and petitioner, who claimed insufficient time to present case to construction review board, never requested additional time or proffered for record names or anticipated testimony of additional witnesses);[26] *and compare with Rubino v. City of Miami Code Enforcement,* 20 Fla. L. Weekly Supp. 363a (Fla. 11th Jud. Cir. Ct., Miami-Dade County, Dec. 18, 2012) (granting certiorari on finding board's failure to inform petitioner of all facts upon which code enforcement department acted, including reason for citation and location of violation, resulted in proceeding that was not "essentially fair").[27]

While the Court agrees that the Final Order fails to correctly memorialize the Board's finding that Webb acted "willfully," and improperly finds Webb guilty of negligence, the Court foregoes any further discussion of these errors, in view of its determination in Part C.

Finally, the claim that that Board Member Singleton's participation in the hearing constituted fundamental error is without merit. Members of the Board are all subject to the conflict of interest disclosure and voting abstention guidelines set forth in § 286.012, Fla. Stat., and the statutes cited therein. *See Chaviano v. Larson, et al.,* 19 Fla. L. Weekly Supp. 180a (Fla. 12th Jud. Cir. Ct., Sarasota County, Nov. 3, 2011).[28] Mr. Singleton, however, did not voluntarily disclose any potential conflict on the record warranting his own recusal. Actual disqualification of a member of an adjudicative body is only required where "facts alleged would prompt a reasonably prudent person to fear that they would not obtain a fair and impartial hearing." *Seiden v. Adams,* 150 So. 3d 1215, 1219-20 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2409a] (involving member of school board under APA). As Webb failed to move for Singleton's disqualification, and presented no evidence in support of such a motion—either before or at the time of the hearing—this leaves the Court with only the transcript of the proceedings for review. *See id.* at 1220. Mr. Singleton opposed a motion to dismiss the charges against Webb, and he was an advocate

for moving to permanently revoke Webb's permitting privileges,[29] but these adverse decisions are not evidence of "actual bias." *See Martin v. State,* 322 So. 3d 25, 38-39 (Fla. 2021) [46 Fla. L. Weekly S101a] (rejecting unpreserved postconviction claim of bias where .there was no evidence of actual bias of juror); *and see Santisteban v. State,* 72 So. 3d 187, 194 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2034a] (fact that judge made adverse rulings against defendant is not adequate ground for disqualification).

Consequently, Petitioner's claim that he was denied procedural process shall be denied.

B. Essential Requirements of the Law

Webb claims that the Board departed from the essential requirements of the law by utilizing the preponderance of the evidence legal standard, rather than the clear and convincing standard. He concedes that § 22-127(5)(g), Sarasota Code, of the Code of Ordinances of Sarasota County, Florida ("Sarasota Code"), provides for use of the preponderance of the evidence standard when evaluating violation charges under Chapter 22, Article 5 of the Sarasota Code, but argues that because the Board's revocation of his permitting privileges resulted in a loss of his livelihood, and is penal in nature, use of the clear and convincing standard was required, pursuant to *Ferris v. Turlington,* 510 So. 2d 292 (Fla. 1987), and its progeny. The Board responds that *Ferris* and the other legal authorities cited by Webb apply only to licensure revocation proceedings, conducted pursuant to the Administrative Procedure Act, and that the revocation of local permitting privileges falls beyond their purview.

The Court does not know by what standard of proof the Board found Webb to be in violation of the building code. Neither the transcript of the hearing, nor the Final Order, mentions the quantum of proof the Board applied to Webb's case. Section 22-127(5)(g), Sarasota Code, directs that the County has "the initial burden of proof of proving the violation by a preponderance of evidence," but this does not preclude the Board from finding proof of a violation by clear and convincing evidence or even beyond a reasonable doubt.

Given the penalties imposed in this case, if the Board utilized the preponderance of the evidence standard, this would have departed from the essential requirements of the law.

As the Board correctly points out, § 489.113(4)(b), Fla. Stat.,[30] is the statutory provision which grants local construction regulation boards the authority to suspend or revoke the permitting privileges of state certified contractors, and it contains no evidentiary standard of review. This does not mean, however, that the "default standard" is proof by a preponderance of the evidence. The appropriate evidentiary standard is governed by a consideration of the underlying rights implicated by an administrative action and by the nature of that action. *See Fla. Dept. of Children and Families v. Davis Family Day Care Home,* 160 So. 3d 854, 857 (Fla. 2015) [40 Fla. L. Weekly S169a]; *Dept. of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern and Co.,* 670 So. 2d 932, 934 (Fla. 1996) [21 Fla. L. Weekly S142a] (per curiam).

Thus, for example, in *South Fla. Water Management Dist. v. RLI Live Oak, LLC,* 139 So. 3d 869 (Fla. 2014) [39 Fla. L. Weekly S345b], the Florida Supreme Court determined that, in the absence of a statutorily-required evidentiary standard, a state trial court's award of civil penalties to a state agency, after ruling in favor of the agency and against a land development company, was governed by the preponderance of the evidence standard. The court observed that the lowest evidentiary standard is generally applicable to civil litigants "unless 'particularly important individual interests or rights are at stake,' " and that such heightened interests include accusations of quasi-criminal wrongdoing or property deprivation. *Id. at* 872. But because no such considerations were involved in court-awarded civil penalties, the preponderance of the evidence standard applied. *See id.*

By contrast, in *Osborne Stern and Co., supra,* the court held that a state banking agency could not impose an administrative fine on an applicant for registration as a securities dealer, on finding him guilty of wrongdoing under the preponderance of the evidence standard, because such fines were "punitive in nature and implicate[d] significant property rights." *Id.* at 935. In that circumstance, the clear and convincing standard was required. *See id.* The court went on to hold that the agency was, however, free to deny the applicant his registration for a license to deal in securities, based on the preponderance of the evidence standard, since denial of a license was not punitive action and did not involve an existing property right. *See id.* at 934; *accord Davis Family Day Care Home,* 160 So. 3d at 857 (approving use of preponderance of the evidence standard to deny license application, given no existing property right in license).

While a business or professional license is not property in the conventional sense, since it conveys no vested interest and is subject to regulation or even revocation, *see Alterman Transport Lines, Inc. v. State,* 405 So. 2d 456, 460 (Fla. 1st DCA 1981) (per curiam), once issued, a license gains certain qualities of property. *See House v. Cotton,* 52 So. 2d 340, 341 (Fla. 1951) (per curiam); *Bayonet Point Regional Medical Center v. Dept. of Health and Rehabilitative Services,* 516 So. 2d 995, 999 n. 3 (Fla. 1st DCA 1987) (Ervin, J., concurring and dissenting); *Wilson v. Pest Control Comm'n of Fla.,* 199 So. 2d 777, 779 (Fla. 4th DCA 1967); *Hubbard v. Jebb,* 163 So. 2d 307, 309 (Fla. 2d DCA 1964). Consequently, since the *Ferris* decision, our courts have consistently required clear and convincing evidence to revoke an existing professional or business license. *See RLI Live Oak, LLC,* 139 So. 3d at 873.

The Board argues that it took no action against Webb's license, so that the line of cases derived from *Ferris* is inapplicable. Given the nature of the action taken against Webb, and the sweeping impact on his ability to work under his license, the Court disagrees. The Board did not issue Webb a written warning, place conditions on his permitting privileges, or suspend his permitting authority for a determinate period of time. Rather, Webb was permanently deprived of the ability to pull pool permits within the County, and notice of this action was submitted to the DBPR and to the "surrounding jurisdictions." Because § 489.113(4)(b), Fla. Stat., allows a local construction regulation board to revoke permitting privileges within its jurisdiction based on a finding that a state certified contractor has been revoked for fraud or willful building code violations in another county or municipality, the action taken by the Board could ripple outward to effect Webb's ability to work in multiple counties throughout the State.

This Court previously considered almost identical facts in *Chaviano, supra.*[31] In *Chaviano,* a state-licensed air conditioning contractor sought review of an order approving the decision by the city's licensing board to permanently revoke the contractor's ability to pull permits within North Port. The Court found that the board failed to follow the essential requirements of the law when it allowed opinion testimony from a certain witness, and then relied upon that testimony to revoke the contractor's permitting privileges. The effect of the board's action on the contractor's ability to work, both in the city and elsewhere, was an integral part of the Court's decision, as discussed in the following passage:

> The [Board's] decision did not prohibit the [contractor] from doing business or obtaining licenses in other areas, yet the Board's decision noted that a report of the disciplinary action would be communicated to the state licensing board and the boards of one or more local jurisdictions with the state, which arguably could have some effect upon other license or license applications. Therefore, the Board's actions affected the [contractor's] interest in his contractor's license in North Port and his private interest in his ability to obtain licensing

elsewhere in Florida, limited to the extent to which that interest could be affected by Florida state and local licensing bureaus having received a letter from North Port regarding the disciplinary action taken against the [contractor].[32]

At least one other circuit has concluded that the decision of a local construction regulation board to revoke permitting privileges must be supported by more than a preponderance of the evidence. In *Walbridge Contracting, Inc., supra,* the Eleventh Judicial Circuit Court denied certiorari relief to a contracting company and its qualifying agent seeking review of a local board's decision to revoke their permitting privileges for willful violations of the building code. The court observed that "a revocation of a professional license is of sufficient gravity and magnitude to warrant a standard of proof greater than mere preponderance of the evidence; the correct standard is that the evidence must be clear and convincing." *Id.* (citing to *Ferris, supra*). Under that heightened standard, the court found competent, substantial evidence supported the board's decision. *And see* Leiby, Larry, *Florida Construction Law Manual* § 2:7 (2020-2021 ed.) (stating that clear and convincing standard applied to decisions of local construction regulation boards to deny, suspend, or revoke permitting authority, citing to *Walbridge Contracting, supra,* and *Ferris, supra*).

The Court proceeds to consider Petitioner's remaining claim, which subsumes any potential error committed by the Board in applying the correct evidentiary standard.

C. Competent, Substantial Evidence

The evidentiary standard of "competent substantial evidence" has been interpreted as "evidence a reasonable mind would accept as adequate to support a conclusion." *Lee County v. Sunbelt Equities, II, Ltd. Partnership,* 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (citing to *Town of Indialantic v. Nance,* 400 So. 2d 37, 39 (Fla. 5th DCA 1981) (additional citation omitted)). Substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred." *Marion County v. Priest,* 786 So. 2d 623, 625 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D1098b] (quoting *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). Competent evidence can come from the fact-based, non-opinion testimony of citizens, *see Metropolitan Dade County. v. Section 11 Property Corp.,* 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1866a], and of professional staff and staff reports, when they are based on the staff's professional experiences and personal observations. *See Village of Palmetto Bay v. Palmer Trinity Private School, Inc.,* 128 So. 3d 19, 27 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c] (citing to cases on this point). Unreliable evidence that provides the basis for a tribunal's findings or conclusions shall be deemed insufficient. *Fla. Rate Conference v. Fla. Railroad & Public Utilities Comm'n,* 108 So. 2d 601, 607 (Fla. 1959). So long as there is competent substantial evidence, the fact that there is contrary evidence in the record bears only upon the "wisdom of the decision. . .[and] is irrelevant to the lawfulness of the decision." *Dusseau v. Metro. Dade County Bd. of County Commissioners,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a]; *accord Orange County v. Butler,* 877 So. 2d 810, 813 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1561a]; *Bell v. City of Sarasota,* 371 So. 2d 525, 527 (Fla. 2d DCA 1979).

Because Webb is a State-certified contractor, and the Board revoked his permitting privileges, the Board had to find that Webb *willfully* committed the alleged building code violations. *See* § 489.113(4)(b), Fla. Stat.;[33] § 22-127(5)(h), Sarasota Code.[34] The term "willful" is not defined by Chapter 489 of the Florida Statutes, or Chapter 22 of the Sarasota Code. The Court must, therefore, give the term its common and ordinary meaning. *See Atwater v. Kortum,* 95 So. 3d 85, 90 (Fla. 2012) [37 Fla. L. Weekly S439a]. This may include references to dictionary definitions. *See Dockswell v. Bethesda Memorial Hospital, Inc.,* 210 So. 3d 1202, 1207 (Fla. 2017) [42 Fla. L. Weekly S32a]. According to *Black's Law Dictionary,* a "willful" act is a "voluntary and intentional act, but not necessarily malicious. . . [that] involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong." *Black's Law Dictionary* (11th ed. 2019). Our courts have ascribed a similar definition in the civil context, finding a "willful" act to be one where the actor "voluntarily and intentionally performed with specific intent and bad purpose to violate or disregard the requirements of the law." *Fugate v. Florida Elections Commission,* 924 So. 2d 74, 75 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D616e]; *and see Walbridge Contracting, Inc., supra* ("an intentional act done of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow").

No evidence was presented that Webb knew about the project, knew about the scheduled January 29, 2020, inspection, or knew about the date the permit was pulled and when it expired. Webb testified that he had no knowledge of the Capri Avenue contract or any Bluwater pool project after his departure from Bluwater in 2018, and he stated he had never been to the Capri Avenue residence. Ms. Zion corroborated Webb's testimony, stating that, after she contracted with Bluwater Pools, in September 2018, she had contact with "Mike," "Rachel," "Collin," "the receptionist," and Mike's daughter, Tina, from Bluwater, and that she never spoke with Webb, nor did she know that Webb was involved in the project. Zion indicated surprise that Webb was attending the hearing rather than someone else from Bluwater Pools.[35] Webb's testimony that he was "aware of the failed inspections,"[36] relied upon by the Board, was given in response to a question lacking any context. The Court does not reweigh the evidence, but finds, on a review of the entire record, an absence of evidence that Webb "voluntarily and intentionally" disregarded the requirement to remedy the inspection failure and permit expiration on the Capri Avenue project, with "specific intent and bad purpose to violate or disregard the requirements of the law."

It is, therefore,

ORDERED AND ADJUDGED that Petitioner's Petition for Writ of Certiorari is ***GRANTED,*** and the Final Order of the Sarasota County General Contractors Licensing and Examining Board is ***QUASHED***.

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[1]*See* Petitioner's Appendix at Exhibit A.

[2]The "Updated Petition" also makes stylistic corrections. As it contains no substantive changes from the original Petition, the Court will refer to the Petition and Updated Petition collectively as "Petition."

[3]The Court has only considered those portions of the record presented to the Board in relation to the hearing.

[4]*See* Petitioner's Appendix at Exhibit B3.

[5]*See id*.

[6]*See id.* at Exhibits B1 and B9.

[7]*See id.* at Exhibit B4.

[8]*See id.* at Exhibit B5.

[9]*See id.* at Exhibit B7.

[10]*See* Petitioner's Appendix at Exhibits B1 and B2.

[11]*See id.* at Exhibits B3c and B3d. The copy of the contract submitted into evidence is unsigned the parties, but there was no apparent disagreement as to the validity or date of the contract.

[12]*See id*. at Exhibit B9a. The permit documents submitted into evidence contain no signatures.

[13]*See id.* at Exhibit B9a and B12.

[14]*See id.* at Exhibit B11.

[15]*See id.* at Exhibit B11.

[16]A Board member erroneously referred to Webb as "Mr. France," and later corrected this error. *See* Transcript ("T.) at pp. 32-32.

[16]*See id*. at p. 32.

[17]*See* T. at pp. 28-32.

[18]Webb introduced several email communications from 2019 and 2020, exchanged by Webb's attorney and counsel for the Griegs, documenting the attempts to negotiate a settlement to the lawsuit. *See* Petitioner's Appendix at composite Exhibit C. One of these emails, dated June 13, 2019, authored by counsel for the Griegs, stated: "I talked to my Client. They have contracted with another License holder, and are finalizing the details of that, so as to move all the permits away. . . . Once the permits are moved away. . . then the separation should be complete." *See id.* at Exhibit C2. Webb's attorney sent a July 9, 2020, email to counsel for the Griegs, stating that notice had been given more than a year prior that Webb was leaving Bluwater and that a settlement had not yet been reached. *See* Exhibit C8.

[19]Mr. McCauley showed the Capri Avenue permit application to Webb to authenticate the signature, and Webb testified that neither the signature nor the handwritten print was his. *See* T. at p. 24. McCauley apparently started looking for other permit applications for comparison samplers but abandoned this effort on the instruction of Board Member Keisacker. *See* T. at pp. 25-27.

[20]*See* Petitioner's Appendix at Exhibit Cl.

[21]*See* Petitioner's Appendix at Exhibit C4.

[22]*See* T. at pp. 11-28, 32-41.

[23]*See* T. at pp. 44, 59.

[24]*See id. at* Exhibit A.

[25]*See* Petitioner's Appendix at Exhibit D.

[26]*See* Attachment 1.

[27]*See* Attachment 2.

[28]*See* Attachment 3.

[29]*See* T. at pp. 43-44, 56.

[30]Section 489.113(4)(b), Fla. Stat., provides that a local construction regulation board may deny, suspend, or revoke the authority of state certified contractors to obtain a building permit, or limit such authority, if the local board finds the contractor, through the public hearing process, to be "guilty of fraud or willful building code violation within the county or municipality that the local construction regulation board represents," or if the local board "has proof that such contractor, through the public hearing process, has been found guilty in another county or municipality within the past 12 months, of fraud or a willful building code violation" and that violation would have been a violation of the building code within the board's jurisdiction.

[31]*See* Attachment 3.

[32]*See id.*

[33]Sec. 489.113(4)(b) provides, in relevant part: "Notwithstanding the provisions of paragraph (a), a local construction regulation board may deny, suspend, or revoke the authority of a certified contractor to obtain a building permit or limit such authority to obtaining a permit or permits with specific conditions, if the local construction regulation board has found such contractor, through the public hearing process, to be guilty of . . .a willful building code violation within the county or municipality that the local construction regulation board represents. . . ."

[34]Sec. 22-127(h), Sarasota Code provides, in relevant part: "Following the same hearing procedures set forth in this section, above, the Boards may suspend or revoke permitting privileges of State Certified Contractors for: . . . committing a willful building code violation. . . ."

[35]*See id*. at p. 32.

[36]*See* T. at 12.

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Volume 30, Number 12
April 28, 2023
Cite as 30 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Torts—Automobile accident—Negligence—Derivative liability—Plaintiffs' motion for partial summary judgment on negligence of alleged at-fault truck driver is denied because there is evidence from which jury could reasonably infer that driver was not negligent—Defendant's motion for partial summary judgment on plaintiffs' derivative negligence claim against trucking company that employed driver is granted— Derivative negligence claim is a concurrent theory of liability to plaintiffs' vicarious liability cause of action against employer and, therefore, not permitted under Florida law—Plaintiffs have not established any of the clear exceptions to no derivative liability rule—Discussion of derivative liability and exceptions

ERIC UNGERICHT and BETTY UNGERICHT, Plaintiffs, v. WILLIE JAMES BUTLER, d/b/a WB TRUCKING, and ZANTAL CHANTEL BROWN, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 22-CA-105. December 9, 2022. David Frank, Judge. Counsel: Christopher J. Nicholas, Fasig Brooks, Tallahassee, for Plaintiffs. Robert Crabtree and Ramsey Revell, Andrews, Crabtree, Knox & Longfellow, LLP, Tallahassee, for Defendants.

AMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This cause came before the Court for hearing on December 6, 2022 on Defendant's, Willie James Butler d/b/a WB Trucking, Motion for Summary Judgment, Plaintiffs' Motion for Summary Judgment, and Defendants' Motion to Strike, and the Court having reviewed the papers filed in support and opposition and the court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

Plaintiff's Motion for Partial Summary Judgment on the Negligence of Defendant (Driver) Brown

Florida's New Summary Judgment Standard

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla.R.Civ.P. 1.510(a). "Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amends. to Fla. R. of Civ. P. 1.510*, 309 So.3d 192, 194 (Fla. 2020) [46 Fla. L. Weekly S6a] (citation omitted). "An issue of fact is material if it could have any bearing on the outcome of the case under the applicable law." *Id*. (citation omitted).

Because the plaintiff has the burden of proof[1] at trial for claims, to defeat a motion challenging a claim, the plaintiff must come forward with record evidence on the essential elements of the claim. *See generally In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] and *Rich v. Narog*, No. 3D21-1631, 2022 WL 4360601, at *5 (Fla. 3d DCA Sept. 21, 2022) [47 Fla. L. Weekly D1933a]. The same would be true for a defense on which the defendant has the burden of proof at trial. Another option would be for the party with the burden of proof at trial to come forward with evidence and assert that there is no contrary record evidence and, thus, summary judgment should be granted in its favor on that claim or defense.

"A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fla.R.Civ.P. 1.510(c)(1).

"A party seeking summary judgment in a negligence action has a more onerous burden than that borne in other types of cases." *Pratus v. Marzucco's Constr. & Coatings, Inc.*, 310 So.3d 146, 149 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D186a] (citations omitted).

". . .[T]hose applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *In re Amends. to Fla. Rule of Civ. Proc.* at 75; *Dumigan v. Holmes Reg'l Med. Ctr., Inc.*, 332 So.3d 579, 587 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D270a]. "Florida law cautions against a motion for directed verdict in negligence cases since the evidence to support the elements of negligence are frequently subject to more than one interpretation." *United Servs. Auto. Ass'n v. Rey*, 313 So.3d 698, 701 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1855d], quoting *Regency Lake Apartments Assocs., Ltd. v. French*, 590 So.2d 970, 972 (Fla. 1st DCA 1991) (other citations omitted).

"At summary judgment, courts must view the evidence and draw inferences in the light most favorable to the nonmoving party." *Esteban-Garcia v. Wal-Mart Stores E. LP*, No. 21-23831-CIV, 2022 WL 16635816, at *2 (S.D. Fla. Nov. 2, 2022) (citation omitted). "To overcome summary judgment, an inference must be reasonable." *Id*. at 3 (citation and internal quotations omitted). "An inference is reasonable if it is one that a reasonable and fair-minded [person] in the exercise of impartial judgment might draw from the evidence." *Id*. (citation and internal quotations omitted). "While a reasonable inference may rest in part on conjecture, a jury cannot be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility." *Id*. (citation and internal quotations omitted). "An inference created from speculation and conjecture is not reasonable." *Id*. at 2 (citation and internal quotations omitted).

"A jury question is presented when the evidence is susceptible to inference that would allow recovery even though there are opposing inferences that are equally reasonable." *State Farm Mut. Auto. Ins. Co. v. Hanania*, 261 So.3d 684, 688 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2723a], quoting *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So.2d 1264, 1279 (Fla. 2003) [28 Fla. L. Weekly S538a]. ". . .[Where] circumstances established by [ ] evidence are susceptible of a reasonable inference supporting the claim of negligence, and the circumstances are also susceptible of reasonable inferences which refute the claim. . .a jury issue is presented . . . .") *Id*., quoting *Streeter v. Bondurant*, 563 So.2d 729, 732 (Fla. 1st DCA 1990).

Record Evidence Relied Upon by Plaintiffs

Plaintiffs seek partial summary judgment on the issue of negligence. Because they have the burden of persuasion at trial, plaintiffs' summary judgment burden is to convince the Court there is only one reasonable inference from the record evidence and that inference is that the defendant driver—Mr. Brown—failed to use reasonable care when he pulled out onto the street at the time of the motor vehicle crash. In other words, plaintiffs assert that the particular issue cannot be genuinely disputed.

To meet its initial summary judgment burden, plaintiffs must support the assertion by citing to particular parts of materials in the record. After acknowledging that "[d]efendants still maintain that they were not negligent," plaintiffs point to record evidence: "that there was at least 1000′ of unobstructed visual distance between the vehicles operated by the Plaintiff ERIC UNGERICHT and Defendant BROWN on the stretch of roadway where the collision occurred, that the collision took place during daylight (approximately 8:30 a.m.)

under dry and clear conditions," an interrogatory answer, and expert testimony. Plaintiffs' Motion at 2-11.

Defendants' Record Evidence

Plaintiffs then contend, as they must, that neither the record evidence they cited, nor any other record evidence, supports any inference to the contrary.

Defendants, however, point to the following record facts supplied by the testimony of the plaintiff, alleged at fault driver Brown, and eye witness Murphy: Brown stopped before the pavement and looked and did not see any vehicles approaching from the right or left; Brown looked a second time and didn't see any approaching vehicles; Brown waited for 7 to 10 seconds to see if any vehicles came into his sight before pulling out; Brown's vehicle was well across the road when Murphy (the vehicle behind plaintiffs) first saw him; neither plaintiff nor Murphy saw Brown pull out, he was already in the road; and plaintiffs' vehicle struck the rear tandem of Brown's vehicle on impact.

Applying the New Standard to the Evidence

The Court disagrees with plaintiffs' assertion that there is no contrary record evidence and finds that a jury could reasonably infer from the evidence noted by defendants that the alleged at fault driver was not negligent.

The Court is regularly called upon to make decisions that have a serious impact on the people it serves. But this is not one of them. Deciding whether Mr. Brown failed to use reasonable care given the multitude of facts at issue is the quintessential domain of a jury, not a judge. This has been a longstanding judicial imperative in America. Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 Yale L.J. 667, 676 (1949) ("On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. The cardinal concept is that of a reasonably prudent man under the circumstances. . . .").

Defendant's Motion for Partial Summary Judgment on Plaintiffs' Concurrent (Derivative) Theory of Liability

Defendant WB Trucking seeks summary judgment on Count II because it is a derivative negligence claim that is a concurrent theory of liability to plaintiffs' vicarious liability cause of action against WB and, therefore, not permitted under Florida law.

In 1954, the Florida Supreme Court set forth a rule that has followed a tortuous path ever since—the no derivative liability rule. The idea was that at least three derivative theories of liability (active tortfeasing) would not lie if the same defendant were vicariously liable via respondeat superior. The rule is explained in the oft cited case *Delaurentos v. Peguero*:

> Florida cases distinguish between (a) acts committed within the scope and course of employment, and (b) acts committed outside the scope of employment. In the first situation, where acts were committed within the course and scope of employment, the basis of employer liability is respondeat superior. "As to this doctrine [respondeat superior] the negligence of the employer is immaterial since this Court is committed to the rule that if the employee is not liable, the employer is not liable." *Mallory v. O'Neil*, 69 So.2d 313, 315 (Fla.1954); *see Garcia v. Duffy*, 492 So.2d 435, 438 (Fla. 2d DCA 1986). Where, as here, a plaintiff alleges and a defendant admits that the alleged torts took place during the course and scope of employment, employer liability can only be pursued on the basis of respondeat superior and not on the basis that the employer was negligent. *Mallory*, 69 So.2d at 315.

47 So.3d 879, 882 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2320b].

In 1977, the Second District then added to the complexity of this path in *Clooney v. Geeting*, 352 So.2d 1216 (Fla. 2d DCA 1977). The court in *Clooney* threw negligent entrustment of a vehicle into the mix. The conclusion in *Clooney* was that the no derivative liability rule also applied to standard negligent entrustment—imprudently lending your vehicle to a negligent driver. It concluded that, like negligent hiring, retention, and supervision, there is no added liability. They are all "concurrent" theories of liability:

> Justice requires, however, that a caveat be imposed on the use of any of the theories we have mentioned [negligent hiring, negligent retention, and negligent entrustment]. Where these theories impose no additional liability in a motor vehicle accident case, a trial court should not allow them to be presented to the jury. The reason for this is a very practical one: Under these theories the past driving record of the driver will of necessity be before the jury, so the culpability of the entrusting party can be determined. As was said in *Dade County v. Carucci*, 349 So.2d 734, 735 (Fla. 3d DCA 1977), "Ordinarily, the evidence of a defendant's past driving record should not be made a part of the jury's considerations." Here Counts II through V impose no additional liability on Anderson Mfg. Anderson has not denied ownership or permitted use of the truck driven by Geeting; therefore, it is liable for Geeting's negligence under the vicarious liability doctrine. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). Since the stricken counts impose no additional liability but merely allege a concurrent theory of recovery, the desirability of allowing these theories is outweighed by the prejudice to the defendants.

Id. at 1220.

It should be emphasized here that it does not appear that the First District has rejected the *Delaurentos* / *Clooney* premises or otherwise charted a different course.

But now the fun starts. We have several exceptions to the no derivative rule.

Our own First District explained an exception in *Dunmore v. Eagle Motor Lines*, 560 So.2d 1261 (Fla. 1st DCA 1990). The *Dunmore* court reasoned that, because the vicarious liability and derivative-liability claims were not brought against the same party (as is the case here), the derivative-liability claim "imposed additional liability on [the allegedly derivatively liable defendant] not available to plaintiff against [that defendant] under any other alleged legal theory." *Id*. at 1263-64, citing *Clooney v. Geeting*. 352 So.2d 1216 (Fla. 2d DCA 1977).

"Courts have also allowed direct negligence claims to proceed when damages for vicarious liability are capped by § 324.021(9)(b)3, F.S. *See Trevino v. Mobley*, 63 So. 3d 865, 867 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1245a]. That statute, however, limits damages awardable under vicarious liability as against a "natural person." *Wilson v. Davis*, No. 8:21-CV-1713-TPB-TGW, 2022 WL 7568315, at *2 (M.D. Fla. Oct. 13, 2022). Also, as defendants point out, the exception does not apply where the defendant is, ". . .an owner of motor vehicles that are used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases motor vehicles." Fla. Stat. 324.021(9)(c)(1). Both of these exceptions to the exceptions apply in the present case.

Another exception would be a claim for punitive damages. *Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744, 764 (Fla. 1st DCA 1991). Plaintiffs have not pursued a claim for punitive damages.

Finally, there is an exception when the direct, active negligence of the defendant employer, ". . .would make the defendant employer responsible independent of any negligence of the employee. *Widdows v. Wilcox*, No. 3:20-CV-799-BJD-PDB, 2021 WL 7708907 (M.D. Fla. Mar. 12, 2021); *Sanchez v. Disc. Rock & Sand Inc.*, No. 4:18-CV-10097-KMM, 2022 WL 832429, at *6 (S.D. Fla. Feb. 9, 2022) (finding that an exception to *Delaurentos* exists where there is sufficient evidence for a jury to find that an employer negligently entrusted an improperly maintained vehicle to an employee that

contributed to an accident); *Wilson v. Davis*, No. 8:21-CV-1713-TPB-TGW, 2022 WL 7568315, at *2 (M.D. Fla. Oct. 13, 2022) (finding that "[a] direct negligence theory might also be viable where the plaintiff alleges that the defendant acted negligently in providing a defective vehicle to the driver, such that the defendant might be liable even if the driver is found not to have been negligent").

Here, plaintiffs point to record facts that only would infer employer derivative negligence in hiring and retention or supervision, not the employer's own direct negligence *independent of the employee*.[2] As examples, plaintiffs describe the pertinent record evidence as follows:

> When Defendant Brown started working for him, Defendant Butler did not have him complete any paperwork (Butler deposition p. 19, line 24);
>
> Defendant Butler testified that he "wasn't aware" if Defendant Brown's license had ever been suspended or revoked (Butler deposition p. 42, line 8);
>
> On September 28, 2020 (eight months before the subject collision), while working for Defendant Butler, Defendant Brown was cited for driving a commercial motor vehicle while "disqualified", due to his licensure suspension in July of 2020 (see Exhibit J to Plaintiff's Request for Admissions to Defendants).
>
> On May 10, 2021 (exactly one week before the subject collision), Defendant Brown, while working for Defendant Butler, was cited for driving the tractor and trailer involved in the subject collision while his commercial driver's license was suspended (see Exhibit K to Plaintiff's Request for Admissions to Defendants).
>
> Defendant Butler permitted Defendant Brown to operate the subject tractor on the date of the collision (Butler deposition p. 62, line 23);
>
> Defendant Butler does not have a personnel file, a driver's training file, discipline file or a performance evaluation file for Defendant Brown (see Defendant Butler's response to Plaintiffs' Request for Production number 40).

Plaintiffs' Resp. to Def.'s Motion at 4-5.

Florida appellate courts have struggled with the development of the law in this area. *See Sager v. Blanco*, No. 3D20-1194, 2022 WL 6832092, at *6 (Fla. 3d DCA Oct. 12, 2022) [47 Fla. L. Weekly D2055a] ("It is well-established that the law allows the promulgation of alternative theories of recovery. Any potential prejudice stemming from the negligent entrustment claim may be mitigated by incorporating appropriate procedural safeguards."); *and see Widdows v. Dwaine Wilcox & Trucks, Inc.*, No. 3:20-CV-799-J-39PDB, 2020 WL 13133419, at *4 (M.D. Fla. Nov. 19, 2020), report and recommendation adopted sub nom. *Widdows v. Wilcox*, No. 3:20-CV-799-BJD-PDB, 2021 WL 7708907 (M.D. Fla. Mar. 12, 2021) ("Despite a suggestion by a Florida appellate judge that the *Clooney* caveat should be abandoned and no longer followed by Florida courts, *see Trevino v. Mobley*, 63 So. 3d 865, 868 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1245a] (Sawaya, J., concurring), courts continue to apply the caveat—including as recently as September of this year—to affirm dismissals of negligence claims concurrent with vicarious liability claims.").

Less murky, however, is that plaintiffs have not established any of the clear exceptions to the no derivative liability rule. The proposed vicarious and derivatively liable party is the same person, vicarious liability is not capped by Florida Statute 324.021(9)(b)3, there is no punitive damage claim, and there are no record facts that reasonably infer the employer's direct negligence independent of the negligence of the employee.

Other Matters Addressed at the Hearing

Plaintiffs argue that defendants were required to challenge the derivative liability count in a motion to dismiss and, thus, waived the matter when they did not. The court disagrees for the reasons stated at the hearing.

Plaintiffs also argue that a challenge to the derivative liability count is in essence an affirmative defense that must be plead as such. The Court disagrees for the reasons stated at the hearing.

Finally, defendants argue that the affidavit submitted by plaintiffs' expert David Wesolowski is improper and should be stricken. The court disagrees for the reasons stated at the hearing.

Accordingly, it is ORDERED and ADJUDGED that

1. Defendant's motion for partial summary judgment is GRANTED.

2. Plaintiffs' motion for partial summary judgment is DENIED.

3. Defendants' motion to strike plaintiff's expert affidavit is DENIED.

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[1]Referred to as "burden of persuasion" by the Florida Supreme Court in the 2021 opinion adopting the new standard. *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So.3d at 72.

[2]Plaintiffs do make the statement, "Moreover, Defendant Butler's history of failing to properly maintain his tractor and trailer and his ongoing failure to comply with applicable Federal Motor Carrier Safety Regulations further evidences his disregard for the safety of others." Plaintiffs' Resp. to Def.'s Motion at 5. However, there are no record facts from which a jury could infer that substandard maintenance caused the collision in question.

* * *

Torts—Negligence—Automobile accident—Affirmative defenses—Motion to amend affirmative defenses to assert defense that accident was caused by sudden and unexpected mechanical failure of vehicle driven by tortfeasor is denied—Motion was filed one month after deadline for requesting leave to amend defenses, defendant had known of potential defense for almost a year before seeking to amend, and amendment shortly before trial date would prejudice plaintiff

LEE N. JACKSON, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY and SANDRA D. WILFORD, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2022-CA-0019. January 30, 2023. David Frank, Judge. Counsel: Hubert R. Brown, Tallahassee, for Plaintiff. Cindy Post Massion, Tallahassee, for Defendants.

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

This cause came before the Court on Defendant Progressive Select Insurance Company's Motion for Leave to File Amended Answer and Affirmative Defenses, filed on January 12, 2023, and the Court having reviewed the motion and response and the court file, and being otherwise fully advised in the premises, finds

The Traditional Concept of Liberality

The traditional notion of liberal amendments to pleadings has never been unlimited. In a dissent, Judge Makar noted the restricted application of a 2016 First District majority opinion reversing a denial of leave to amend a pleading:

> Moreover, it remains an outlier in a sea of contrary caselaw (see *Brown* and *Levine*); absent some future case in this District that happens to be identical in every respect with this one, trial judges should refer to the bountiful precedent that appropriately applies principles of deference to their discretionary decisions whether to grant leave to amend and continue court proceedings.

Morgan v. Bank of New York Mellon, 200 So.3d 792, 797 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D2157a].

In *Brown v. Montgomery Ward & Co.,* the court held that, "Under the circumstances of this case we cannot say that the trial court abused its discretion in denying appellant the right to file an amended complaint two weeks before the scheduled trial. . . ." 252 So.2d 817, 819 (Fla. 1st DCA 1971).

In *Levine v. United Co. Life Ins. Co.,* the Florida Supreme Court affirmed the denial of a motion to amend an answer filed two weeks before trial explaining that, ". . .the liberality typically associated with

amendments to pleadings diminishes as the case progresses." 659 So.2d 265, 266-67 (Fla. 1995) [20 Fla. L. Weekly S444c].

The Fourth District more recently affirmed a denial of a motion to amend an answer, explaining:

> While "[t]he Florida Rules of Civil Procedure encourage a policy of liberality in allowing litigants to amend their pleadings," *Morgan v. Bank of New York Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016), this "policy" narrows as a case approaches trial. *See, e.g., Horacio O. Ferrea N. Am. Div., Inc. v. Moroso Performance Prods., Inc.*, 553 So. 2d 336, 337 (Fla. 4th DCA 1989) ("[T]he record supports the trial court's findings that [defendant]'s amendment would concern matters that were known to it for a long, long time and that the plaintiff would be prejudiced since they had not been able to conduct any discovery or prepare a defense to [defendant]'s assertions.").

State Farm Mut. Auto. Ins. Co. v. Baum Chiropractic Clinic PA, No. 4D21-84, 2021 WL 2672903 (Fla. 4th DCA June 30, 2021) [46 Fla. L. Weekly D1548a].

The New Imperatives of Active Differential Case Management

The Florida Supreme Court has now mandated strict judicial control of trial court dockets. *See In re: Comprehensive Covid-19 Emergency Measures for Florida Trial Courts,* Fla. Admin. Order No. AOSC20-23 Amendment 12 (April 13, 2021). This amendment required chief judges of the trial courts to issue administrative orders that require the presiding judge for each civil case to manage civil cases in a specific manner. The order required presiding judges to: (1) determine whether each civil case was complex, streamlined, or general; (2) issue a case management order for each streamlined and general civil case that "at a minimum" specifies certain deadlines and indicates that "the deadlines established in the order will be strictly enforced by the court;" and (3) establish maximum periods within which the deadlines shall be set. Presiding judges were instructed to issue a case management order on existing cases by December 2021.

In addition, the chief judge's administrative order: Shall direct all judges within their circuits to strictly comply with Florida Rule of General Practice and Judicial Administration 2.545(a), (b), and (e), which respectively require judges to conclude litigation as soon as it is reasonably and justly possible to do so, to take charge of all cases at an early stage and to control the progress of the case thereafter until it is determined, and to apply a firm continuance policy allowing continuances only for good cause shown. *Id.* at III.G.(2).

Subsequently, the Chief Judge of the Second Judicial Circuit entered an administrative order that, among other things, required differential case management deadlines to be ***strictly enforced***." Administrative Order 2021-04, April 30, 2021.

Subsequently, in July 12, 2022 and again on October 19, 2022 this Court, as the presiding trial court, issued a case management order firmly establishing the following deadline:

> ** The following requirements will be strictly enforced by the Court **
> *Ninety (90) days prior to the pretrial conference*
> *All objections to pleadings and motions to dismiss must have been heard and resolved.*
> ***The deadline for adding affirmative defenses***

Orders Setting Pretrial Conference and Jury Trial, p. 2, July 12, 2022 and October 19, 2022 (emphasis added). The currently set pretrial conference is on March 13, 2023.

Accordingly, the deadline for requesting leave to file an amended affirmative defense came and passed on December 12, 2022.

Defendant waited until a month after the deadline, with jury selection set to begin on March 17, to move for leave to add an affirmative defense stated as follows:

> The October 13, 2020 accident was solely caused by the sudden and unexpected mechanical failure of the vehicle driven by the tortfeasor, Christelle Haygood. Due to this failure, Christelle Haygood was therefore not negligent and there can be no liability against Progressive, the underinsured motorist carrier.

Motion at 6.

Defendant gives no reason for delay or ground to support the motion. It simply states that it, ". . .wishes to amend its Answer and Affirmative Defenses to include an additional Affirmative Defense." Motion at 1. Moreover, the defendant had known about the potential issue of mechanical failure since approximately February of 2021. Plaintiff's Response to Defendant Progressive Select Insurance Company's Motion for Leave to File Amended Answer and Affirmative Defenses at 2.

Conclusion

To the extent Florida was ever a "leave to amend at any cost" jurisdiction, those days are over. To comply with the letter and spirit of differential case management mandates, trial courts must use their inherent authority to manage their dockets and enforce their orders. That includes orders setting deadlines for amendments to pleadings. Otherwise, trial courts would be unable to managed cases toward trial or resolution because all a party would have to do is lie in wait, request leave to amend close to trial, and get an almost automatic continuance. And this would be at a time when trial courts are being told to tighten the standard for granting continuances.

Even if the traditional notion of liberality applied, defendant still would not prevail on the motion. Defendant knew about the potential mechanical failure issue for a long time. It had an obligation to investigate and, if the facts provide a good faith basis to assert the defense, request to amend in a timely fashion. It did not. Additionally, to allow such an amendment at this point would prejudice the plaintiff. The defense has been articulated as "unexpected mechanical failure." There is no specific description of the vehicle part or system that failed or mention of any facts to support it. Plaintiff literally would be starting at ground zero to gather the facts, inspect and test the vehicle, and determine the need for his own experts. An insurmountable task at this point in the litigation.

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

* * *

Torts—Premises liability—Property owner's liability for injury caused by criminal act of third party—Plaintiffs who were struck in their apartment by bullets fired from car have met minimum threshold to establish defendant landlord's duty to protect against criminal attack—Affidavit attesting to seeing shooter's car on apartment complex property at time of shooting and police reports of criminal activity at complex in past four years raise reasonable inference that shooter was on defendant's property at time of shooting, that property had been high crime area that had experienced multiple similar crimes in past, and that defendant should have known of danger that eventually caused harm to plaintiffs

MARY McSWAIN, et al., Plaintiffs, v. COMMUNITY HAVANA, LLC, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 21-CA-627. February 14, 2023. David Frank, Judge. Counsel: Louis J. Baptiste, Webster, Baptiste, Attorneys at Law, PLLC, Tallahassee, for Plaintiffs. Darylaine Hernandez, Orlando, for Defendant.

AMENDED ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court on the continued hearing on February 9, 2023 on defendant's September 2, 2022 Motion for Summary Judgment, and the Court having reviewed the papers filed in support and opposition and the court file, heard argument of counsel, and being otherwise fully advised in the premises, finds

According to defendant's motion, on January 2, 2019, defendant Community Havana owned and operated a residential apartment complex known as "Havana Heights," in Havana, Gadsden County, Florida. At the time, plaintiffs, Mary McSwain and her daughter Steviey Annah Moore, were invitees on the premises of Havana Heights and inside apartment C-4 located in the northwest corner of the property. While in the apartment with her daughter, Ms. McSwain heard what she thought were gunshots, and approached her bedroom window to investigate the noise. The noise appeared to be coming from the area of 4th Street, which runs adjacent to the subject property on the west side. After hearing the gunshots and approaching the window, Ms. McSwain observed a vehicle making a U-Turn at the stop sign and heard additional gunshots coming from the area of the motor vehicle. They tried to run out of the bedroom; but before they could get to a safe location, bullets went into the bedroom and struck both Ms. McSwain and her daughter Annah.[1]

Plaintiffs filed the present negligence lawsuit claiming that defendant ". . . owed a non-delegable duty to keep invitees such as Plaintiffs safe and to use reasonable care in inspection and maintenance of its property and to keep the premises free of unreasonably dangerous conditions and to warn invitees of hazards on the premises."

Defendant now asks the Court to enter final summary judgment in its behalf because:

1. Community Havana had no legal duty to plaintiffs for criminal acts committed off community Havana's premises, and

2. Community Havana is not liable for the unforeseeable criminal acts of a third party.

Motion at 3, 5.

Florida's New Summary Judgment Standard

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Because the plaintiff has the burden of proof at trial for claims, to defeat a motion challenging a claim, the plaintiff must come forward with record evidence on the essential elements of the claim. *See generally In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] and *Rich v. Narog*, No. 3D21-1631, 2022 WL 4360601, at *5 (Fla. 3d DCA Sept. 21, 2022) [47 Fla. L. Weekly D1933a]. The same would be true for a defense on which the defendant has the burden of proof at trial. Another option would be for the party with the burden of proof at trial to come forward with evidence and assert that there is no contrary record evidence and, thus, summary judgment should be granted in its favor on that claim or defense.

"A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fla.R.Civ.P. 1.510(c)(1).

"A party seeking summary judgment in a negligence action has a more onerous burden than that borne in other types of cases." *Pratus v. Marzucco's Constr. & Coatings, Inc.*, 310 So.3d 146, 149 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D186a] (citations omitted).

". . .[T]hose applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *In re Amends. to Fla. Rule of Civ. Proc.* at 75; *Dumigan v. Holmes Reg'l Med. Ctr., Inc.*, 332 So.3d 579, 587 (Fla. 5th DCA 2022) [47 Fla. L. Weekly D270a]. "Florida law cautions against a motion for directed verdict in negligence cases since the evidence to support the elements of negligence are frequently subject to more than one interpretation." *United Servs. Auto. Ass'n v. Rey*, 313 So.3d 698, 701 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1855d], quoting *Regency Lake Apartments Assocs., Ltd. v. French*, 590 So.2d 970, 972 (Fla. 1st DCA 1991) (other citations omitted).

"At summary judgment, courts must view the evidence and draw inferences in the light most favorable to the nonmoving party." *Esteban-Garcia v. Wal-Mart Stores E. LP*, No. 21-23831-CIV, 2022 WL 16635816, at *2 (S.D. Fla. Nov. 2, 2022) (citation omitted). "To overcome summary judgment, an inference must be reasonable." *Id*. at 3 (citation and internal quotations omitted). "An inference is reasonable if it is one that a reasonable and fair-minded [person] in the exercise of impartial judgment might draw from the evidence." *Id*. (citation and internal quotations omitted). "While a reasonable inference may rest in part on conjecture, a jury cannot be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility." *Id*. (citation and internal quotations omitted). "An inference created from speculation and conjecture is not reasonable." *Id*. at 2 (citation and internal quotations omitted).

Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75-76 (Fla. 2021), 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].

However, testimony from parties always has an element of bias for their respective positions. It is human nature. The fact that a summary judgment affidavit is "self-serving" alone is not a ground to reject the testimony. Florida courts have addressed the veracity of "self-serving" summary judgment evidence. "A non-conclusory affidavit which complies with [Federal Rule of Civil Procedure 56] can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *Raissi v. Valente*, 247 So.3d 629, 632 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1124a], citing *United States v. Stein*, 881 F.3d 853, 858-59 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C571a].

Assuming the evidence is not such that it must be outright discarded, "If there is a conflict between the parties' allegations and evidence, the nonmoving party's evidence is presumed to be true and all reasonable inferences must be drawn in the nonmoving party's favor. *James B. Wilson v. Pinellas County*, No. 8:20-CV-135-TPB-SPF, 2021 WL 5163229, at *1 (M.D. Fla. Nov. 5, 2021). "A jury question is presented when the evidence is susceptible to inference that would allow recovery even though there are opposing inferences that are equally reasonable." *State Farm Mut. Auto. Ins. Co. v. Hanania*, 261 So.3d 684, 688 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D2723a], quoting *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So.2d 1264, 1279 (Fla. 2003) [28 Fla. L. Weekly S538a].

Landowner's Duty to Protect Against Criminal Attack

"As a basic principle of law, a property owner has no duty to

protect one on his premises from criminal attack by a third person. Even though one's negligence may be a cause in fact of another's loss, he will not be liable if an independent, intervening and unforeseeable criminal act also causes the loss. If, however, the criminal attack is reasonably foreseeable, a duty may arise between a landowner and his invitee.[2] But it must be borne in mind that a landowner is not an insurer of the safety of his invitees and is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate. In order to impose a duty upon a landowner to protect an invitee from criminal acts of a third person[,] a plaintiff[ ] invitee, must allege and prove that the landowner had actual or constructive knowledge of prior, similar criminal acts committed upon invitees. . . ." *Bryan v. Galley Maid Marine Prod., Inc.*, 287 So. 3d 1281, 1286 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D108a] (citations and internal quotations omitted).

Determining Whether the Duty Threshold Has Been Met

Our First District has explained the duty element as follows:

> The concept of foreseeability relates both to the duty and proximate cause elements of negligence. The foreseeability analysis is distinctly different for each element. In *McCain v. Florida Power Corp.*, 593 So.2d 500, 502-3 (Fla.1992) (internal citations and footnote omitted; italics in original), the Supreme Court explained these concepts as follows:
>
> [t]he duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold legal requirement for opening the courthouse doors, whereas the latter is part of the much more specific factual requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven.

Davis v. Bruhaspati, Inc., 917 So.2d 350, 352 (Fla. 1st DCA 2005) [31 Fla. L. Weekly D102a].[3]

The element of duty is for the Court to decide as a matter of law, unless there is a material disputed fact upon which the duty analysis depends. *Pozanco v. FJB 6501, Inc.*, 346 So.3d 120, 125-26 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1163a] ("Because a genuine issue of material fact exists as to whether the conditions and circumstances surrounding the pool could amount to the sort of hidden danger that would render [plaintiff's] injury foreseeable to the landowner or create a duty to warn under the circumstances present here, the trial court should have allowed the issue to go before a jury."); *see also Bryan,* 287 So.3d at 1287 ("We further conclude that genuine issues of material fact exist as to whether [defendants] had a duty to render or call for aid after the attacks.").

Stated plainly, if the facts are clearly established, duty is a call for the Court to make. If there are factual matters that must first be determined, it falls to the jury.

Defendant's (Movant's) Record Evidence

The path defendant has chosen is to assert that plaintiffs have no cognizable summary judgment record evidence to support the element and, thus, their case must fail as a matter of law. Because plaintiffs have the burden at trial on their claims, defendants do not have to produce any record evidence and they point to none. Rather, they only point to plaintiffs insufficient showing, which is permissible under the new standard.

Plaintiffs' Record Evidence

Plaintiffs primarily rely on two pieces of evidence. First, the affidavit of the plaintiff mother herself. In the affidavit she states:

> Before I was shot, I looked out my window and saw the vehicle and shooter standing outside the vehicle on the property. (Havana Heights Property). . . . I have attached a google map where I have marked an X where the shooter was MS where I observed the shooter.

Plaintiffs' Notice of Supplemental Summary Judgment Exhibit, p.3.

The following is a cropped image from the Google Maps exhibit:

Plaintiffs' Notice of Supplemental Summary Judgment Exhibit, p.6.

The second piece of evidence was a police grid (summary of criminal activity reports) for the subject property for the four years leading up to the subject incident. Among other things, the reports document: multiple incidents of fighting with knives and guns, gun shots, robbery at gunpoint, and at least one injury from gunshot. Plaintiff's Response at 14, email from, and with a declaration of authenticity electronically signed by, Ms. Destinee Green from the Gadsden County Sheriff's Office Criminal Records Section.

The Court overruled defendant's objection to the authenticity of the reports. *See Locklear v. State,* 301 So.3d 464, 466 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1937a] (". . .the documents do constitute self-authenticating public records 'not bearing a seal but purporting to bear a signature of an officer or employee of [a department of a state], affixed in the officer's or employee's official capacity.' § 90.902(2), Fla. Stat."); *and see Paterson v. Deeb*, 472 So.2d 1210, 1218 (Fla. 1st DCA 1985) ("Unquestionably, allegations that prior criminal acts had occurred in the vicinity is pertinent to determining foreseeability, and police records of reported crimes in the geographical area are usually competent evidence on this issue."). The authenticity of the Google Maps image was not contested.

Defendant attacked the reliability and credibility of the testimony contained in plaintiff's affidavit. Defendant insisted that the plaintiff could not have seen the shooter at the exact moment of shooting because she was running away at that moment. Defendant concluded that the plaintiff's affidavit just does not hold up and is too vague.

The Court agrees with defendant in this respect. The plaintiff's affidavit testimony is not especially strong or precise. It certainly will be fertile ground for cross examination at trial. But that is the place to address it—at trial. "The credibility of the witnesses, their bias or prejudice and other matters concerning the weight to be given the spoken word or other evidence . . . . are matters wholly within the province of the jury." *Frank v. Wyatt*, 869 So.2d 763, 765 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D887a], quoting *Slavin v. Kay*, 108 So.2d 462, 467-68 (Fla.1959) (on rehearing granted). The affidavit is not, however, "blatantly contradicted by the record" and, therefore, will not be rejected.

Applying the New Standard to the Evidence

The reasonable inferences drawn from summary judgment evidence discussed above are that the shooter was on defendant's property at the time of the shooting, that the property has been a high crime area that experienced multiple similar crimes during the years leading up to the subject incident, and that defendant *should have* known of the danger which eventually caused harm to the plaintiffs. This meets the minimal threshold of duty and the doors to the courthouse are open.[4]

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

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[1]Defendant does not cite to any summary judgment record evidence for this description or any other facts, but the Court will accept it for the purposes of this motion.

[2]There is no dispute over plaintiffs' status as invitees.

[3]Several states have adopted or cited the section of the Restatement of Torts Third which provides a less stringent test for a duty analysis. Section 7 of the Restatement (Third): Liability for Physical and Emotional Harm states: "Duty (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." Some Florida courts are warming up to the Restatement Third's "categorical no duty" approach, if not its abandonment of "foreseeability." *See Pollack v. Cruz*, 296 So.3d 453, 460 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1244a] and *Knight v. Merhige*, 133 So.3d 1140 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D391a].

[4]We must remember, the sole ground and element challenged in defendant's motion for summary judgment is duty. And, as discussed at the hearing, if it turns out that the evidence at trial does not sufficiently support these inferences, the matter of duty may be raised again on directed verdict.

* * *

Civil procedure—Service of process—Amended complaint—Service of amended complaint and summons within initial 120-day period following filing of action, or within extended period, was timely and clearly sufficient to put defendants on notice and answerable to plaintiff's claims—No merit to argument that service was defective because pleading served was amended complaint and not the original complaint that it superseded

MONTEVILLA AT BARTRAM LAKES ASSOCIATION, INC., Plaintiff, v. LENNAR HOMES, LLC, et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2022-CA-4203. Division CV-A. February 24, 2023. Waddell A. Wallace, Judge. Counsel: Barry B. Ansbacher and Michael Feinberg, Ansbacher Law, Jacksonville, for Plaintiff. Dara L. Lindquist and Charlotte L. Warren, Carlton Fields, Orlando, for Defendants.

ORDER DENYING MOTIONS TO QUASH SERVICE AND DISMISS AMENDED COMPLAINT FOR FAILURE TO EFFECTUATE SERVICE OF PROCESS

THIS CASE came before the Court on January 19, 2023, on the following motions:

• *Plaintiff's Motion to Issue Alias Summons and Request for Extension of Time to Effect Service* filed December 14, 2022 [**Docket No. 0293**];

• *Defendant Harmony Munger's Amended Motion to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed December 2, 2022 [**Docket No. 0214**];

• *Defendants Maurice Rudolph, Kristine Norman, Jennifer Hendry, Serge Gagnon, Liam O'Reilly, Zenzi Rogers, Chris Mayo, and Joseph Panchula Amended Motion to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed December 2, 2022 [**Docket No. 0225**];

• *Defendants, Lennar Homes, LLC, and Lennar Corporation's Motion to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed December 5, 2022 [**Docket No. 0243**];

• *Defendant Standard Pacific of Florida GP, Inc.'s Motion to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed December 6, 2022 [**Docket No. 0242**];

• *Defendants Standard Pacific of Tampa, Standard Pacific of Florida, LLC, CalAtlantic Group, Inc., Standard Pacific 1, Inc., & Standard Pacific of Tampa GP, Inc. Motion to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed December 9, 2022 [**Docket No. 0261**];

• *Defendant Westfield Homes USA, Inc.'s Motion to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed December 14, 2022 [**Docket No. 0291**]; and

• *Defendant Amber Lehman's Motion to Quash Service* and *Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process* filed January 11, 2023 [**Docket No. 0381**].

The moving parties of the preceding motions are collectively referred to in this Order as the "Lennar Defendants."

This Court, having reviewed the motions, proposed orders, and having heard the argument of counsel for the parties, makes the following findings of fact and conclusions of law:

1. This action commenced on July 23, 2022.

2. Pursuant to Fla.R.Civ. P. 1.070, absent a timely motion for extension, or good cause, service of process was required to be effected by November 21, 2022.

3. Prior to service of the complaint on any parties, Plaintiff, pursuant to Rule 1.190 Fla.R.Civ.P., amended and restated its complaint on October 28, 2022. Thus as of such date, the only operative complaint was the amended complaint. *Oceanside Plaza Condo. Ass'n v. Foam King Indus*., 206 So. 3d 785 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D2505b] (Long-standing Florida case law makes clear that after the filing of an amended complaint, the original complaint which was superseded ceased to be part of the record and could no longer be viewed as a pleading.)

4. Therefore, after the amendment, the initial pleading for each defendant in this action, including the Lennar Defendants, was the amended complaint, and it would have served no purpose and, in fact, would have been improper to serve the superseded original complaint.

5. The following Lennar Defendants were served with a summons and the amended complaint within the initial 120 days after the filing of this action:

a. Joseph Panchula was served on November 2, 2022 [**Docket No. 0122**].

b. Chris Mayo was served on November 2, 2022 [**Docket No. 0124**].

c. Serge Gagnon was served on November 4, 2022 [**Docket No. 0200**].

d. Jennifer Hendry was served on November 5, 2022 [**Docket No. 0129**].

e. Kristine Norman was served on November 7, 2022 [**Docket No. 0199**].

f. Maurice Rudolph was served on November 8, 2022 [**Docket No. 0198**].

g. Liam O'Reilly was served on November 8, 2022 [**Docket No. 0201**].

h. Zenzi Rogers was served on November 8, 2022 [**Docket No. 0202**].

i. Lennar Homes, LLC was served on November 8, 2022 [**Docket No. 0204**].

j. Standard Pacific of Florida, LLC f/k/a Standard Pacific of Florida, a Florida general partnership, was served on November 8, 2022 [**Docket No. 0236**].

k. Standard Pacific of Tampa was served on November 8, 2022 [**Docket No. 0235**].

l. Lennar Corporation was served on November 9, 2022 [**Docket No. 0203**].

6. On November 3, 2022, Plaintiff filed its Motion for Extension of Time to Effect Service on Defendants **[Docket No. 0120]**.

7. This motion was filed *prior* to the expiration of the initial 120 days, and therefore Plaintiff was not required to show good cause or excusable neglect in support of its motion. *See Miranda v. Young*, 19 So. 3d 1100, (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2070a] (The 1999 to Rule 1.070(j) provides broad discretion to a trial court to extend time for service "even when good cause has not been shown"); *Onett v. Ahola*, 683 So. 2d 593, 595 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D2414a] (Trial court dismissal for failure to timely effect service was reversed. "Obviously if the plaintiff obtains an order extending the 120-day time limit and then accomplishes service within the extension of time service is timely as a matter of law. There would be no occasion to consider the issue of good cause. The issue of good cause arises only if the plaintiff accomplishes service after the 120-day limit (and any extensions) have expired.")

8. However, this Court finds that the motion did establish good cause for the extension and that the granting of said motion by the *Order Granting Plaintiff's Motion for an Extension of Time to Effect Service on Defendants* entered on November 16, 2022 **[Docket No. 0135]** would have been proper even if the rules required such a showing. The time for service was extended until March 16, 2022, by such order.

9. The following Lennar Defendants were served with a summons and the Amended Complaint more than 120 days after the filing of this action, but within the extended time to effect service pursuant to this Court's *Order Granting Plaintiff's Motion for an Extension of Time to Effect Service on Defendants*.

a. CalAtlantic Group, Inc. was served on November 23, 2022 [**Docket No. 0237**].

b. Standard Pacific of Florida GP, Inc. was served on November 23, 2022 [**Docket No. 0207**].

c. Standard Pacific 1, Inc. was served on November 23, 2022 **[Docket No. 0238]**.

d. Standard Pacific of Tampa GP, Inc. was served on November 23, 2022 **[Docket No. 0239].**

e. Westfield Homes USA, Inc. was served on November 23, 2022 **[Docket No. 0288].**

f. Harmony Munger was served on November 29, 2022 [**Docket No. 0208**].

g. Amber Lehman was served on January 4, 2023 **[Docket No. 0377].**

10. The relevant statutes are Fla. Stat. § 48.031(1)(a) and Fla. Stat. § 48.081(2). Section 48.031(1)(a) provides that "[s]ervice of original process is made by delivering a copy of it to the person to be served with a copy of the complaint . . . or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents." Section 48.081(2) provides that "[a] domestic corporation . . . may be served with process required or authorized by law by service on its registered agent designated by the corporation under chapter 607 or chapter 617, as applicable."

11. The Lennar Defendants do not dispute that a summons and the amended complaint were served upon the proper persons to effect service, and their complaint is limited to the fact that the pleading which was served was the amended complaint and not the superseded original complaint.

12. The only purpose of service of process is to provide notice to defendants, which has been accomplished here. See *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 953 (Fla. 2001) [26 Fla. L. Weekly S574a] ("It is well settled that the fundamental purpose of service is to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff and, therefore, to vest jurisdiction in the court entertaining the controversy.") (citations and internal quotation marks omitted). "Hypertecnhical" defects in service do not require a trial court to quash service. *American Hospital of Miami, Inc. v. Nateman*, 498 So. 2d 444, 446 (Fla. 3d DCA 1986) (The trial court's decision to deny a motion to quash where the defendant was misnamed in the summons was upheld.)

13. Service of the amended complaint was clearly sufficient to put the Lennar Defendants on notice and answerable to Plaintiff's claims. Any arguments to the contrary by the Lennar Defendants are belied by the 33 answers and the three motions to dismiss (on grounds other than challenging service of process) filed by the other 35 defendants in this action, who were served in the exact same manner as the Lennar Defendants.

14. Further, even if this Court found the arguments of the Lennar Defendants to be persuasive, granting the remedy sought by the Lennar Defendants of dismissal would be an abuse of discretion. Numerous affirmative defenses filed by other defendants assert a statute of limitations and statute of repose defenses. See, for example, *Brightview Landscape Services, Inc. Answer and Affirmative Fednses to Plaintiff's Amended Complaint* [**Docket No. 065. Filed 01.05.23**]. Further, at the hearing on its motions, the Lennar Defendants concede that if the Court granted a dismissal without prejudice at least some of Plaintiff's claims might be extinguished by limitations or repose.

15. Even where a party fails to show good cause under Fla.R.Civ.P. 1.070(j), Florida courts have held that a trial court abuses its discretion in denying an extension of the 120-day time period where the statute of limitations has run. *Fernandez v. Cohn*, 54 So. 3d 1040 (Fla. 3d DCA 2011) [36 Fla. L. Weekly D303a]. In other words, where the dismissal of an action for failure to effect service within 120 days under Rule 1.070(j) effectively acts as a dismissal with prejudice due to the statute of limitations, "discretion should normally be exercised in favor of extending the time for service of process." *Id*. at 1042 (Fla. 3d DCA 2011); see also *Miranda v. Young*, 19 So. 3d 1100, 1103 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2070a] ("The dismissal of the complaint under rule 1.070(j) after the expiration of the statute of limitations is inconsistent with Florida's long-standing policy in favor or resolving disputes on their merits.").

16. Under these circumstances, if the Court were to agree with the Lennar Defendants, the appropriate remedy would be to order the Clerk to issue alias summonses and direct Plaintiff to re-serve the Lennar Defendants with both the superseded original complaint and the amended complaint.

17. Such remedy was even proposed by Plaintiff in order to avoid the judicial labor required to hear these motions, but the Lennar Defendants objected to same.

18. However, this Court sees no purpose in requiring any additional service. Such a "remedy" would only serve to delay the adjudication of this dispute. Further, no "remedy" is required as service on the Lennar Defendants is not defective.

19. For the above reasons, this Court finds that each of the Lennar Defendants has been properly served with process.

NOW THEREFORE, this Court Orders:

A. The Motions to Quash Service and to Dismiss Amended Complaint for Failure to Effectuate Proper Service of Process [Docket Nos. 0214, 0225, 0242, 0243, 0261, 0291, 0381] filed by the Lennar Defendants' are **DENIED**.

B. Each of the Lennar Defendants shall answer Plaintiff's amended complaint within 20 days of this Order.

C. Plaintiff's *Motion to Issue Alias Summons and Request for Extension of Time to Effect Service* is deemed **MOOT**.

* * *

Civil procedure—Dismissal—Failure to attend pretrial conference and mediation—Failure to comply with discovery or disclose witnesses and exhibits

WILLIAM ADKISON and ELIZABETH ADKISON, Plaintiffs, v. SECURITY FIRST INSURANCE COMPANY d/b/a SECURITY FIRST FLORIDA, Defendant. Circuit Court, 5th Judicial Circuit in and for Lake County. Case No. 35-2021-CA-001202-AXXX-XX. February 7, 2023. Dan R. Mosley, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law Group, Miami, for Plaintiff. Drew Stoller, Scharome R. Wolfe, P.A., dba My Legal Wolfe, Orlando, for Defendant.

ORDER

THIS CAUSE came before the Court on February 6, 2023, at the Pre-Trial Conference set by the Court and the Court, having reviewed the court file and hearing argument from counsel, and being otherwise fully advised in the premises, it is thereupon **Ordered and Adjudged as follows:**

CONCLUSIONS OF FACT

On September 16, 2022 the Court entered an **Order Setting Cause for Pretrial Conference and Jury Trial and Order of Mediation**. The Order instructed:

> [t]hat a pre-trial conference in this cause will be held VIA ZOOM—ZOOM INFORMATION ATTACHED - at 8:45 A.M., on Monday, February 06, 2023, pursuant to Rule 1.200, Florida Rules of Civil Procedure, to consider all matters suggested in this rule to simplify the issues and expedite the trial, or other disposition of the case.
>
> *Failure of any party to appear by trial counsel or to comply with any other provisions of this order will be grounds for the Court to strike that party's pleadings or take such other action as justice requires, including contempt of court proceedings.*

The Court finds that Plaintiff failed to appear at Pretrial Conference on February 6, 2023. As discussed further below, the Court also finds that Plaintiff failed to comply with every provision of the Order setting pretrial deadlines.

Also on September 16, 2022 the Court entered an **Order** (hereafter the "Order") setting trial and establishing certain pretrial deadlines that include:

1. Pre-Trial Conference shall be held February 6, 2023.
   The Court finds that Plaintiff's counsel failed to appear for the Pre-Trial Conference noticed by the Court.
2. Disclosure of Experts: Plaintiff - November 7, 2022.
   The Court finds that Plaintiff failed to disclose its expert witnesses by November 7, 2022, thus prejudicing Defendant in its ability to determine what expert specialty is necessary for trial. As of the pretrial conference on February 6, 2023, Plaintiff did not disclose experts.
3. Discovery Cut-Off: January 23, 2023.
   The Court finds that Defendant served Expert Request to Produce and Expert Interrogatories on Plaintiff dated December 8, 2022. On January 23, 2023 Plaintiff filed an untimely Motion for Extension of Time to File Responses to Defendant's Discovery Requests (more than two weeks after the discovery was due). The Motion was filed on the date of discovery cutoff and Plaintiff made no attempt to set this Motion for hearing prior to the Pretrial Conference. Defendant is prejudiced by Plaintiff's failure to comply with expert discovery. As of the February 6, 2023 Pretrial Conference, Plaintiff has failed to respond to expert discovery.
4. Mediation to be set no later than November 7, 2022.
   The Court finds that Mediation was not set by November 7, 2022 and that as of the February 6, 2023 Plaintiff did not file a Notice of Mediation and mediation has not taken place.
5. Witness Lists: January 6, 2023 Exhibits: January 6, 2023.
   The Court finds that Plaintiff failed to disclose its fact witnesses and exhibits by January 6, 2023, thus prejudicing Defendant in its ability to prepare for trial, including determining its own fact and expert witnesses and exhibits for trial.
6. Dispositive Motion to include Motion in Limine Cut-off: January 6, 2023.
   The Court finds that Defendant timely filed its **Motion to Dismiss, Motion to Strike Experts, or alternatively, Motion to Extend Pretrial Deadlines** due to Plaintiff's failure to disclose experts and failure to mediate**.** Despite being placed on notice by this Motion, Plaintiff's only record activity between December 8, 2022 and February 6, 2023 was the untimely Motion for Extension of Time to File Responses to Defendant's expert discovery.

CONCLUSIONS OF LAW

The primary difficulty facing the Plaintiff in this case is that any purported neglect, under the facts above, is simply not "excusable." The Court makes an explicit finding of Plaintiff's "willful non-compliance" in failing to comply with discovery, failing to disclose expert witnesses, failing to disclose fact witnesses and exhibits, failing to attend mediation, and failing to attend Pre-Trial Conference.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED THAT** Plaintiff's claim is dismissed without prejudice.

* * *

Municipal corporations—Ordinances—Beachfront property—Public use—Town is entitled to judgment on pleadings on multiple counts of complaint alleging that town ordinance prohibiting interference with customary-use-doctrine derived rights of beachgoers to make traditional uses of dry sand beach area in town constituted a taking and inverse condemnation and further alleging that ordinance was not properly adopted—No merit to claim that town violated property owners' procedural due process rights by failing to give particularized notice required by section 163.035 where ordinance was adopted prior to effective date of statute, and adoption of ordinance at duly-advertised public hearing satisfied requirements of due process—Count seeking declaratory judgment that ordinance is void and unenforceable because it was not adopted pursuant to provisions of section 163.035 is denied where ordinance predates effective date of statute—Failure to repeal ordinance does not violate section 163.035 where statute provides that ordinances based on customary use of beaches that were adopted in two-and-a- half-year period prior to effective date of section 163.035, as was ordinance at issue, are presumptively valid but can be challenged in court—Injunctions—Town is entitled to judgment on pleadings as to count seeking injunction prohibiting town from encouraging public to trespass and enjoining non-owners from accessing beach property—Request for injunction is not stand-alone cause of action, and court cannot enjoin members of public who are not party to action—Facial taking—Where face of ordinance shows that it prohibits any person or entity, not just property owners, from interfering with customary use of beach, ordinance can be applied constitutionally and is not facially unconstitutional—Facial taking did not occur where ordinance merely recognizes and attempts to regulate citizens' customary use rights that already exist under Florida common law—No merit to claim that ordinance violates separation of powers by circumventing judicial branch's power to determine application of customary use because judiciary's authority in that area is not exclusive—No merit to argument that ordinance exceeds town's home rule authority—Quiet title action is not available to challenge rights of public to enjoy customary use of beaches or ordinance regulating that use

DIRTY DUCK 16004 LLC; DIRTY DUCK 16008 LLC; SALLY S. DOWDLE, as Trustee of the James C. Dowdle Non-Exempt Marital Trust #2; GARY W. HARROD, as Trustee of the Gary W. Harrod Qualified Personal Residence Trust dated October 16th 2007; TERENCE J. MCCARTHY, and ELIZABETH SCHMIDT, Plaintiffs, v. TOWN OF REDINGTON BEACH, a Florida municipal corporation, Defendant.

Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 21-003526-CI-19. February 3, 2023. Thomas Ramsberger, Judge. Counsel: Kyle B. Teal, Buchanan Ingersoll & Rooney, PC, Tampa, for Plaintiffs. Robert Michael Eschenfelder, Trask Daigneault, LLP, Clearwater, for Defendant.

ORDER GRANTING DEFENDANT'S DISPOSITIVE MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNTS I, II, III, IV, VI AND VII OF PLAINTIFFS' AMENDED COMPLAINT

THIS CAUSE having come to be heard and considered on July 11, 2022, and at a continued hearing on October 17, 2022, on the Defendant, Town of Redington Beach's Dispositive Motion for Judgment on the Pleadings as to Counts I, II, III, IV, VI and VII. The Court, having heard arguments of counsel, having considered the pleadings and submitted supplemental authorities, having considered the Parties' respective memoranda of law, and being otherwise advised in the premises, hereby

FINDS AND ORDERS the following:

1. On July 20, 2021, the Plaintiffs filed a five-count Complaint. In the first two counts, Plaintiffs alleged Ordinance 2018-03, which created § 13-30 of the Redington Beach Town Code, are a facial and an as-applied taking of their respective properties. On January 6, 2022, the Plaintiffs filed an Amended Complaint asserting seven (7) counts.

2. On January 10, 2022, the Defendant, Town of Redington Beach ("Town") filed its Answer and Affirmative Defenses to the Amended Complaint.

3. In the Plaintiff's Amended Complaint,

a. Count I alleges that the Town violated Plaintiffs' procedural due process rights because it did not provide them with procedural due process in relation to the adoption of the Ordinance.

b. Count II seeks a declaratory judgment that Ordinance 2018-03 is void and unenforceable because it was not adopted pursuant to the provisions in Florida Statutes § 163.035.Count III seeks injunctive relief because the Town did not adopt Ordinance 2018-03 pursuant to Florida Statutes § 163.035 and appears to merely be a form of relief requested based on the substantive legal argument raised Count II.

c. Count IV alleges the adoption of Ordinance 2018-03 constitutes an inverse condemnation and facial taking.

d. Count V alleges Ordinance 2018-03 constitutes an as-applied taking.

e. Count VI alleges Ordinance 2018-03's legislative finding of customary use violates the proper role of the judiciary in violation of the Separation of Powers Doctrine as guaranteed by Art. II, § 3 and Art. V, § 1 and 20(c)(3) of the Florida Constitution; and (ii) exceeds Defendant's Home Rule authority as proscribed by Art. VIII, § 2(b) of the Florida Constitution.

f. Count VII alleges that the Town's adoption of Ordinance 2018-03 placed a cloud over the owners' titles and that Plaintiffs are therefore entitled to an order quieting their titles and declaring Plaintiffs are the fee simple owners of their respective properties.

4. On May 9, 2022, the Town filed a Dispositive Motion for Judgment on the Pleadings as to Counts I, II, III, IV, VI and VII of the Amended Complaint (not including Count V) (the "Motion"). On July 3, 2022, the Plaintiffs filed their Response in Opposition.

5. The Court convened a hearing on the Town's Motion on July 11, 2022. However, at the end of the scheduled hour, and with Plaintiffs' counsel not having equal time to present, the hearing was continued to October 17, 2022 to allow for completion of same.

6. In addition to their initial motion and response, counsel for both Parties filed separate Notices of Supplemental Authority, providing the Court with additional authorities in support of their respective positions. Counsel for both Parties confirmed at the conclusion of the October 17, 2022, hearing that they had been afforded a full opportunity to present their arguments.

7. Based on the written submissions of the Parties, the supplemental authorities submitted by the Parties, the argument of counsel, and for the reasons set forth below, the Town's motion is hereby GRANTED.

8. Standard Applicable to Motions for Judgment on the Pleadings

The purpose of a motion for judgment on the pleadings is to test the legal sufficiency of a cause of action or defense. A motion for judgment on the pleadings filed pursuant to Rule 1.140(c) must be decided wholly on the pleadings and may only be granted if the moving party is clearly entitled to a judgment as a matter of law. Pursuant to Fla. R. Civ. P. 1.130(b), any exhibits attached to the pleadings must be considered a part thereof for all purposes. Thus, attachments to pleadings shall be considered on a motion for judgment on the pleadings. If the defendant has filed a motion for judgment on the pleadings, the trial judge must treat all of the allegations of the complaint as true, and all of the disputed allegations of the answer as false. The inquiry is then limited to a determination whether the complaint states a cause of action.

9. Count I: Procedural Due Process

In this count, Plaintiffs allege that they were denied procedural due process under Art. I, § 9 of the Florida Constitution because the Town did not follow the procedural steps outlined in Florida Statutes § 163.035 (which include particularized notice for each parcel owner) when it enacted Ordinance 18-03. **Amended Complaint, ¶ 24, 59-60**. The Town, however, argues that Florida Statutes § 163.035 was not in effect on the date of the Ordinance, and that its adoption of the Ordinance would be governed by Florida Statutes § 166.041, providing for the various procedures which a municipality must follow when adopting an ordinance. The Town points out that Florida Statutes § 166.041(3)(a) sets forth the process required for adopting municipal police power ordinances. That statute does not require particularized notice to the owners of properties which may be impacted by an ordinance of general applicability apart from the general newspaper notice and the opportunity at the adoption hearing for the public to "appear and be heard with respect to the proposed ordinance." The Ordinance 18-03 was adopted on June 6th 2018, (*Amended Complaint*, **Ex. C**) at a duly-advertised public hearing at which members of the public including beachfront lot owners and their attorneys were present and able to be heard. **Amended Complaint, Ex. D, pgs. 2-3**.

The Amended Complaint does not allege that the Town failed to follow the normal ordinance adoption procedure. Rather, the Plaintiffs' position is that the Town should have followed the unique and elaborate procedures outlined in Florida Statutes § 163.035 for local governments seeking to establish customary use of properties within their jurisdictions. However, as reviewed in more detail in the Court's discussion as to Count II, Florida Statutes § 163.035 became effective July 1, 2018, after the June 6, 2018, effective date of Ordinance 2018-03.

"Procedural due process" imposes procedural limitations on a state's power to take away protected entitlements. To determine whether the Town violated Plaintiffs' procedural due process rights, the Court must first determine whether the ordinance's adoption was "adjudicative" or "legislative." "A legislative act involves policy-making rather than mere administrative application of existing policies." When government action is "legislative," individuals impacted by such action are not entitled to procedural due process beyond that which the legislative process affords them. *75 Acres, LLC v. Miami-Dade Cnty*., 338 F.3d 1288, 1294 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C898a] ("[W]hen a regulation is legislative in nature, the legislative process (wherein elected officials are accountable to the electorate) is all the process that is due."). The federal appeals court

with jurisdiction over Florida has concluded that even ordinances that have a significant impact on one property owner are generally legislative in character:

> While it is true that the County's moratorium ordinance has been applied specifically to 75 Acres' property in this case, such an observance does not detract from the fact that the moratorium resulted from the application of a generally applicable ordinance.

75 Acres, 338 F.3d at 1297 (referencing *United States v. Fla. E. Coast Ry. Co*. 410 U.S. 224, 244-46, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973). The Florida Supreme Court has also confirmed that the more general ordinance advertising notice citizens receive during the ordinance adoption process provides sufficient notice of generally-applicable ordinances:

> Citizens complains that the Authority should have given actual notice to each property owner that validation of the mandatory connection ordinance would be considered during the bond validation proceeding. However, in *Penn v. Florida Defense Finance & Accounting Service Center Authority*, 623 So.2d 459, 462 (Fla. 1993), this Court held that the statutory twenty-day period between publication of notice and the bond validation hearing did not violate the Florida and federal guarantees of due process. Thus, the Court necessarily concluded that such constructive notice by publication is appropriate in bond validation proceedings.

Keys Citizens For Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So.2d 940, 949 (Fla. 2001) [26 Fla. L. Weekly S502a].

Ordinance 2018-03 was not an application of existing Town codes to specific individuals (as would occur, for instance, in an ordinance rezoning a parcel of land) but rather the formulation of a new policy with general application. Under the Ordinance, no one is allowed to interfere with the customary use doctrine-derived rights of beachgoers (a right yet to be confirmed by the Court when it disposes of the as-applied takings count) to make traditional uses of the dry sand beach area in the Town (including privately-owned portions) and, in turn, users were confined to a set list of uses, and must abide by a 15-foot buffer. Such regulation of conduct is the hallmark of legislative activity. See *Brown v. Crawford Cnty*., 960 F.2d 1002, 1011 (11th Cir. 1992) ("[A] legislative act is characterized by having a policymaking function and general application."); *Bannum, Inc. v. City of Beaumont*, 236 F.Supp.2d 633, 635 (E.D. Tex. 2002) ("[T]he more the general community is affected by the action, the more likely it is a legislative act."). For instance, in *Biblia Albierta v. Banks*, 129 F.3d 899, 904-05 (7th Cir. 1997), the court found that although the ordinance in that case only then impacted three properties, in passing the ordinance the county commissioners "created neutral, prospective rules that apply to all current and future owners of the property." See also, *Yeldell v. Cooper Green Hosp*., 956 F.2d 1056, 1062-63 (11th Cir. 1992) ("Legislative acts are those which involve policy-making decision of a general scope, or to put it another way, legislation involves line-drawing."). When government action is legislative in nature, "property owners generally are not entitled to procedural due process." *75 Acres*, 338 F.3d at 1294. "The challenge to such laws must be based on their substantive compatibility with constitutional guarantees." *Id*.

Through their submission of supplemental authorities, the Court is aware of litigation pending in the United States District Court for the Middle District of Florida styled *Buending, et al. v. Town of Redington Beach*, case no. 8:19-cv-1473. While the Court has not undertaken a review of the pleadings in that litigation, based on the discussion contained in the court opinions from that litigation submitted by the Parties, and the representations of counsel during the hearing, the federal litigation is an additional challenge to the Town's Ordinance raising many of the same challenges as are raised in the Amended Complaint in this case.

In the submitted opinion issued on September 22nd 2022 in the *Buending* case, United States District Court Judge James S. Moody granted judgment on the pleadings as to a claim that the Town's adoption of its Ordinance violated due process. In so doing, Judge Moody held:

> Starting with [Plaintiffs' Due Process Clause claim], § 166.041(3)(a) sets forth the process required for adopting municipal police power ordinances. That statute does not require particularized notice to property owners that may be impacted by an ordinance of general applicability apart from the general newspaper notice and the opportunity at the adoption hearing for the public to "appear and be heard with respect to the proposed ordinance." The subject ordinance was adopted on June 6th 2018, at a public hearing at which members of the public—including beachfront lot owners and their attorneys—had the opportunity under the statute to be present and to be heard.
>
> The Second Amended Complaint does not allege that the Town failed to follow the statutory ordinance adoption procedure. Rather, Plaintiffs' position is that the Town adopted the ordinance "without actual evidence of customary use," "deprived Plaintiffs of the right to exclude other (sic) from their private property without providing Plaintiffs with an appropriate opportunity for a hearing where they could present evidence before a neutral arbiter," adopted the ordinance "pursuant to a modified version of the common law judicial doctrine of customer (sic) use, which modified version did not exist at common law and was never recognized in Florida," and adopted the ordinance "by legislative fiat rather than by judicial determination as required under common law and Florida law."
>
> As Defendant points out, Plaintiffs' reference to "Florida law" is a reference to Florida Statute § 163.035, with the contention that the Town should have followed the unique and elaborate procedures outlined in that statute for local governments seeking to establish customary use of the properties within their jurisdictions. However, as the Court and the Eleventh Circuit previously recognized, § 163.035 became effective July 1, 2018, after the June 6, 2018, effective date of the Ordinance. So, it is axiomatic that the Town could not have deprived Plaintiffs of a process right contained in a statute that was not yet effective.
>
> Notably, Plaintiffs are already challenging the ordinance based on its substantive compatibility with constitutional guarantees by alleging in their Second Amended Complaint that the ordinance amounts to a taking. The process available to Plaintiffs is this judicial process. *See City of Pompano Beach v. Yardarm Restaurant, Inc*., 834 So.2d 861, 866 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2208a] ("Here, Yardarm has not shown any procedural due process violations. With respect to actions taken by the Building Official on Yardarm's building permit applications, Yardarm was afforded, and actually utilized, full judicial procedures to challenges these administrative decisions.").
>
> Also, to the extent Plaintiffs attempt to pivot and now argue (as they do in their response) that the Town's application of customary use is based on vague and arbitrary standards, the Court is unpersuaded. Plaintiffs do not point the Court to binding relevant law in support of this claim. Simply put, Plaintiffs' procedural due process claim is not applicable based on the pleadings. Accordingly, the Court grants the Town's motion.

Buending, et al. v. Town of Redington Beach, case 8:19-cv-1473, Dkt. 136, pg. 5-6. Filed as supplemental authority with this Court on October 13th 2022. (Filing # 159205231).

This Court agrees with the analysis of Judge Moody and, for the reasons outlined in the *Buending* order and the arguments set forth in the Town's motion, judgment on the pleadings is appropriate as to Count I.

10. Count II: Applicability of Florida Statutes § 163.035

In this count, Plaintiffs seek a declaratory judgment that Ordinance 2018-03, which was adopted and effective on June 6th 2018, is "void and unenforceable" because it was not adopted pursuant to the provisions in Florida Statutes § 163.035, which became effective July 1st 2018. Plaintiffs are not entitled to this declaration. Florida Statutes § 163.035(2) provides that a government:

> may not adopt or keep in effect an ordinance. . .that. . .is based upon customary use of any portion of a beach. . .unless such ordinance. . .is based on a judicial declaration affirming recreational customary use on such beach.

Subsection (3) of the statute provides that "[a] governmental entity *that seeks to affirm the existence of a recreational customary use* on private property must follow" a detailed procedure beginning with notice and leading to a declaratory action in Florida court to determine whether the entity's evidence demonstrates that the identified recreational uses have been ancient, reasonable, without interruption, and free from dispute.

Subsection (4) provides that the statute:

> does not apply to a governmental entity with an ordinance or rule that was adopted and in effect on or before January 1, 2016, and *does not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted before July 1, 2018.*

Emphasis added. First, Plaintiffs cannot show that the Town should have followed the statute's procedures since the face of Chapter Law 2018-94 (which created the statute), provides that the statute took effect July 1st 2018, after the Ordinance had taken effect.

Further, Plaintiffs cannot establish that the Ordinance violates subsection (2)'s "keep in effect" language simply because the Town did not repeal its June 6th 2018 Ordinance on July 1st 2018. When construing Florida statutes, the federal court will use Florida's rules of statutory interpretation. *Robbins v. Garrison Property and Cas. Ins. Co.*, 809 F.3d 583, 586 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1900a]. "When the statute is clear and unambiguous," a court uses its plain language and avoids rules of statutory construction. *Daniels v. Fla. Dept. of Health*, 898 So.2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a].

In this case, Plaintiffs' argument fails because it fails to give effect to subsections (3) and (4) of the statute. Subsection (3) applies to entities that are "*seek[ing]* to affirm the existence of a recreational customary use on private property." When the Ordinance was adopted, this statute did not exist, and the Town did not *seek* to affirm by ordinance any customary use after the statute's July 1st 2018 effective date.

Subsection (4) created three classifications of regulations: (1) those in effect before January 1st 2016; (2) those adopted between January 1st 2016 and June 30th 2018; and (3) those adopted on or after July 1st 2018. The Legislature clearly contemplated that there would be ordinances adopted between January 1st 2016 and June 30th 2018, and that as to that category, since they weren't protected by the blanket exemption for pre-January 1st 2016 rules, they could be challenged in court. If they were, the governmental entity would have the right to assert the affirmative defense of customary use. It is only those governmental entities seeking to affirm a customary use *after the effective date of the statute* which were required to undertake the notice and judicial declaration process outlined in subsection (3). And by treating ordinances adopted between January 1st 2016 and June 30th 2018 as subject to challenge but authorizing an affirmative defense of customary use, the Legislature's clear intent was not to make local governments in that class re-do their determinations using the new process.

Florida courts endeavor to give meaning to each word of a statute. "Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Brittany's Place Condominium Ass'n, Inc. v. U.S. Bank, N.A.*, 205 So.3d 794, 797-98 (Fla. 2d DCA 2016) [41 Fla. L. Weekly D2267a]. "[I]t is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992). If a statute is fairly susceptible of two constructions, one of which will give effect to it, and the other which will defeat it, the former construction is preferred. *Department of Legal Affairs v. Rogers*, 329 So.2d 257, 263 (Fla. 1976). "No part of a statute, not even a single word, should be ignored, read out of the text, or rendered meaningless, in construing the provision." *Scherer v. Volusia Cty. Dep't. of Corr.*, 171 So.3d 135, 139 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1564c]. Finally, "when conflicting provisions, that cannot be reconciled, exist within the same statute, the most recent expression contained in the statute normally prevails, but if the last expression in one section is plainly inconsistent with preceding sections which conform to the Legislature's obvious policy and intent, the later section must be construed as to give it effect consistent with such other sections and the policy they indicate." *Sharer v. Hotel Corp. of America*, 144 So.2d 813, 816-817 (Fla. 1962).

The Town correctly notes that the interpretation Plaintiffs seeks to have applied to the statute reads out of the statute the Town's right to assert customary use as an affirmative defense, ignores the prospective nature of the phrase "seeks to affirm", and effectively amends subsection (2) to read that 'any governmental entity which seeks in the future *or which has sought since January 1, 2016*' to affirm customary use must follow the notice and declaration process.

A customary use affirmative defense is available to governmental entities adopting such regulations between January 1, 2016, and June 30, 2018. As to the preemption argument, if every ordinance in the 2016-2018 category were automatically void as of July 1, 2018, then the provision of an affirmative defense for such ordinances would be meaningless. And the statute's elaborate procedural steps are clearly only aimed at those entities which "seek to affirm the existence of a recreational customary use" on or after July 1, 2018, which the Town didn't do.

The Court finds that the statute's proper construction is that regulations enacted between January 1, 2016, through June 30, 2018, are presumptively valid but can be challenged requiring proof by affirmative defense and, as of July 1, 2018, an entity cannot keep in effect a regulation created on or after that date unless it follows the statutory process. This interpretation best gives meaning and effect to each of the statute's provisions.

While no Florida appellate court has addressed this question, in *Buending v. Town of Redington Beach*, 10 F.4th 1125 (11th Cir. 2021) [29 Fla. L. Weekly Fed. C246a], the United States Court of Appeals for the Eleventh Circuit addressed an argument similar to Plaintiffs and ruled:

> The District Court erred in declaring the Ordinance void under Florida Statute § 163.035.
>
> We first address whether the Ordinance violates § 163.035. When, as here, the statute is unambiguous, we look to the plain language of the text. *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005) [30 Fla. L. Weekly S143a]; see also *Robbins v. Garrison Prop. & Cas. Ins. Co*., 809 F.3d 583, 586 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1900a].

In finding that the Ordinance violated § 163.035, the District Court looked to subsection 2, which states:

> (2) Ordinances and rules relating to customary use.—A governmental entity may not adopt or keep in effect an ordinance or rule that finds, determines, relies on, or is based upon customary use of any portion of a beach above the mean high-water line, as defined in s. 177.27, *unless such ordinance or rule is based on a judicial declaration* affirming recreational customary use on such beach.

Fla. Stat. § 163.035(2) (emphases added).

The District Court found that the Ordinance violated § 163.035 because it reasoned that the Town violated the "kept in effect" portion of the statute. The court found that the Town kept the Ordinance in effect after July 1, 2018, when § 163.035 went into effect, and did so without seeking a judicial declaration affirming customary use. The Town rejects this reading of § 163.035, arguing that the Property Owners' interpretation of the statute conflicts with § 163.035(4), which allows for ordinances adopted before July 1, 2018 to be kept in effect and defended in court. Section 163.035(4) reads:

> (4) Applicability.—This section does not apply to a governmental entity with an ordinance or rule that was adopted and in effect on or before January 1, 2016, *and does not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted before July 1, 2018.*

Fla. Stat. § 163.035(4) (emphasis added).

The Property Owners in turn respond that § 163.035(4) cannot serve as a valid basis for the Town to keep the Ordinance in effect because, they say, the Florida legislature intended for § 163.035(4) to apply only to localities' defense of takings suits. Upon our review, we conclude that this argument fails. For one, the Property Owners provide mere assertions of legislative intent and have not provided any evidence in support of its claims. But more to the point, the Property Owners' view that § 163.035(4) is limited to suits against government takings contravenes a plain reading of the statutory text. Section 163.035(4) states that a locality may raise an affirmative defense of customary use "in any proceeding." Fla. Stat. § 163.035(4) (emphasis added). We understand "any proceeding" to mean any proceeding, including this one brought by the Property Owners here. We therefore decline to adopt the Property Owners' reading. See *Daniels*, 898 So. 2d at 64.

Instead, we conclude that the Town was entitled to invoke customary use as an affirmative defense under § 163.035(4). Again, § 163.035(4) states that the statute "does not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted before July 1, 2018." Fla. Stat. § 163.035(4). The Ordinance was passed on June 6, 2018. See Ord. No. 2018-03. Thus, a plain reading of § 163.035(4) supports the conclusion that the Town was permitted to keep the Ordinance in effect after July 1, 2018 and raise an affirmative defense of customary use in defending against the Property Owners' lawsuit. *Daniels*, 898 So. 2d at 64.

We therefore vacate the District Court's ruling that the Ordinance is void under § 163.035 because it was kept in effect after July 1, 2018.

Buending, at 1130-31.

At the hearing, Plaintiffs' counsel correctly point out that this Court is not bound by the opinion of a federal appeals court in the manner it would be had the opinion been from a Florida appellate court. And that is particularly the case where the federal appeals court is ruling on a matter of Florida law. While this may be true, the Court has carefully considered the question and finds that the analysis of the federal appeals court in *Buending* is the correct interpretation of the statute. Indeed, the published *Buending* opinion was issued on August 20th 2021. It appears the Florida Legislature did not, in the 2022 legislative session, amend the statute to correct the *Buending* opinion. See, *ContractPoint Florida Parks, LLC v. State*, 958 So.2d 1035 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1416b] (the Legislature is presumed to know the judicial construction of existing law when it enacts a new law).

Based on the foregoing, the Town is entitled to judgment on the pleadings as to Count II.

11. Count III: Injunctive Relief

Count III is entitled "Injunctive Relief § 163.035." Count III alleges that the Town adopted its Ordinance and has "encouraged trespassing" on the Plaintiffs' private property, and the Plaintiffs are "being denied their right to exclude others" from their property. Based on these allegations, Plaintiffs then seek an injunction to enjoin the Town from "encouraging the public at large to trespass" and to enjoin "non-owners from accessing the beach property" owned by Plaintiffs. **Amended Complaint, ¶ 82 and pg. 18-19**.

The Town argues that Count III is simply a form of relief Plaintiffs should have sought in Count II inasmuch as the premise of Count III (at least as it is titled) is that Ordinance 2018-03 should have been adopted pursuant to Florida Statutes § 163.035 and that the Ordinance is encouraging citizens to trespass onto Plaintiffs' property. The Town correctly observes that an injunction is a form of relief, not a stand-alone cause of action. Count III does not articulate what substantive law claim is being made other than referencing the statute and using the word "trespass." If Count III is attempting to state a cause of action for trespass, it does not allege the elements of that common law action and, even if it did, that subject is simply subsumed into the ultimate question in this case: does the doctrine of customary use grant to Town citizens the right to use the portion of Redington Beach covered by the ordinance for the recreational purposes set out in the Ordinance?

Finally, the Town pointed out in its motion that part of the relief requested in Count III is "a temporary and permanent injunction precluding non-owners from accessing the beach property landward of the mean high-water line." This is a request for an injunction against persons not a party to this litigation and, inasmuch as the court does not have personal jurisdiction over all such "non-owners", the Town is correct to argue that the Court is unable to grant this relief. See Florida Statutes § 86.091, which provides in relevant part: "No declaration shall prejudice the rights of persons not parties to the proceedings."

Based on the foregoing, the Town is entitled to judgment on the pleadings as to Count III.

12. Count IV: Facial Taking

Count IV alleges that the Town's adoption of Ordinance 2018-03 the taking of Plaintiffs' private property depriving them of all economic benefit of their property, and that the ordinance thus constitutes a taking in violation of Art. X, § 6 of the Florida Constitution. **Amended Complaint, ¶ 88-94**. The challenged ordinance created § 13-30 of the Redington Beach Town Code. **Amended Complaint, Ex. C**. Plaintiffs allege § 13-30 constitutes a facial taking of their respective properties under Art. X, § 6 of the Florida Constitution, because it "authorizes a physical invasion and occupancy by the general public" of Plaintiffs' property without compensation and deprives Plaintiffs "of their right to exclude the public from their private property. . ." **Amended Complaint, ¶¶ 92 - 94**. Art. X, § 6 of the Florida Constitution provides in relevant part:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

This clause prohibits the government from taking private property for a public use without paying for it. Because Florida follows federal takings law, courts may examine both state court opinions as well as

caselaw interpreting the United States Constitution's Fifth Amendment. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220, 1226 (Fla. 2011) [36 Fla. L. Weekly S623a] (holding that the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution are interpreted coextensively), *rev'd on other grounds*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) [24 Fla. L. Weekly Fed. S435a].

A facial challenge seeks to invalidate the legislation itself and is the most difficult challenge to mount successfully because it requires a plaintiff to show that no set of circumstances exists under which the law would be valid. *United States v. Ruggiero*, 291 F.3d 1281, 1285 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1350a]. A facial challenge asserts that a statute *always* operates unconstitutionally. "To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018) [43 Fla. L. Weekly S236a]. Showing a challenged law "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face." *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1763c]. A facial challenge "must fail unless no set of circumstances exists in which the statute can be constitutionally applied." *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1026b]. Stated differently, "if a challenged portion has any lawful application, the insurers' facial challenge fails as to that portion." *Patronis v. United Insurance Company of America*, 299 So.3d 1152, 1156 (Fla. 1st DCA 2020) [45 Fla. L. Weekly D1359d]. Showing that a statute "might operate unconstitutionally in some hypothetical circumstance is insufficient to render it unconstitutional on its face," which explains why a "facial challenge to a statute is more difficult than an 'as applied' challenge" as a general matter. *Ogborn*, at 59.

In this case, the face of the Ordinance already provides evidence that there are circumstances in which it can be applied constitutionally. Specifically, § 12-30(a) provides that "no individual, group, or entity shall impede or interfere with the right of the public at large, including the residents of and visitors to the town, to utilize the dry sand areas of the beach" for the listed activities. By its terms, the code section prohibits any person, group or entity from interfering with a resident's customary use of the beach recognized in code. It does not just apply to the conduct of the Plaintiff-owners. Therefore, even if Plaintiffs' as-applied challenge to the code in Count V eventually succeeds at trial (a fact-based question not before the Court at this juncture), the code clearly may be constitutionally applied.

Next, while Plaintiffs argue the Town's Ordinance "authorizes the physical invasion and occupancy by the general public" of their dry sand, that is not what the text of the Ordinance does. As the Town argues in its motion, Florida common law, not the Ordinance, "gave" the residents and visitors to the Town that right, as recognized in *City of Daytona Beach v. Tona-Rama Inc.,* 294 So. 2d 73 (Fla. 1974) (incorporating the customary use doctrine into Florida's property law):

> The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected. *** If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area. This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself. Although this right of use cannot be revoked by the land owner, it is subject to appropriate governmental regulation and may be abandoned by the public.

Tona-Rama, at 78.

From that moment, the market for most beachfront property factored in the possibility that a future court would find the doctrine applied to a given property. Since state law defines what property one "owns", if background state law burdens an otherwise fee-simple ownership, subsequent purchasers purchase the property with the potential that the burden will impact them. Indeed, the Ordinance's exordial clauses expressly confirm it was not creating any new "right" not already in existence at the time Plaintiffs bought their respective properties, to wit:

> WHEREAS, in light of this long and continuous use, the Board of Commissioners finds that the doctrine of customary use has applied to all of the beaches in the Town since even before the Town's founding; and
>
> WHEREAS, the Town desires to ensure that the public's long-standing customary use of the dry sand areas of all of the beaches in the Town for recreational purposes is protected; and. . .

Amended Complaint, Ex. "C", pg. 3.

With respect to the interplay of the interaction of takings law and the customary use doctrine, at least one Florida appellate court has confirmed that where a government simply recognizes and attempts to regulate a group of citizens' customary use rights which already exist under the state's common law, a taking will not occur. In *Trepanier v. County of Volusia*, 965 So.2d 276, 289 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2197a], the court addressed the question of whether an application of the customary use doctrine would affect a facial taking under Florida law:

> Finally, we agree with the trial court's analysis of the "takings" issue. *If the law recognizes that the public has a customary right* to drive and park on Appellants' property as an adjunct of its right to other recreational uses of that property, as recognized in *Tona-Rama*, then *no takings claim can be made out.*

Trepanier, at 298. Emphasis added. Also, per *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, n. 7, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the state may resist payment of compensation "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." And it does not matter if plat dedications for beachfront lots referenced access only for lot owners since, "[s]uch dedications may create private rights or easements in the owners of lots in the subdivision, or their successors, *in addition to public rights acquired by common or ancient usage*." *Reynolds v. County of Volusia*, 659 So.2d 1186, 1190 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D1871a]. Emphasis added. Also, per *Buending*, 10 F.4th at 1132, under Florida law, if customary use is factually established, "there [would be] no taking in the case."

In this case, the Amended Complaint alleges that the Plaintiffs acquired their respective properties well after *Tona-Rama*. One cannot lose a property right one never had. The customary use doctrine itself, not the Ordinance, gave the right to non-owners to access the beach. All the Ordinance did was recognize the doctrine applied, and limited the uses to the benefit of Plaintiffs, and "we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title." *Lucas*, 112 S.Ct. 2900.

While Plaintiffs seek in their Amended Complaint to characterize the Ordinance as imposing some new burden on Plaintiffs' land, this logic was expressly rejected in *Lucas,* to wit:

> the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and. . .it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional.

Lucas, 112 S.Ct. 2900-2901.

Just as a state may decide to expressly prohibit a nuisance activity already unlawful under its common law of nuisance, the Town may elect to expressly regulate the customary uses of its privately-owned beaches by non-owners.[1] For the Court to find that the Town's Ordinance constitutes a facial taking from the moment it became law, it would be required to find that the *Trepanier* court was wrong, and that even if facts are established in a court challenge to meet the customary use test, any government recognition of the right of non-owners to engage in such uses will instantly be a taking. But this is the same argument rejected by the federal Eleventh Circuit Court of Appeals in *Buending*, where the trial court had ruled the Ordinance was a facial taking. *Buending v. Town of Redington Beach*, 2020 Slip Copy 2020 WL 5802998 (M.D. Fla. January 9th 2020).

The Court also has given consideration to a Final Judgment (submitted by both Parties as supplemental authority) entered on March 21, 2022, in the case of *Northshore Holdings, LLC, et al. v. Walton County, Florida*, Case No. 2021 CA 210 (Fla. 1st Judicial Circuit). In *Northshore Holdings*, the landowner plaintiffs sought a judicial declaration that the Florida Supreme Court's adoption of the customary use doctrine constituted an unconstitutional judicial taking. In rejecting this argument, Circuit Judge David Green ruled:

> Despite this court's statement that the right of use by custom had not been previously expressed in the history of Florida jurisprudence, this court does acknowledge that the Florida Supreme Court's language in *Tona-Rama* does appear to indicate that the court was treating this right of the public to enter privately-owned beachfront property as something which is inherent in the title to the land or in restrictions that background principles of the State's law of property already place upon land ownership. No such specific finding is contained in the decision issued by the Florida Supreme Court, but this court believes that the Court must have concluded that the right to use a parcel of land by custom is inherent in the title to the property and that such an assumption must be considered before making any decision which might be deemed contrary to Florida Supreme Court precedent.
>
> Accordingly, the court finds that, based upon the principles announced in *Lucas* and *Hoffman*, for the reasons stated above, it is without authority to enter a judgment finding the doctrine of customary use as established by the Florida Supreme Court unconstitutional as a violation of the prohibitions against taking of property without just compensation. . .because this court must follow the holdings in *Tona-Rama* as binding precedent.

Northshore Holdings, at 8-9. The Court agrees with the reasoning and ruling in *Northshore Holdings*, which supports the Town's argument that the mere adoption of its Ordinance did not, as a matter of law, create a facial taking.

Finally, as the Town observed, if a governmental action to protect a group's customary use rights to use a property the group does not own is always a *per se* taking, it would not matter how the existence of the rights would be proven (judicially as happened in *Tona-Rama* or legislatively through the authority of Florida Statutes § 163.035). Either way, affirming a customary use right would be an automatic taking. The Court does not believe that the Legislature would create a statute addressing the verification of such rights if it believed doing so would result in a taking.

Based on the foregoing, the Town is entitled to judgment on the pleadings as to Count *IV*.

13. Count VI: Separation of Powers & Home Rule

Count VI combines two distinct constitutional principles, those being separation of powers and the local home rule authority of municipalities. The Court will address each *in seriatim*. First, Plaintiffs allege Ordinance 2018-03 violates "the proper role of the judiciary" in violation of the Separation of Powers Doctrine as guaranteed by Florida Constitution Art. II, § 3 and Art. V, § 1 and 20(c)(3). The first constitutional provision invoked is:

> SECTION 3. Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Plaintiffs next cite the following portions of Florida Constitution Art. V, § 1 and § 20(c)(3):

> SECTION 1. Courts.—The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality.
>
> SECTION 20. Schedule to Article V.—
>
> (3) Circuit courts shall have jurisdiction of appeals from county courts and municipal courts, except those appeals which may be taken directly to the supreme court; and they shall have exclusive original jurisdiction in all actions at law not cognizable by the county courts;

Plaintiffs allege that Ordinance 2018-03 circumvents the judicial branches exclusive power to determine the application of customary use, thus violating the separation of powers doctrine and the jurisdiction of Florida courts. The Court does not agree with this contention. One of the fundamental principles of both the federal and state constitutions is the prohibition of the unlawful encroachment by one branch upon the powers of another branch. *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 263-64 (Fla. 1991).

However, separation of powers does not mean that every governmental activity is classified as belonging exclusively to a single branch of government. *State v. Johnson*, 345 So.2d 1069, 1071 (Fla. 1977) (citing *State v. Atlantic Coast Line R.R.*, 56 Fla. 617, 632, 47 So. 969, 974 (1908)). "The prohibition of Art. II, § 3 is directed only at those powers which belong exclusively to a single branch of government." *Simms v. State, Dept. of Health & Rehabilitative Services*, 641 So.2d 957, 960 (Fla. 3rd DCA 1994) (citing *Atlantic Coast Line R.R.*, 56 Fla. at 631, 47 So. at 974). The fact that one branch has inherent authority does not necessarily mean that all others are excluded. *Petition of Florida State Bar Ass'n*, 145 Fla. 223, 227, 199 So. 57, 59 (1940).

Pursuant to police power, the state and local governments may enact laws and ordinances reasonably necessary for the protection of the public health, safety, welfare, or morals of their communities. *Clarke v. Morgan*, 327 So.2d 769, 774 (Fla. 1975); *Brevard County v. Woodham*, 223 So.2d 344, 347 (Fla. 4th DCA), cert. denied, 229 So.2d 872 (Fla. 1969).

Additionally, the Court also notes that the September 22, 2022, order of Judge Moody in the *Buending* case grants judgment on the pleadings for the same claim brought by the *Buending* plaintiffs:

> Turning to Count IV, the Court agrees with Defendant that this "separation of powers" claim is unavailing based on the pleadings. To briefly summarize, Plaintiffs allege that Ordinance 2018-03 circumvents the judicial branch's exclusive power to determine the application of customary use, thus violating the separation of powers doctrine and the jurisdiction of Florida courts. Like the due process claim, Plaintiffs do not point to binding or even relevant law in support of this claim. It is true that, one of the fundamental principles of both the federal and state constitutions is the prohibition of the unlawful encroachment by one branch upon the powers of another branch. However, separation of powers does not mean that every governmental activity is classified as belonging exclusively to a single branch of government. "The prohibition of Art. II, § 3 is directed only at those powers which belong exclusively to a single branch of government." *Simms v. State, Dept. of Health & Rehab. Svs.*, 641 So.2d 957, 960 (Fla. 3d DCA 1994).
>
> In other words, it is bedrock law that the fact that one branch has inherent authority over a matter does not necessarily mean that all others are excluded. Pursuant to police power, the state and local governments may enact laws and ordinances reasonably necessary for the protection of the public health, safety, welfare, or morals of their communities. While the Constitution does enshrine a separation between the legislative, executive, and judicial functions, an absolutist definition of each such power has not been endorsed by the courts and is not applicable to the ordinance at issue here. Accordingly, the Court grants judgment on the pleadings with respect to Count IV of the Second amended Complaints.

Buending, et al. v. Town of Redington Beach, case 8:19-cv-1473, Dkt. 136, pg. 8-9. Again, the Court agrees with the foregoing analysis of Judge Moody in the *Buending* order.

The other part of this Count VI is Plaintiffs' contention that the Town's Ordinance exceeds its home rule authority provided in Art. VIII, § 2(b) of the Florida Constitution. That section states:

> (b) Powers. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

Even though municipalities may be created by statute, their powers are derived from the Constitution. *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So.2d 571 (Fla. 2d DCA 1975), affirmed 332 So.2d 610. Both the Florida Constitution and the Municipal Home Rule Powers Act (Chapter 166, Florida Statutes) permit Florida municipalities to do anything that fulfills municipal purpose that is not prohibited by United States or Florida Constitutions, general or special law, or county charter. *Everett v. City of Tallahassee*, 840 F.Supp. 1528 (N.D. Fla. 1992).

Under its broad home rule powers, a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State. *City of Hollywood v. Mulligan*, 934 So.2d 1238 (Fla. 2006) [31 Fla. L. Weekly S461a]. The Plaintiffs presented the Court with no authority standing for the proposition that Ordinance 2018-03 addresses a topic which does not fall within a municipal purpose. Indeed, Florida Statutes § 163.035 expressly authorizes similar ordinance adopted prior to 2016, and allows similar ordinances adopted before July 1, 2018, to exist subject to challenge and the assertion of the affirmative defense of customary use.

Based on the foregoing, the Town is entitled to judgment on the pleadings as to Count VI.

14. Count VII: Quiet Title

In Count VII, Plaintiffs seek an order quieting their respective titles. Plaintiffs allege that the Town's adoption of Ordinance 2018-03 placed a "cloud over the owners' titles" and that they are therefore entitled to an order quieting their titles and declaring that they are the fee simple owners of their respective properties. The Town admits in its Answer that at least as the Town is concerned, Plaintiffs are, indeed, the fee simple owners of their respective properties. **Amended Complaint ¶ 127** and **Answer ¶ 127**.

Florida Statutes § 65.061, allowing for an action to quiet title, was designed to afford a prompt and adequate method by which the rightful owner of real property may place his own title in repose by obtaining a speedy adjudication of the effect of hostile claims. *Seaboard Air Line Ry. Co. v. Atlantic Coast Line R. Co.*, 117 Fla. 810, 158 So. 459 (1935). Neither the Town, nor its Ordinance, assert any adverse claim over the title to any of the Plaintiffs' properties. Rather, the Town admits Plaintiffs have fee title to their properties. Where a party is making no claim on the title of another, it will be error for a trial court to quiet title on the property in question. *State Road Dept. v. Kilgore*, 300 So.2d 734 (Fla. 2d DCA 1974) ("counsel for appellee stipulated that appellee was not claiming any title to [a portion of appellant's property]. The trial court therefore erred in quieting title to that [portion] in favor of appellee.").

Plaintiffs seek to characterize the customary use doctrine's impact on a property owner's land as impacting the owner's "title." However, as has been extensively reviewed earlier, the public's use of rights they gained via the customary use doctrine are part of the background law of property. Since neither the Town nor its Ordinance challenge Plaintiffs' titles, nor purport to assert any ownership interest in Plaintiffs' properties, a quiet title action is not a proper remedy for what is effectively a takings argument (which Plaintiffs already set out in their as-applied taking claim in Count V).

In sum, at least as to the facts alleged in the Amended Complaint, a quiet title action is not available to challenge either the rights of non-party individuals to enjoy customary use, nor the Town's Ordinance regulating that use. Therefore, the Town is entitled to judgment on the pleadings as to Count VII.

15. Conclusion

Based on the foregoing, it is therefore **ORDERED AND ADJUDGED** that Defendant Town of Redington Beach's Dispositive Motion for Judgment on the Pleadings as to Counts I, II, III, IV, VI, and VII is hereby **GRANTED**.

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[1]While "[a] valid takings claim will not evaporate just because a purchaser took title after the law was enacted", "courts should give substantial weight to the treatment of the land. . .under state and local law", and "[a] reasonable restriction that predates a landowner's acquisition. . .can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." *Murr v. Wisconsin*, 582 U.S. __, 137 S.Ct. 1933, 1945, 198 L.Ed.2d 49 (2017) [26 Fla. L. Weekly Fed. S717a].

* * *

Torts—Defamation—Action by condominium unit owners alleging that condominium association, directors, and management made defamatory statements about resolution of plaintiffs' lawsuit against defendants in emails that were sent to all condominium unit owners and residents is dismissed with prejudice—Statements at issue are not defamatory or are privileged—Emails reporting amicable resolution of lawsuit about roofing maintenance and announcing special assessment due to litigation costs and increased insurance premium are not reasonably capable of having defamatory meaning, are not injurious in and of themselves, and do not constitute actionable defamation—Further emails are protected by qualified privilege—Defendants had duty and interest in lawsuit resolution and roofing repairs addressed in emails, and recipients were unit owners and residents who had interest in safety and cost of roof maintenance—Plaintiffs' argument that emails contain express malice intended to conceal unsafe condition of roof and falsely depict prior lawsuit as acrimonious and costly, which if true would defeat privilege, is contradicted by evidence regarding condition of roof and plaintiffs' own statements about lawsuit

STEFAN E. BRODIE and ELIZABETH BRODIE, Plaintiffs, v. BAYSIDE VILLAGE EAST CONDOMINIUM ASSOCIATION, INC., LAURIE MELNICK, TAMAR ROODNER, JASON STONE, ALEXANDER DANZ, and MARQUIS ASSOCIATION MANAGEMENT, LLC, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Complex Business Litigation. Case No. 2022-012584-CA-01. February 23, 2023. Michael A. Hanzman, Judge. Counsel: Jonathan E. Minsker, Minsker Law, PLLC, Miami; Steven Molo and Alex Eynon, Mololamken LLP, New York, NY; and Megan Cunniff Church, Mololamken LLP, Chicago, Illinois, for Plaintiffs. Jason Giller and Hilary Schein, Jason B. Giller, P.A., Miami; Glen Waldman and Eleanor Barnett, Armstrong Teasdale LLP, Coral Gables; and Hugo Alvarez and Steven Ehrlich, Cole, Scott & Kissane, P.A., Miami, for Defendants.

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

I. INTRODUCTION

This case presents the latest battle in an ongoing war between the owners of a condominium unit on the one hand, and the Association/Directors on the other; a decade plus long feud that illustrates why "good fences make good neighbors." *See* Robert Frost, North of Boston, "Mending Wall" (1914). Unfortunately, there are no "fences" separating condominium owners living under the same roof—the common element that spawned the acrimony between these particular combatants.

Plaintiffs Stefan E. Brodie and Elizabeth Brodie ("Plaintiffs" or the "Brodies"), who are unit owners at Bayside Village East Condominium (the "Condominium"), bring this action for Defamation *per se* (Count I) and Defamation (Count II) against Defendants Bayside Village East Condominium Association, Inc. (the "Association"); Laurie Melnick, Tamar Roodner, and Jason Stone as members of the Association's Board of Directors; Marquis Association Management, LLC ("Marquis")—the company contracted to be responsible for the Condominium's management; and Alexander Danz ("Danz"), as the General Manager of the Condominium and employee of Marquis. (collectively "Defendants"). The allegedly defamatory statements are contained in three emails sent by Danz, on behalf of the Association, to unit owners and Condominium residents. Each relate to the status of a previously filed lawsuit by the Brodies against Defendants.

Defendants insist the Complaint should be dismissed with prejudice because: (1) the emails at issue are not defamatory as a matter of law; (2) the February 17, 2022 email is protected by Florida's qualified interest privilege; (3) Defendant members of the board are immune from liability under Florida Statute § 617.0834; and (4) those Defendants who were acting as agents should not be held liable for the acts of their principal. (D. E. 46). The Court agrees that Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted, as the statements Plaintiffs take issue with are either not defamatory and/or are privileged. The Court therefore need not, and does not, reach the remaining arguments raised in the Motion. *See, e.g., PDK Labs. Inc. v. U.S. D.E.A.,* 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurs) ("[i]f it is not necessary to decide more, it is necessary not to decide more . . .").

II. BACKGROUND

The current action is Plaintiffs' fourth and most recent lawsuit in a long history of disputes with the Association. The Complaint tracks that history, alleging that "beginning in June 2005 and continuing over the next seventeen years, the Brodies repeatedly notified the Association that the roof was leaking and the leaks were causing damage to their Unit." Comp., ¶ 24. In July 2006, "the Brodies sued the Association, its directors, and others for breaching their contractual, statutory, and fiduciary duties to the Brodies, by . . failing to properly repair the systemic structural damage to the Condominium's roof." *Id.* at ¶ 26. Although this lawsuit was settled, Plaintiffs assert that Defendants refused to properly fix the roof and the problems persisted. *Id.* at ¶¶ 27-31. Plaintiffs allege that in or about 2015 (after a lapse of approximately 9 years), the Association retaliated for the 2006 lawsuit and for raising concerns about the roof's condition by taking "capricious and unilateral steps to limit the Brodies' use of certain common elements . . . ." *Id.* ¶ 32. Consequently, Plaintiffs filed their second lawsuit against the Association. That action was settled, allegedly with the Defendants "agreeing to restore all of the Brodies' rights to the disputed common elements and paying the Brodies' [sic] a substantial settlement payment." *Id.* The roof disputes, however, persisted.

By January 2021, the Brodies allege they "had had it" and retained counsel to convince the Association to fulfill its duties and also retained their own contractor and engineering firm which purportedly "confirmed . . . the deteriorating condition of the roof . . . which could prove catastrophic as the hurricane seasons was approaching." *Id.* at ¶ 36. Faced with what Plaintiffs allege was "imminent danger caused by the dilapidated and leaking roof, which the Association had concealed from the Association's members for years," the Brodies filed a third lawsuit, seeking an injunction that would require the Association to replace the roof and perform the necessary "emergency repairs." *Id.* at ¶ 38. Although the Association argued that the injunction was unnecessary since it had already contracted with "[Solomon Construction and Roofing Corp. ("Solomon")], Plaintiffs objected that Solomon's work was shockingly bad." *Id.* at ¶¶ 39-40.

While this third lawsuit was pending, the Miami-Dade County Building Department issued a Notice of Violation for "failure to maintain the roof in a safe condition," but the Association purportedly hid this notice from the unit owners. *Id.* at ¶¶ 40-41. Plaintiffs allege that after a second notice of violation was issued on September 28, 2021, for work performed on the roof without a permit, Plaintiffs sought to have the court appoint a receiver to manage the repair and replacement of the roof. *Id.* at ¶¶ 43-44. Apparently, no ruling on that motion was ever entered.

On January 23, 2022, the Brodies, the Association, and Marquis settled the third lawsuit, with the Association and Marquis agreeing to retain Trinity ERD Corporation ("Trinity"), an engineering and consulting firm, to have "sole and exclusive authority to manage the Roof Replacement Project and the performance of the Solomon Agreement [to perform the "Roofing Project"], to ensure compliance with the [Florida Building Code] and to resolve the Notice of Violation . . ." and to "ensure an end product that was safe and watertight." *See* Comp., Exhibit B, Settlement Agreement, Sect. 2(b). The parties also agreed that if the Brodies or the Association (or their respective experts) made suggestions that conflicted with how Solomon was performing, "Trinity shall have the sole and exclusive authority to resolve disagreements as to the Roof Replacement

Project." *Id.* at Sect. 2(e)-(g). Trinity was to be paid by the Association but would provide written reports to both the Association and the Brodies. *Id.* at Sect. 2(a). The Settlement Agreement also affirmed that the Association had already obtained financing for the cost of the Roofing Project. *Id.* at p. 1. The settlement imposed no other monetary obligations, stated that the parties were to pay for their own attorneys' fees, and included mutual releases.

After this third case was concluded, Defendants sent emails to unit owners and residents reporting about the settlement, the need for a special assessment related in part to litigation costs, and the upcoming roof repairs. Plaintiffs of course felt compelled to respond, thereby escalating an inevitable "email war," and now claim the Association's communications damaged their reputation. This fourth and most recent lawsuit now seeks "no less than" $20 million in damages.

III. PLAINTIFFS' ALLEGATIONS OF DEFAMATION

The Complaint asserts that on February 9, 2022, only two and half weeks after reaching the settlement, Danz sent the first email to residents and owners of the Condominium. Plaintiffs find the email highly objectionable, pointing to the following statements as false:

> [T]he Board welcomes the addition of Trinity ERD to the roofing team. Following the permits required to commence the work, the Association engaged Trinity ERD . . . to provide the Board project management support vis-à-vis the roof project. Given the magnitude of the project, the additional project supervision was deemed prudent and in the furtherance of executing the project in an expeditious but high quality manner. Trinity, the Association's independent outside project manager, will be providing onsite and back office support with weekly meetings and interim reports regarding the progress of the project . . . . This decision was made after the Board and its advisors elected to expand the scope of the roof project . . . .

See Comp., Exhibit A. Plaintiffs allege that these statements "grossly misrepresent the scope of Trinity's responsibilities" and that falsely stated the repair undertakings "were voluntary." Comp., at ¶¶ 49-51. More objectionable still, according to the Brodies, was the following paragraph in the same email:

> [T]he Board is also pleased to announce that the litigation relating to claims asserted by a Unit Owner relating to the roof project has been brought to an amicable conclusion wherein no economic consideration was exchanged. It seems that subsequent to the commencement of the lawsuit last year, they are now content with the Board's decision making regarding the roof and the re-roofing project. While the Board is saddened by the commencement, defense and acrimony imposed by virtue of the lawsuit we are happy to announce its conclusion which will also free up attention, resources and time to focus on other aspects of administration.

Id. Plaintiffs allege that these statements are false "or, at minimum, omit facts and details so that the gist of the statements are false." Comp., at ¶ 53. In so doing, Plaintiffs allege the statements "create a false impression that the Brodies' lawsuit was frivolous" and that they were content with the Board's decisions as to the roofing project. *Id.* Plaintiffs claim this is far from reality and felt compelled to "correct the misrepresentations and misimpressions" via their own email, dated February 13, 2022, sent to the unit owners and Condominium residents. *Id.* at ¶ 54.

Therein, Plaintiffs complained that Defendants' email was "highly misleading and contained a number of false statements." *See* Comp., Exhibit B. Plaintiffs stated, *inter alia,* that the Association only retained Trinity, which was "effectively acting as a Receiver," after the Condominium was cited for a number of violations, deeming the roof unsafe, and "ordered that the condominium could be demolished if not immediately and properly repaired." *Id.* Plaintiffs pointed out that the Board of Directors then retained Pistorino and Alam, "the experts on the Champlain Towers collapse," which "confirmed" the "deteriorated condition and the need for immediate replacement of the roof." *Id.* The Brodies stated that Eddy Concina, of EC Consulting (the Association's long-time engineering expert and author of EC Consulting's Report on the roof's condition) had advised that the "roof needed to be replaced immediately, and that he did not think it was appropriate to delay the project until 2022." *Id.* Plaintiffs wrote that EC Consulting had described Solomon as the "worst of the 4 bids" presented for the roof repair. Plaintiffs also explained that they were far from being content with the Board's decision-making regarding the roof repairs. They accused the Board of being "**consistently dishonest with us and our fellow unit owners**, and the Board's recent email only confirms that **such dishonesty continues to this day**" and do not know why the Board "apparently **views the unit owners with such disdain** as to repeatedly conceal or misrepresent the truth." *Id.* Attached to the email was a copy of the settlement agreement and the Pistorino and Alam Report (dated May 17, 2021). *See* Comp., Exhibit B (emphasis added).

Based on the language and tone of the Brodies' email, it was inevitable that the Association would respond. On February 17, 2022, Danz sent an email "addressed to those 'who received an email sent by Mr. and Mrs. Brodie,' " explaining that "given the gravity of the allegations and rumors that continue to emanate from one unit owner, a response is warranted." *Id.,* Exhibit C, Danz February 17, 2022 email. The response (on behalf of the Board) began by commenting that "one should be very skeptical as to the veracity of any allegations that certain unit owners have been promoting that are seemingly intended to smear, embarrass and/or cause this Association financial harm." *Id.* It added that "no one should be swayed by the **uncorroborated, misleading and/or false statements** made by the same people that **openly carry disdain for our small community** and worse, **cause same financial harm** and frustrate ongoing projects." *Id.* (emphasis added).

The email went on to respond to each of the Brodies' accusations by noting the following: (a) "the Association is not subject to a Receiver's oversight"; (b) there was absolutely no risk to life safety (as confirmed by the Pistorino and Alam Report and the EC Partnership Consulting Letter attached to the February 17 email); (c) the settlement agreement was not "controversial"; (d) the only "consideration" given to the Brodies in the settlement agreement was a "release"; (e) the appointment of Trinity was something that the Board had already committed prior to and regardless of any settlement agreement, based on its counsel's recommendations and Trinity's extensive experience/national reputation; (f) the first Notice of Violation for unsafe conditions was pursuant to Section 8-5 of the Miami-Dade Code, which provides that a building will be presumed unsafe if there is deterioration of structure or structural parts and said presumption was triggered by the EC Consulting Report that indicated stress to the truss systems; (g) the Miami-Dade Building Department never advised anyone that the building had to be evacuated and the notice was handed to management in an effort "not to scare anyone"; (h) the language of vacating or potential demolition is a "standard language" but the building "did not even come close to meeting the threshold" that would require demolition; and (i) EC Consulting did not advise the Board that the roof required immediate replacement and at no point did it conclude that Solomon Roofing was the worst. In addition to pointing out the "misstatements circulated earlier [that] week", the February 17 email commented that the Unit Owner's "continued association to Champlain Towers is **repulsive**." *Id.* The email concluded by stating that "[u]nlike those that **seemingly thrive on misinformation, acrimony, and hateful speech,** the Board's prerogative is to represent its members and protect their interest." *Id.* (emphasis added).

In the Complaint, Plaintiffs describe the February 17 email as launching "a series of personal attacks and lies meant to deceive the email's recipients and harm the Brodies and their reputation." Comp., at ¶ 61. Plaintiffs allege these defamatory statements were "intended to subject the Brodies to the hatred, distrust, ridicule, and contempt of their neighbors and cause the disgrace." Comp., at ¶¶ 61-68. Plaintiffs further allege that the February 17 email falsely represented the Brodies' efforts to have the roof properly replaced as contrary to the interests of the Condominium and inferred that their lawsuit was frivolous. Comp., at ¶¶ 71-72.

Notably, the attachments to the Brodies' email and Defendants' February 17 email establish that the Pistorino and Alam Report identified "some localized damage to truss members . . . Those conditions can be repaired/addressed during a roofing replacement project" and that "**[g]enerally the roofing system appeared to be in good condition**, with one location where a truss member was observed split and damaged; however, this appears to be a localized issue." Comp., Exhibit B, Pistorino & Alam Report dated May 17, 2021 (emphasis added). The Report also stated that "[t]here were no signs of active water intrusion through the roofing system in the inspected area." *Id.* The Report concluded that "those conditions appear to be from original construction."

The EC Consulting Report attached to the February 17 email, dated November 3, 2021, stated that it conducted a follow-up inspection after the Pistorino & Alam Report and noted that the condition "appear to be in a similar condition"; "there did not appear to be any immediate danger to life safety"; "the repairs could be performed as part of the [Roof Replacement] Project"; and "repair work is forthcoming and there are no immediate life safety issues, as opined by several engineers." Comp., Exhibit C. Plaintiffs do not refute the references to the building code and the Association's interpretation as to the Notice of Violation.

Plaintiffs also identify as defamatory a third email, dated May 26, 2022, sent by Danz to the same prior recipients, announcing the following:

> [T]he Board unanimously approved a special assessment for the purpose of covering the expenses incurred because of the legal defense costs in the recent lawsuit by a Unit owner as well as unforeseen increases in the Association's insurance premiums. While the Association's carrier provided insurance defense, the Plaintiffs had engaged 4 law firms which required the Association to engage a similar team of attorneys and firms to defend. As most of you already know, the lawsuit which caused the Association to incur these legal fees was eventually settled, with the claims being dismissed and the Association paying out nothing.

Comp., Exhibit D, Danz Email Dated May 26, 2022. Plaintiffs complain that "these statements are false because they cause the false impression that the Brodies' lawsuit was frivolous and resulted in no meaningful settlement" for them. Comp., ¶¶ 73-76. Plaintiffs allege that the long history of over 17 years of disputes and litigation shows these three emails by the Association were published to defame and cause harm to Plaintiffs, as well as to hide Defendants' attempt to "conceal from the other residents the full extent of Defendants' misconduct concerning the roof."[1] Mot, pp. 19, 22. Thus, they filed their claims for defamation *per se* and defamation *per quod.*

Defendants have moved to dismiss the action arguing, *inter alia,* that the statements are not defamatory as a matter of law and/or are protected by Florida's qualified privilege. The Court agrees.

IV. LEGAL STANDARD FOR MOTION TO DISMISS

The primary purpose of a motion to dismiss is to determine whether a complaint properly states a cause of action upon which relief can be granted. *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]. In determining the motion, the trial court "must treat as true all of the amended complaint's well-pleaded allegations, including those that incorporate attachments, and . . . look no further than the amended complaint and its attachments." *City of Gainesville v. State Dept. of Transp.,* 778 So. 2d 519, 522 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D674b]; *Cintron v. Osmose Wood Preserving, Inc.,* 681 So. 2d 859, 861 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d] ("[t]he question . . . to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested"). If, however, "legal conclusions are alleged [in the complaint], they are not deemed true for purposes of a motion to dismiss." *Gallego v. Wells Fargo Bank, N.A.,* 276 So. 3d 989, 990 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1909c]. The court "need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Id.* (citing *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.,* 728 So. 2d 297, 300 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D559a]). Moreover, "[t]he conclusions of the pleader, as to the meaning of the exhibits attached to the complaint are not binding on the court. Exhibits attached to the complaint are controlling, [and] where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits control." *Skupin v. Hemisphere Media Group, Inc.,* 314 So. 3d 353, 356 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a].

V. APPLICABLE LAW

Plaintiffs bring claims for defamation *per se* and defamation *per quod.* "[A] publication is libelous per se . . . if, when considered alone without innuendo: (1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) it tends to injure one in his trade or profession. *Blake v. Giustibelli,* 182 So. 3d 881, 884 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D122a]. Defamation *per se* applies to "statements [which] are so obviously defamatory, that is damaging to reputation, that the mere publication of them gives rise to an absolute presumption both of malice and damage." *Wolfson,* 273 So. 2d at 777.

"If a publication is not defamatory *per se,* a plaintiff may still succeed on a defamation claim *per quod,* by 'specifically alleg[ing] the facts and innuendo which make the words defamatory, as well as pleading special damages from such defamation.' " *Happy Tax Franchising, LLC v. Hill,* 2021 WL 3811041, at *4 (S.D. Fla. June 6, 2021). To state a cause of action for defamation *per quod*, "a private person must allege publication (1) of false and defamatory statement of and concerning that private person, (2) without reasonable care as to the truth or falsity of those statements, (3) resulting in actual damage to that private person." *Hay v. Indep. Newspaper, Inc.,* 450 So. 2d 293, 294 (Fla. 2d DCA 1984).

In either defamation *per se* or *per quad*, the analysis of the defamatory effect of a statement must be considered in the context of the publication. *Smith v. Cuban American Nat'l Foundation,* 731 So. 2d 702, 705 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D329b]. Complaints alleging written defamation must be construed without reference to extrinsic facts or circumstances. *Wolfson,* 273 So. 2d at 778. With respect to alleged written defamatory statements, "[u]nder the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true." *Kieffer v. Atheists of Fla., Inc.,* 269 So. 3d 656, 706 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D1129c]. The question of falsity "overlooks minor inaccuracies and concentrates upon substantial truth." *Id.* at 707.

"[W]hether a statement of fact is susceptible to defamatory interpretation" is a question of law for the court. *Turner v. Wells,* 198 F.Supp. 3d 1355, 1365 (S.D. Fla. July 29, 2016); *Wolfson,* 273 So. 2d

at 778 ("[b]ecause the facts giving rise to the tort of defamation may be isolated with clarity, the court naturally has a prominent function in evaluating the pleading and proof to determine whether or not a cause is proper for submission to the jury"). Courts interpret the content "not by 'extremes, but as the common mind would naturally understanding it.' " *Byrd v. Hustler Magazine, Inc.,* 433 So. 2d 593, 595 (Fla. 4th DCA 1983). *See also, Loeb v. Geronemus,* 66 So. 2d 241, 245 (Fla. 1953) ("the words used 'are not to be construed or taken in their mildest or most grievous sense, but in that sense in which they may be understood in and which they appear to have been used and according to the ideas which they were adopted to convey to those who hear them or to whom they are addressed' "). Where a court finds that "a communication is ambiguous and reasonably susceptible of a defamatory meaning, it is for the trier of fact to decide whether the communication was understood as defamatory." *Perry v. Cosgrove,* 464 So. 2d 664, 666 (Fla. 2d DCA 1985). "Where the court finds that a communication could not possibly have a defamatory or harmful effect, the court is justified in either dismissing the complaint for failure to state a cause of action or in granting a directed verdict at the proof stage." *Wolfson,* 273 So. 2d at 778; *Byrd,* 433 So. 2d at 595.

Even if the statements were deemed objectionable, they may still be protected under a "qualified privilege." *See, e.g. Nodar v. Galbreath,* 462 So. 2d 803, 809 (Fla. 1984) ("[o]ne who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused"); *Cape Publications, Inc. v. Reakes,* 840 So. 2d 277, 280 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D353a] ("[e]ven if one assumes that the statements made . . . were not substantially true, no liability would attach for the statements if they were protected by a qualified privilege and were made without express malice"). "The law of Florida embraces a broad range of the privileged occasions that have come to be recognized under the common law." *Nodar, supra*; *Randolph v. Beer,* 695 So. 2d 401, 403 (Fla. 5th DCA 1997) [22 Fla. L. Weekly D1186a] ("[a] communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social one"); *Thomas v. Tampa Bay Downs, Inc.,* 761 So. 2d 401, 404 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1204c] ("once it is determined that the . . . report is qualified, it becomes cloaked with a legal presumption of good faith").

If a qualified privilege applies, "the privilege raises a presumption of good faith and places upon the plaintiff the burden of proving express malice . . . . " *Randolph*, 695 So. 2d at 404. "The Supreme Court defines express malice as 'ill will, hostility, evil intention to defame and injure.' " *Boehm v. American Bankers Ins. Group, Inc.*, 557 So. 2d 91, 94 (Fla. 3d DCA 1990) (it is "unequivocally established that all of the three elements [(ill will, hostility and evil intention to defame and injure)] and more must be shown"). In order to overcome a qualified privilege, a plaintiff would have to establish "that the defendant's primary motive in making the statements was the intent to injure the reputation of the plaintiff." *Fridovich v. Fridovich,* 598 So. 2d 65, 69 (Fla. 1992). Plaintiffs have to show "the speaker is motivated more by a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege . . . . " *Randolph,* 695 So. 2d at 404. "[T]he malice which vitiates a qualified privilege must be actual and not merely inferred from falsity, etc." *Geronemus,* 66 So. at 244 (Fla. 1953); *Loeb,* 66 So. 2d at 244 (a matter that would have been protected under a qualified privilege will lose its protection and be subject to a libel action if it is "published falsely, fraudulently and with express malice and intent to injure the persons against whom it is directed"). If, however, the defendant's motivation was to protect that duty/interest, "he does not forfeit the privilege merely because he also in fact feels hostility or ill will toward the plaintiff." *Id.; Nodar,* 462 So. 2d at 811 (" [s]trong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his privileged position 'to gratify his malevolence [by defamatory expressions against the plaintiff]' ") (*citing Myers v. Hodges,* 53 Fla. 197, 213 (Fla. 1907)).

VI. ANALYSIS

Upon careful analysis of the Complaint and the attachments in their entirety, the Court finds that **neither** the initial email by Danz dated February 9 (reporting the "amicable" resolution of the roofing lawsuit) **nor** May 26 (announcing special assessment due to costs related to litigation and insurance premiums) are reasonably capable of having a defamatory meaning, are injurious in and of themselves, or constitute actionable defamation. Making announcements that are not phrased as Plaintiffs would prefer and are not slanted in Plaintiffs' favor do not result in false and defamatory statements, much less tend to subject the Brodies to hatred, distrust, ridicule, contempt, or disgrace. *Loeb,* 66 So. 2d at 244 (in a defamation case where defendants allegedly made statements that "fabricated false accusations" against Plaintiff accusing him of being "a man of low moral character and no one here would permit him in his home socially," the court found that a published letter by Defendants "containing nothing more than an announcement of expulsion from membership and restriction from the premises of the organization in question . . . cannot under the circumstances be considered libelous in nature"); *Cuban American Nat'l Foundation,* 731 So. 2d at 706 ("[u]nder the substantial truth doctrine, a statement does not have to be perfectly accurate if the 'gist' or the 'sting' of the statement is true"); *Janklow v. Newsweek, Inc., Janklow v. Newsweek, Inc.,* 759 F.2d 644, 647-48 (8th Cir. 1985) (court rejected the plaintiff's defamation claim as he had asked the court "to hold [defendant] liable for omission of those additional facts that he believes should have been published, but whose omissions did not make what was published untrue").

The Court also finds that all three emails sent on February 9, February 17, and May 26, 2022, on behalf of the Association, are protected by a qualified privilege. Here, the Parties do not dispute the propriety of the communications' scope, or the duty involved. *See, e.g., Nodar, supra.* The Defendants had a duty and/or interest on the subject addressed in the emails at issue, and the recipients of the emails were unit owner and residents who had an interest in the safety and cost of maintaining the common areas of the Condominium.

Plaintiffs attempt to defeat the privilege by arguing that Defendants have acted in bad faith and that the Complaint is replete with evidence of express malice. As such, Plaintiffs argue the facts as to the existence of malice are highly disputed and thus must be submitted to a jury to determine if the qualified privilege applies. *Knepper v. Genstar Corp.,* 537 So. 2d 619, 622 (Fla. 3d DCA 1988) ("[w]here evidence is disputed as to the existence or nonexistence of a privilege, there is a mixed question of law and fact and the fact issue is to be determined by the jury"); *but see Nodar,* 462 So. 2d at 810 (the Florida Supreme Court has held that "[w]here the circumstances surrounding a defamatory communication are undisputed, or are so clear under the evidence as to be unquestionable, then the question of whether the occasion upon which they were spoken was privileged is a question of law to be decided by the court").

The Court finds that, based on the allegations and the exhibits, the circumstances surrounding the defamatory communications are undisputed, or are so clear under the attached evidence, that a qualified privilege applies here as a matter of law. *Nodar,* 462 So. 2d at 810; *John Hancock Mutual Life Ins. Co. v. Zalay,* 581 So. 2d 178,

179 (Fla. 2d DCA 1991) (reversing final judgment finding privilege question should not have gone to jury and that insurer had, as a matter of law, qualified privilege to talk to its policy holders regarding the policy; holding that "[w]here the circumstances and content of allegedly defamatory statements are undisputed, or are clear under the evidence, the question of whether a qualified privilege existed is a question of law").

The argument Plaintiffs advance to overcome the qualified privilege centers around the allegation that Defendants sought to "conceal their misconduct" as to the roof's condition, "pretend[ing] the Condominium's roof was safe." Mot, pp. 1-2. Plaintiffs' claim of a purported "unsafe condition" that needed to be hidden is contradicted by their own exhibits. Specifically, the EC Consulting Report as well as the Pistorino & Alam Report expressly state there was no immediate danger and the repairs could be performed as part of the Roof Replacement Project. The Brodies also cannot complain about Defendants' description of the prior lawsuit as acrimonious or costly, when Plaintiffs themselves emphatically stated they were "far from" being content with the settlement agreement and had spent "hundreds of thousands of dollars in the lawsuit." Comp., Exhibit B; *Rubinson v. Rubinson,* 474 F.Supp. 3d 1270, 1275-76 (S.D. Fla. July 24, 2020) ("it is hard to conceive of how, when considering the emails alone, Defendant's mention of virtually the same conduct suddenly casts Plaintiff in a negative light, let alone, subjects him to hatred, distrust, ridicule, contempt, or disgrace").

Further, Plaintiffs argument that Defendants' February 17 email was sent out because they "had an ax to grind against the Brodies [based] . . . on their prior history, the prior lawsuit, and the terms of the settlement," completely ignores the fact that said email was sent in response to the Brodies' own, wherein Plaintiffs asserted that: (1) the Danz's February 9 email was "highly misleading and contained] a number of false statements concerning the roofing project and [the] lawsuit"; (2) the roof was in deteriorating condition and needed to be repaired immediately; (3) the Board continued "to be dishonest with the unit owners" and "apparently views the unit owners with such disdain as to repeatedly conceal or misrepresent the truth." *See* Comp, Exhibit B. The February 17 email was a communication necessitated by Plaintiffs' accusations, was limited to the scope of said accusations, and provided evidence contradicting the Brodies' grave representations. Therefore, the Court finds that Plaintiffs' allegations are insufficient to show express malice and overcome the protections of a qualified privilege.

Finally, Plaintiffs' assertion that it is improper to dismiss the action "at this early stage" even if the qualified privilege applies is not well taken. Numerous cases "confirm the fact that trial courts, upon motion to dismiss, routinely make decisions as to whether a privilege applies to protect an allegedly defamatory statement." *Huszar v. Gross,* 468 So. 2d 512, 516 (Fla. 1st DCA 1985).

VII. CONCLUSION

Plaintiffs' Complaint shows on its face that the statements are not defamatory and/or are protected by a qualified privilege. Further, the emails and the attached documents/reports show that the February 17 correspondence was in response to Plaintiffs' initial accusations of falsehood and ill motives. Defendants' response shows (along with the attached documents) that they sought to clarify there was no "risk to life," no "imminent risk," and the Roof Project was to be underway; and this email was in direct response to the insults and accusations first hurled at them by Plaintiffs. The Brodies cannot publish accusations and insults to then find the same statements objectionable when included in the Defendants' responsive email. This is especially so where the referenced reports belie Plaintiffs' fears of imminent risk of life and safety. Under these circumstances, it is proper for the Court to dispose of this action at the pleading stage since it fails to state a cause of action upon which relief may be granted. *Blake v. City of Port St. Lucie,* 73 So. 3d 905 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2491a] ("dismissal with prejudice can occur at the pleading stage" where defendant is subject to qualified immunity); *From v. Tallahassee Democrat, Inc.,* 400 So. 2d 52 (affirming dismissal with prejudice because statements were privileged). Moreover, as it appears from the face of the Complaint that no amendment can cure the pleading's infirmity, the Court dismisses the action with prejudice. *See, e.g. Winchester Corp. v. Miami Free Zone, Corp.,* 443 So. 2d 1964 (Fla. 3d DCA 1984) (no error in court's dismissal with prejudice "since it is clear that the deficiencies . . . cannot be cured"); *Skupin,* 314 So. 3d at 357 (affirming dismissal with prejudice because "no amendment of the complaint would change the non-defamatory statements to defamatory ones").

Final Judgment is hereby entered in favor of Defendants. Plaintiffs shall take nothing from this action and all Defendants shall go hence without day. The Court retains jurisdiction to address any authorized post-judgment matters.

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[1]Defendants argue the emails do not identify who the unit owner is and that it was Plaintiffs' email only that disclosed their identity. The Court agrees with Plaintiffs that the communications contained sufficient information to identify the Brodies. *Wolfson v. Kirk,* 273 So. 2d 774, 779 (Fla. 4th DCA 1973); *Harwood v. Bush,* 223 So. 2d 359, 362 (Fla. 4th DCA 1969); *Zimmerman v. Buttigieg,* 521 F.Supp. 3d 1197 (M.D. Fla. 2021).

* * *

Insurance—Property—Hurricane damage—Post-loss obligations—All-risk replacement-cost policy—Increased cost of construction—Insurer not entitled to summary judgment on claim for replacement costs based on insured's failure to seek those costs within 180 days because insurer's outright denial of coverage within 90 days rendered that obligation moot—In addition, insurer is not entitled to summary judgment on claim for increased cost of construction attributable to enforcement of law or ordinance based upon insured's failure to repair or replace property within two years of loss—Repair/replace policy term was rendered moot by outright denial of claim and, moreover, did not apply to pre-lawsuit dealings—Even if policy imposed post-denial contractual obligations on insured, as insurer argued, genuine issue of material facts exist as to whether noncompliance was excused by prior material breach by insurer and whether insured substantially complied with policy terms at issue or took such justifiable actions that would excuse insured from additional compliance

MAJORCA ISLES I CONDOMINIUM ASSOCIATION, INC., Plaintiff, v. AMERICAN COASTAL INSURANCE COMPANY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-005183-CA-01. Section CA32. February 9, 2023. Ariana Fajardo Orshan, Judge. Counsel: Charles L. Gowland, Jr., Constable Law, P.A., Safety Harbor, for Plaintiff. David J. Maldoff and Shannon M. Nicolas, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on Defendant, AMERICAN COASTAL INSURANCE COMPANY (*hereinafter* "American Coastal"), two separate Motions for Partial Summary Judgment, and the Court having considered the written submissions and arguments of counsel, and being otherwise duly advised in the premises the court finds as follows:

I. PROCEDURAL HISTORY

This action involves a first party claim for insurance proceeds due to damage associated with Hurricane Irma on September 10, 2017. On March 3, 2021, Plaintiff, MAJORCA ISLES I CONDOMINIUM ASSOCIATION, INC. (*hereinafter* "Majorca") filed this breach of contract lawsuit against American Coastal. In its Complaint, Majorca alleged that American Coastal breached the insurance policy by

failing to provide insurance coverage under the Policy and by specifically denying that the Property was damaged by Hurricane Irma. Majorca is pursuing "all damages recoverable due to Defendant's material breach of its contract for insurance," which damages could include, but were not limited to, Actual Cash Value (*hereinafter* "ACV") (in the amount of $3,665,119.83) and RCV Replacement Cost Value (*hereinafter* "RCV") (in the amount of $4,232,254.65).

On June 30, 2022, American Coastal filed two motions for partial summary judgment. The first motion claimed that Majorca was not entitled to increased-cost-of-construction damages because Majorca did not repair or replace the Property within two years of the loss. The second motion claimed that Majorca was not entitled to ACV damages because it never requested those damages prior to filing suit, and Majorca was not entitled to RCV damages because it did not repair or replace the Property within two years after Hurricane Irma.

Majorca opposed both motions. It argued that, because American Coastal denied the claim outright within 90 days, the Policy did not require Majorca to demand ACV, RCV, or repair or replace the Property within two years of the loss. Majorca also claimed that whether American Coastal committed a prior material breach of the insurance policy by denying its claim outright was a fact issue for the jury. According to Majorca, if the jury finds in its favor on that issue, then Majorca is discharged of the very contractual obligations (ACV, RCV, time to repair) upon which American Coastal relied. Finally, Majorca contended that assuming it had post-denial contract obligations, there remained a fact issue as to whether Majorca's alleged non-compliance with those post-denial conditions were legally justified or excused. As part of their oppositions, Majorca explained that it did not repair and/or replace the damaged Majorca I Property because American Coastal denied its claim outright on February 26, 2018.

On September 11, 2022, the Honorable Mark Blumstein consolidated American Coastal's two summary judgment motions and set them for argument on October 7, 2022. The parties argued their respective positions on October 7, 2022. On the record, Judge Blumstein denied both motions but never entered a written order.

On November 7, 2022, American Coastal filed a motion for reconsideration. In January 2023, this case was transferred to the Honorable Jennifer D. Bailey and thereafter to the undersigned. On January 31, 2023, this Court granted American Coastal's motion for reconsideration on the basis that Judge Blumstein did not issue a written order stating his reasons for denying summary judgment motions. On February 1, 2023, the Court held a hearing in which the parties re-argued their respective summary judgment positions.

II. STIPULATED FACTS

A. Majorca is a Florida not-for-profit homeowners' association whose Board of Directors (*hereinafter* "Board") is responsible for managing "Phase I" of the condominiums (*hereinafter* "Majorca I"). There are fourteen buildings in the Majorca I condominium complex located in Miami County, Florida (*hereinafter* "Property").

B. American Coastal sold Majorca an "all risk," replacement-cost-value insurance policy covering the roofs and certain exterior components of the Property. Majorca paid a significantly increased annual insurance premium for the "replacement cost policy" or "RCV" policy, which allows Majorca, as the insured, to recover the replacement cost value caused by the loss, without deduction for depreciation.

C. Hurricane Irma made landfall in South Florida on September 10, 2017. Shortly thereafter, on November 16, 2017, Majorca retained the services of a public adjuster, Phill Wright (*hereinafter* "Mr. Wright"), to assist with Majorca's potential insurance claim.

D. On December 1, 2017, after a preliminary inspection of the Property by Mr. Wright, Majorca filed a claim with American Coastal alleging that Hurricane Irma caused significant damage to all of the buildings in the Majorca I complex. Majorca also retained the services of Robin Roberts (*hereinafter* "Mr. Roberts"), a licensed architect, who performed an inspection of the property and likewise concluded that the Majorca I buildings suffered significant damage caused by Hurricane Irma.

E. American Coastal's expert, Michael Cahill (*hereinafter* "Mr. Cahill"), also inspected the Property after Majorca made its insurance claim. American Coastal's causation expert concluded that Hurricane Irma caused no damage to the Majorca I buildings.

F. On February 26, 2018, based on Mr. Cahill's inspection and report, American Coastal denied Majorca's insurance claim outright. In its denial letter, American Coastal stated the following:

> We have concluded our investigation and determined that the damage to roof tiles are not due to a covered cause of loss. It was also determined that the majority of exposed and broken roof tiles exhibited long-term environmental exposure that existed prior to Hurricane Irma and that the remainder of damage to roof tiles are a result of footfall and/or was mechanical in nature.

Also, in its denial letter, American Coastal advised Majorca that it should consider the claim "closed" based on its conclusion that there was no causal connection between Hurricane Irma and the damage to the Majorca I buildings.

G. American Coastal's coverage denial was based on the lack of causation and the corresponding, pre-existing-damage exclusions in the Policy. Between the time that Majorca filed its insurance claim on December 1, 2017 and the time that it denied the claim on February 26, 2018, American Coastal never demanded from Majorca an ACV or RCV damages calculation. Nor did American Coastal advise Majorca that it must repair and/or replace the damaged Property within two years of the loss. Nowhere in American Coastal's denial letter does the carrier refer to those provisions of the insurance policy.

H. After American Coastal denied the claim in February 2018, Majorca and American Coastal engaged in additional unsuccessful attempts to settle Majorca's claim until March 2021. During that three-year period, American Coastal never demanded from Majorca an ACV or RCV damages calculation or invoked any of those Policy terms. Through its public adjuster Mr. Wright, Majorca provided American Coastal an RCV damages calculation in the amount of $4,232,254.65 in May 2018, but American Coastal never responded to it or otherwise claimed that the RCV calculation was somehow barred by the Policy. Nor did American Coastal during that three-year, post-denial period ever advise Majorca that it must repair and/or replace the damaged Property within two years after Hurricane Irma, or by September 10, 2019.

III. THE POLICY TERMS AT ISSUE

Because the Parties' respective summary judgment positions depend, at least in part, on the terms of the underlying insurance contract between Majorca and American Coastal, the Court will next set forth the contract terms at issue.

A. DUTIES IN THE EVENT OF LOSS OR DAMAGE

The Policy sets forth numerous post-loss duties with which Majorca must comply to obtain coverage under the Policy. Those duties are set forth in two separate sections of the Policy (Florida Changes, AC 01 25 06 16, at pages 2-3, §G.3) and on the Coverage Form (CP 00 17 06 07, at pages 9-10, under "Loss Conditions," §E.3(1)-(8)). Majorca has many duties under the Policy including, providing "prompt notice" of a claim and cooperating with American Coastal in its investigation. Notably, however, the Policy does not require Majorca to provide American Coastal an ACV or RCV calculation of its losses or to repair/replace the Property within two years of the loss. Instead, the Policy merely states that, if American Coastal makes the "request," Majorca would be required to provide

"inventories of the damaged . . . property," which would include "costs, values and amount of loss claimed." Coverage Form (CP 00 17 06 07), at page 10 of 14, Loss Conditions §E.3(5); Florida Changes (AC 01 25 06 16), at page 2 of 4, §G.3(6). There is no evidence that American Coastal ever made the request referenced in these policy provisions before it denied the claim on February 26, 2018.

B. LOSS PAYMENT CONDITION

The Policy contains a "Loss Payment Condition" that sets forth the time within which American Coastal would pay for a loss covered by the Policy. See Florida Changes (AC 01 25 06 16), at page 3 of 4, §H. That provision states that, as long as Majorca complied with its post-loss duties (set forth above), American Coastal "will pay for covered loss or damage upon the earliest of the following: . . .(3) Within 90 days of receiving notice of an initial . . .claim, unless we deny the claim during that time. . ." *Id*., §H(3).

Nothing in the Loss Payment Condition of the Policy states that American Coastal would pay ACV or RCV damages within 90 days if it found that Majorca's loss was covered. Nor does the Loss Payment Condition premise payment on repair and/or replacement of the damaged Property. The provision simply states that American Coastal "will pay for covered loss or damage," without qualification or exception.

C. INCREASED COST OF CONSTRUCTION/LAW AND ORDINANCE

In the Coverage Form of the Policy (CP 00 17 06 07), American Coastal sets forth various provisions that govern if, and only if, American Coastal decides there is coverage under the Policy. Section A, Coverage, states this plainly: "We will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." Coverage Form (CP 00 17 06 07), at page 1 of 14, §A.

One provision governs what is called increased costs of construction, or law and ordinance. Under the Policy, American Coastal is required to pay Majorca increased costs of construction if it determines that there is coverage—that is, if it concludes that Hurricane Irma caused damage to the Property. The provision provides in relevant part:

(2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property subject to the limitations stated in e.(3) through e.(9).

.....

(7) With respect to this Additional Coverage:

(a) We will not pay for the Increased Cost of Construction:

(i) Until the property is actually repaired or replaced, at the same or another premises; and

(ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend that period in writing during the two years.

Coverage Form (CP 00 17 06 17), at page 4 of 14—page 5 of 14, Additional Coverages §4(e)(2), 4(e)(7)(a)(i)-(ii).

Because there is no dispute that American Coastal denied Majorca's claim outright within 90 days, this two-year repair/replace Policy term was rendered moot, does not apply to the Parties' pre-lawsuit dealings and, therefore, compliance was not required. Enforcing this provision prior to providing coverage is like putting the cart before the horse.

D. ACTUAL CASH VALUE (ACV) AND REPLACEMENT COST VALUE (RCV)

In the Policy's Coverage Form, American Coastal sets forth additional terms that may apply if, and only if, American Coastal determines that Hurricane Irma caused damage to the Majorca I Property. Those additional terms, ACV and RCV, provide the following:

c. You may make a claim for loss or damage covered by this insurance on actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within the 180 days after the loss or damage.

d. We will not pay on a replacement cost basis for any loss or damage:

(1) Until the lost or damaged property is actually repaired or replaced; and

(2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

Coverage Form, Optional Coverages (CP 00 17 06 07), at page 14 of 14, §§ G.3(c) & (d).

As the plain terms of these provisions state, a request to have American Coastal pay Majorca on an ACV basis is not mandatory but purely discretionary, or at Majorca's "elect[ion]." Under the ACV term, Majorca had 180 days to exercise its discretion to voluntarily seek ACV, but American Coastal denied the claim within 90 days, rendering the 180-day term moot, inapplicable to the Parties' pre-lawsuit dealings and, accordingly, compliance was not required. The same conclusion applies to the RCV term, which must be read together and in harmony with the ACV provision. Because Majorca never had 180 days to decide whether to seek ACV, it never sought RCV either because American Coastal denied the claim within 90 days.

E. MAJORCA'S POST-DENIAL CONTRACT OBLIGATIONS

At the February 1, 2023 summary judgment hearing, Majorca argued that there are no provisions in the Policy that govern Majorca's post-denial obligations—specifically, that there is no post-denial obligation to seek ACV, RCV, or repair and/or replace the damaged Property within two years after the loss. Upon a full review of the Policy, the Court finds that the Policy contains no provisions that impose any post-loss obligations on Majorca once its claim was denied on February 26, 2018. Neither in its briefs, nor at the February 1 argument, did American Coastal identify any Policy term that governed Majorca's post-denial contract obligations.

IV. SUMMARY JUDGMENT ANALYSIS

On summary judgment, this Court must "view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Davila v. Gladden*, 777 F.3d 1198, 1203 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C754a]; *accord Diaz v. Cabeza*, 51 So. 3d 556, 558 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D2903d]; *Scott v. Strategic Realty Fund*, 311 So. 3d 113, 116 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D1137a]. Summary judgment is only proper when "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). Therefore, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *In re Amendments to Florida Rules of Civil Procedure 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a].

A. THE PLAIN TERMS OF THE INSURANCE POLICY PRECLUDE SUMMARY JUDGMENT IN FAVOR OF AMERICAN COASTAL.

Insurance policies are contracts subject to the same rules of construction governing all contracts. *See Trinidad v. Florida Peninsula Ins. Co.,* 121 So. 3d 433, 441 (Fla. 2013) [38 Fla. L. Weekly

S507a]. " 'Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.' " *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D556a] (*quoting M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015) [25 Fla. L. Weekly Fed. S68a]). As such, "[w]hen a contract is silent as to a term, as this contract is, a court should not remedy the deficiency by divining from its crystal ball the drafter's intent." *Pasteur Health Plan v. Salazar*, 658 So. 2d 543, 544 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1083a]. " 'We cannot determine the rights of the parties by looking at only a part of the contract. We must construe it as a whole.' " *Id*. (*quoting Marion Mortg. Co. v. Howard,* 131 So. 529, 531 (1930)). " '[A] cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless." *Id*. (*quoting Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So.3d 197, 203 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1496a]). Thus, the Court " 'must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions.' " *Id*. (*quoting Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So.2d 415, 416-17 (Fla. 1st DCA 2004) [30 Fla. L. Weekly D56a]).

Here, American Coastal argues that, despite its outright denial of Majorca's claim on February 26, 2018, Majorca was contractually obligated before filing this lawsuit to seek ACV and/or RCV and/or replace the damage to the Majorca I Property within two years after Hurricane Irma struck, or by September 10, 2019. American Coastal argues that because Majorca did not comply with these post-denial contractual obligations, it may not recover ACV or RCV damage or damages for increased costs of construction (law and ordinance).

The plain terms of the Policy do not support American Coastal's position, rendering summary judgment inappropriate. First, the Policy does not impose any post-loss conditions on Majorca once the claim was denied outright in February 2018. As such, American Coastal seeks to add new terms to the Policy that do not exist, something this Court cannot do. *See Pasteur Health Plan*, 658 So. 2d at 544. As the Second District Court of Appeals observed in *Castro v. Homeowners Choice*, 228 So. 2d 596 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1842a] in reversing summary judgment in favor of an insurer:

> [The Policy does not] include any language that would inform an insured that an attempt to negotiate a settlement after a denial of coverage would act as a reopening of a claim requiring the insured to comply with policy conditions precedent that it never initially invoked or requested. Furthermore, Florida law regulating insurance does not define what constitutes the reopening of a claim of loss after a denial of coverage or reference any obligation that an insured comply with policy conditions precedent after the denial of coverage. *Id*. at 599.

Second, putting aside American Coastal's denial, the Policy does not require Majorca to make an ACV or RCV claim or to repair and/or replace the Property within two years of the loss to obtain coverage. As the plain terms of the Policy state, Majorca did not have that duty as part of its post-loss obligations. Nor was American Coastal obligated to pay on an ACV/RCV basis prior to denying the claim. And, the increased-construction-costs (law and ordinance) and ACV/RCV terms are all premised on a finding by American Coastal that Hurricane Irma caused damage to the Property. Based on the record and its own denial letter of February 26, 2018, there is no dispute that American Coastal unequivocally denied coverage and stated that neither Hurricane Irma (nor any other covered loss) caused damage to the Property.

B. THERE IS A DISPUTED ISSUE OF FACT ABOUT WHETHER AMERICAN COASTAL COMMITTED A PRIOR MATERIAL BREACH OF THE INSURANCE CONTRACT.

Even if the Court were to agree with American Coastal that the Policy contains post-denial contract obligations, American Coastal still would not be entitled to summary judgment because an issue of fact exists as to whether American Coastal materially breached the contract. It is axiomatic that "[a] material breach by one party may be considered a discharge of the other party's obligations thereunder." *Nacoochee Corporation v. Pickett*, 948 So. 2d 26, at 30 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D3057a]; *accord Popular Bank of Fla. v. R.C. Asesores Financieros, C.A.*, 797 So. 2d 614, 622 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D2433a] ("Upon Popular Bank's material breach of the 1989 amendment by failing to pay service and termination adjustment fees, RCAF was excused as a matter of law from complying with its exclusivity or noncompete provision and to recover damages for the bank's breach."); *Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D361a] ("Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability." (internal quotations and citations omitted)).

Consistent with this basic principle of contract law, the Third District Court of Appeal has held that if an insurer wrongfully denies coverage, then the insured is discharged of its contract obligations.[1] Federal courts applying Florida law have reached the same conclusion.[2]

In *Water Restoration Guys*, the Third District Court of Appeal rejected the exact argument advanced here by American Coastal, noting the "absurd[ity]" of any insurance-contract interpretation that requires an insured to provide documentation and comply with post-loss conditions following a denial of a claim:

> To require an insured . . . to provide documentation irrelevant to the purported basis for the denial, and after the denial decision is made, would be an absurd reading of the policy at issue. . . [T]he failure to comply with policy provisions made superfluous by [the Insurer's] denial, provides no basis for summary judgment or final judgment in favor of [the Insurer]. *Water Restoration Guys,* 347 So. 3d at 451.

Here, the Court rejects American Coastal's contention that it can materially breach the policy and still rely on the policy to deny Majorca damages in this litigation. That position runs counter to contract law and the unanimous view among Florida appellate courts that have squarely addressed the question. Under binding Third District precedent, Majorca was not required to comply with post-denial policy conditions made superfluous and moot by American Coastal's quick denial of the claim. *See Water Restoration Guys*, 347 So. 3d at 450-51; *Wegener*, 494 So. 2d at 259. And, the question of whether the damage to the Property was a "covered loss" and whether American Coastal's denial was wrongful are hotly contested fact issues that the jury must decide. Indeed, causation and damages are the two central, disputed issues in the case. If the jury agrees with Majorca that Hurricane Irma did, in fact, cause damage to its Property, then Majorca will not be constrained by policy terms and alleged post-lost conditions that may limit its damages, such as those American Coastal raises in its motions for partial summary judgment.

American Coastal cites cases that do not support its position. In each of those cases, the insurer either granted coverage or otherwise never denied coverage, thereby requiring the insured to comply with contractual obligations.[3] For example, in *Buckley Towers*, the insurer did not deny the insured's claim and construed the claim as a request for RCV damages. 395 F. App'x at 661-62. The court held that the insured was bound by the insurance contract to comply with the RCV term to repair and replace the property, which the insured had not

done. *Id*. at 663-64. The court distinguished a situation where an insurer wrongfully denies a claim denial (as here), acknowledging that Florida law holds that an insurer cannot rely on noncompliance with policy terms after a claim is denied. *Id*. at 664 n.1 (discussing and distinguishing *Kovarnik*, 363 So. 2d at 169, where the appellate court reversed summary judgment for the insurer, reasoning: "The underlying rationale throughout this line of cases is that an insurer may not repudiate a policy, deny liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its own benefit.").

Likewise, in *CMR Construction & Roofing*, 843 F. App'x 189, the insurer acknowledged coverage and paid the claim. *Id*. at 191 ("After Hurricane Irma, [the insured] reported to [the insurer] that its buildings had been damaged. [The insurer] inspected the property and, based on its estimate of the repair cost and factoring in the deductible and depreciation, it paid [the insured] $96,763.53."). The issue presented in *CMR* was whether the insurer owed more under the policy. The insured sued and claimed that the insurer breached the policy by not paying RCV and ACV. *Id*. at 191-92. As in *Buckley Towers*, the Eleventh Circuit concluded that the insured had contractual obligations related to ACV and RCV. *Id*. The court concluded that "[t]here is no reason to think that if [the insured] had actually repaired the damaged property, as the policy requires, Empire would have denied coverage for the cost of the completed repairs." *Id*. at 192.

Here, it is undisputed American Coastal denied coverage. The Third District Court of Appeal, as well as numerous other Florida appellate courts, have uniformly held that an insured like Majorca need not comply with policy conditions after an insurer wrongly denies a claim outright. American Coastal has not cited a single case that involves the situation presented here—an alleged material breach of contract and repudiation of coverage within 90 days of a claim being filed. Nor does any case upon which American Coastal relies involve a situation where, as here, the policy conditions upon which the insurer relied were rendered moot and/or superfluous in light of a claim denial (i.e., requiring Majorca to elect ACV 180 days after the loss when the claim was denied before the expiration of the 180-day period).

Finally, the Court rejects American Coastal's contention that the cases involving denials of coverage only involve conditions precedent to filing suit. *Tio*, for example, involves the same claims made by American Coastal in this case. *Tio*, 304 So. 3d at 1279. There, the insurer "asserted that [the insured] was not entitled to any consideration of replacement cost value damages because [the insured] had not undertaken any repairs to the subject property." *Id*. The Third District Court of Appeals held that the insured was not required to comply with this RCV policy condition—which was not a condition precedent to filing suit—because the insurer wrongfully denied coverage. *Id*. (holding that insurer cannot enforce the terms of its policy "at its convenience" when the insurer "breached the insurance contract"); *accord Perez*, 2021 WL 1390398, at *1-*2 (same). Several other cases make clear that an insured like Majorca need not comply with post-loss policy conditions that are not conditions precedent to filing suit. *See, e.g., Goldberg*, 302 So. 3d at 925 (repudiation of coverage discharged insured of obligation to file supplemental insurance claim); *Bryant*, 271 So. 3d at 1021 (repudiation of coverage discharged insured of obligation to file proof of loss); *Ifergane*, 232 So. 3d at 1065 (repudiation of coverage relieves insured of having to provide insurer information and examination under oath post-denial).

C. THERE IS A DISPUTED ISSUE OF FACT ABOUT MAJORCA'S REASONS FOR NOT COMPLYING WITH POST-DENIAL POLICY CONDITIONS, THUS PRECLUDING SUMMARY JUDGMENT.

Notwithstanding that summary judgment is denied based on the terms of the Policy and because there are disputed fact issues as to whether American Coastal materially breached the Policy, summary judgment should be denied for another separate and independent reason. Where, as here, an insurer alleges noncompliance with post-loss conditions, "if [ ] the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented for resolution by a jury." *El Dorado Towers Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 717 F. Supp. 2d 1311, 1318 (S.D. Fla. 2010) (interpreting Florida law) (*quoting Coconut Key Homeowners Ass'n, Inc. v. Lexington Ins. Co.*, 649 F. Supp. 2d 1363, 1369 (S.D. Fla. 2009)); *El Dorado Towers Condominium Ass'n, Inc. v. QBE Ins. Corp.*, Case No. 09-20047, 2010 WL 2400082, at *6 (S.D. Fla. June 16, 2010) (interpreting Florida law) (denying insurer's motion for summary judgment; holding that genuine issues of material fact existed whether insured complied with policy conditions); *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1333, 1340 (S.D. Fla. 2009) (interpreting Florida law) (denying insurer's motion for summary judgment; finding that genuine material issues of fact exist whether insured cooperated with policy conditions to some degree); *Schnagel v. State Farm Mut. Auto. Ins. Co.*, 843 So. 2d 1037, 1038 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D1139a] (demand for production of documents under insurance policy was part of the policy's cooperation clause; summary judgment was improper where the insured cooperated to some degree); *Haiman v. Fed. Ins. Co.*, 798 So. 2d 811, 812 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2542a] ("Whether the failure to produce documents requested is a material breach would be a question of fact for the jury."); *Continental Ins. Co. v. Roberts*, Case No. 8:05-CV-1658, 2008 WL 1776552, *6 (S.D. Fla. April 18, 2008) (whether insured failed to cooperate as required by "cooperation clause" of the policy is an issue of fact, not one of law).

That is the case here. Majorca states, through sworn statements by its public adjuster and its Board president, that it has neither made permanent repairs nor has it otherwise replaced the roofs at the Property because American Coastal materially breached the Policy by denying the insurance claim outright within 90 days of a claim being made. According to these witnesses, Majorca made temporary repairs to the Property only and paid for those expenses out of its own pocket after American Coastal denied coverage. American Coastal disputes this explanation. However, the jury, not this Court on summary judgment, should decide whether this explanation is justified and whether, as an issue of fact, Majorca substantially complied with the Policy terms at issue or took such justifiable actions that excuses it from additional compliance.

V. CONCLUSION

For the foregoing reasons, American Coastal's two Motions for Partial Summary Judgment (Dkt. No. 49 and Dkt. No. 50) are hereby DENIED.

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[1] *See Water Restoration Guys, Inc. v. Citizens Property Ins. Corp.*, 347 So. 3d 449, 450 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D1551a] (reversing summary judgment for insurer; "When an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered loss has not occurred, the insurance carrier cannot assert the insured's failure to comply with the policy's conditions precedent to filing suit as a basis for summary judgment." (internal quotations and citation omitted)); *Citizens Property Ins. Co. v. Tio*, 304 So. 3d 1278, 1280 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D641d] ("Citizens contracted with Tio to provide coverage for a direct loss to property covered by the policy. After Citizens breached that contractual obligation, the trial court properly instructed the jury on how to value the insured's relevant damages, and the jury rendered a verdict for Tio that was supported by competent substantial evidence."); *Ifergane v. Citizens Property Ins. Corp.*, 232 So. 3d 1063, 1065 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2198a] (reversing summary judgment for the insurer; "should the factfinder determine that Citizens' letter was a denial of coverage letter, then as a matter of law, Citizens waived any right it had to enforce the insured's post-loss conditions. . ."); *Wegener v. International Bankers Ins. Co.*, 494 So. 2d 259, 259 (Fla. 3d DCA 1986) (reversing directed verdict in favor of insurer; "as a matter of law, the effect of the thus-found-to-be-improper repudiation of coverage was to waive any right to insist upon the insured's necessarily-thus-futile compliance with the

various conditions to recovery"); *see also Bryant v. GeoVera Specialty Ins. Co.*, 271 So. 3d 1013, 1021 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1232a] (same); *Goldberg v. Universal Prop. & Cas. Ins. Co.*, 302 So. 3d 919, 925 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2118b] ("[B]y failing to pay any amount for the personal property loss [of Plaintiff], Universal effectively denied coverage for the loss. Such a denial of coverage waives the insurer's right to insist upon the insured's compliance with policy conditions"); *Castro*, 228 So. 3d at 599 ("When an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered loss has not occurred, the insurance carrier cannot assert the insured's failure to comply with the policy's conditions precedent to filing suit as a basis for summary judgment."); *Mercury Ins. Co. of Fla. v. Anatkov*, 929 So. 2d 624, 627 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1315b] ("Where, as here, an insurer denies coverage which actually exists, the insurer has breached the contract and therefore cannot be allowed to rely upon a contractual provision . . .in order to relieve itself from liability." (internal quotations and citation omitted)); *Kovarnik v. Royal Globe Ins. Co.*, 363 So. 2d 166, 169 (Fla. 4th DCA 1978) (reversing summary judgment for insurer; "an insurer may not repudiate a policy, deny liability thereon, and at the same time be permitted to stand on the failure to comply with a provision inserted in the policy for its own benefit."); *Indian River State Bank v. Hartford Fire Ins. Co.*, 35 So. 228, 246 (Fla. 1903) ("Did the defendant company absolutely repudiate or deny all liability upon the policy sued upon? If it did, then it follows as a legal consequence that it has waived the making of proofs of loss provided for in the policy.").

[2]*See Perez v. Brit UW Limited*, Case No. 19-CV-22024, 2021 WL 1390398, at *1 (S.D. Fla. April 13, 2021) (interpreting Florida law) ("The [Insureds] did not receive any monies from the [Insurer] for any of its damages resulting from Hurricane Irma and therefore could not have provided proof that the "Actual Cash Value" of its damages were used before seeking additional monies from the [Insurer]."); *id.* ("The [Insurer] denied a majority of the [Insured] damages claiming that they pre-existed and therefore were not covered under the insurance policy. *This clearly is a question of fact that must be resolved by the jury*. If the [Insureds] are correct then the Defendant would be in breach of its insurance contract and all damages resulting from said breach would be compensable. *The simple fact that the contract at issue in this case is an insurance policy does not change the principles of damages in contract law*" (emphasis added); *id.* at *2 ("[B]ased on the competing estimates of damages, it is clear that the [Insurer] is taking the position that only a small fraction of the damages resulting from Hurricane Irma are covered under the insurance policy. Therefore, *the determination of what amount is necessary to put the Plaintiffs' home in its pre-loss condition is a question of fact for the jury*." (emphasis added)); *2000 Island Boulevard Condominium Ass'n, Inc. v. QBE Ins. Corp.*, Case No. 11-20247, 2012 WL 13071266, at *5 (S.D. Fla. Jan. 19, 2012) (interpreting Florida law) (denying insurance carrier's motion *in limine* because "whether [the insured] is required to strictly comply with the terms of the policy hinges on the trier of fact's decision regarding whether [the insurer] first breached the policy."); *Nu-Air Mfg. Co. v. Frank B. Hall of N.Y.*, 822 F.2d 987, 993 (11th Cir. 1987) (interpreting Florida law) ("Where an insurer unconditionally denies liability, it waives all policy provisions governing notification of loss, proof of loss, and payment of premiums.").

[3]*See Ceballo v. Citizens Property Ins. Co.*, 967 So. 2d 811, 812 (Fla. 2007) [32 Fla. L. Weekly S566a] (insurer covered and paid face value of policy as a result of total loss of home by fire; question was whether insured could automatically recover policy limits of supplemental insurance for same loss without providing additional damages); *State Farm Fire & Cas. Co. v. Patrick*, 647 So. 2d 983, 983 (Fla. 3d DCA 1994) (coverage granted and claim paid; question presented was whether insurer wrongfully withheld depreciation); *CMR Construction & Roofing, LLC v. Empire Indemnity Ins. Co.*, 843 F. App'x 189, 191 (11th Cir. 2021) (*per curiam*) (interpreting Florida law) (insurer granted coverage and paid claim; dispute was whether insurer should have paid more); *Buckley Tower Condominium, Inc. v. QBE Ins. Corp.*, 395 F. App'x 659, 661-62, 663-64 (11th Cir. 2010) (interpreting Florida law) (insurer never "fully rejected" insured's claim; court held that insured had contractual obligations under RCV provision of the policy); *Diamond Lake Condominium Ass'n, Inc. v. Empire Indemnity Ins. Co.*, Case No. 19-CV-547, 2021 WL 6118076, at *1 (M.D. Fla. Dec. 27, 2021) (interpreting Florida law) (insurer granted coverage but the parties disagreed over valuation of the loss); *Oriole Gardens Condominium Ass'n v. Aspen Specialty Ins. Co.*, 875 F. Supp. 2d 1379, 1381 (S.D. Fla. 2012) (interpreting Florida law) (coverage granted and ACV paid; insured failed to timely file supplemental claim for RCV as requested by the insurer); *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1328, 1329, 1333 (S.D. Fla. 2009) (interpreting Florida law) (insurer made no coverage decision; it "failed to adjust, pay, and/or settle the claim"; insured claimed breach of contract for failing to pay ACV or RCV).

* * *

Torts—Premises liability—Business invitee—Criminal attack—Action brought against owner of establishment at which plaintiff/invitee was stabbed by assailant—Summary judgment is entered in favor of plaintiff on affirmative defense asserting that plaintiff has not pled valid claim—Complaint sufficiently alleged elements of duty, breach, causation, and damages—Summary judgment is entered in favor of plaintiff on affirmative defense alleging that he provoked assailant—Depositions of all eyewitnesses have been conducted, and there is no record evidence to support that claim

AERIAL STEWART, et al., Plaintiffs, v. REGAN HOSPITALITY LLC, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-027146-CA-01. Section CA04. February 22, 2023. Carlos Guzman, Judge.

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on the Plaintiff's Motion for Partial Summary Judgment as to Regan's Affirmative Defenses and Motion in Limine served on 10/31/22. The Court, having listened carefully to the arguments of counsel, reviewed the record evidence, the relevant legal authority, and being otherwise fully advised in the premises, hereby finds as follows:

FINDINGS OF FACT

1. On August 1, 2021, the Plaintiffs were stabbed while an invitee at an establishment owned and controlled by REGAN HOSPITALITY, LLC d/b/a THE LOCUST located in Miami Beach.

2. The assailant that stabbed the Plaintiffs were neither an employee nor an agent of REGAN HOSPITALITY, LLC d/b/a THE LOCUST.

3. Plaintiff filed suit against REGAN HOSPITALITY, LLC d/b/a THE LOCUST for negligence. The Defendant REGAN HOSPITALITY, LLC d/b/a THE LOCUS filed an Answer and Affirmative defenses.

4. Plaintiff filed this motion seeking Partial Summary Judgment as to two issues. First, the ninth affirmative defense that the Plaintiffs failed to state a claim upon which relief can be granted and second as to the tenth affirmative defense, subpart a, that the Plaintiffs "provoked" the assailant.

LEGAL STANDARD AND APPLICABLE LAW

5. 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 is designed to put 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 Ano 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 (1986).

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

ANALYSIS AND FINDINGS

Plaintiffs have moved for summary judgment on two of Defendant's affirmative defenses. Summary judgment may be granted on an affirmative defense. Fla. R. Civ. P. 1.510(a). "The standard for a motion for summary judgment differs depending on whether the party moving for summary judgment also bears the burden of proof on the relevant issue." *Calderone v. U.S.*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting William W. Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487(1984)). As the United States Court of Appeals for the Sixth Circuit has noted:

> When the moving party does not have the burden of proof on the issue, he need show only that the opponent cannot sustain his burden at trial. *Id*.

Where, as here, a party moves for summary judgment on an issue for which it does not bear the burden of persuasion, the movant need not produce any evidence. *In re Amendments to Fla. R. of Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a] ("A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." (citation omitted)).

The Court addresses each of the applicable Affirmative Defenses in turn:

a. Ninth Affirmative Defense—failure to state a cause of action upon which relief can be granted

The court finds the Plaintiffs have pled a valid claim upon which relief can be granted. Here, the Defendant failed to explain to the court how the Plaintiffs failed to plead a claim upon which relief can be granted as the Plaintiffs have pled the necessary elements of duty, breach, causation and damages. Further, there is no record evidence to support this defense. Accordingly, Summary Judgment is appropriate as a matter of law and procedure.

b. Tenth affirmative defense - the Plaintiffs provoked the assailant

The Court finds there is no record evidence the Plaintiffs provoked the assailant in this case. It is undisputed numerous depositions of eye witnesses have been conducted. No motions to continue this motion were filed. As of the date of the hearing, there were no pending depositions of any additional alleged eye witness. The Defendant has had more than a reasonable amount of time to conduct discovery on this issue.

The Court finds the Defendant failed to present to the court or file any record evidence in a form that would be admissible in evidence to support the defense the Plaintiffs "provoked" the assailant as required by Rule 1.510.

Accordingly, Summary Judgment is appropriate on this issue as the Defendant failed to show there is a genuine dispute to any material fact and the Plaintiffs are entitled to Summary Judgment as a matter of law and procedure. *See* Rule 1.510(a).

CONCLUSION

In light of the foregoing, it is hereby ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Summary Judgment as to Defendant's affirmative defense as to the ninth affirmative defense and as to the "provocation" allegation contained in the tenth affirmative defense, sub part a, is hereby granted as a matter of law and procedure.

2. Plaintiffs Motions in Limine will be deferred until such matter as this case is set for trial.

* * *

Criminal law—Plea bargain—Because active involvement of victim, prosecution of case by out-of-jurisdiction counsel, and other aspects of case render plea discussions more difficult and cumbersome, facilitated plea bargaining is ordered

STATE OF FLORIDA, Plaintiff, v. JALYN A. DELANCY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case No. F22-6696. February 17, 2023. Milton Hirsch, Judge.

ORDER ON FACILITATED PLEA BARGAINING

Plea bargaining is simply contract negotiation in the criminal-justice context. *See, e.g., Novaton v. State,* 634 So. 2d 607 (Fla. 1994); *Garcia v. State,* 722 So. 2d 905 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2641a]; *State v. Frazier,* 697 So. 2d 944 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D1849a]; *Madrigal v. State,* 545 So. 2d 392, 395 (Fla. 3d DCA 1989) (citing *Brown v. State,* 367 So. 2d 616, 622 (Fla. 1979)). As with any contract negotiations, plea bargaining must be conducted between the interested parties. A judge is an outsider to such negotiations, and cannot seek to involve himself except to the very limited extent provided in the *State v. Warner,* 762 So. 2d 507 (Fla. 2000) [25 Fla. L. Weekly S485a]/*Wilson v. State,* 845 So. 2d 142 (Fla. 2003) [28 Fla. L. Weekly S311a] line of cases.[1]

To say that a judge may not be an active participant in plea bargaining, however, is not to say that a judge may not take steps to insure that counsel for the interested parties are active participants in plea bargaining. On the contrary: it is arguably a judge's duty to see to it that all good-faith efforts to resolve a case have been made before that case is permitted to demand the very considerable investment of public resources associated with trial by jury.

As the number of attorneys participating in plea negotiation increases, the difficulty and complexity of negotiation increases as well. Here, the alleged victim is represented by experienced criminal counsel, who has indicated his intention to be actively involved in accord with the vast array of powers that appear to be vested in victims by the current iteration of Fla. Const. Art I. § 16(b). This case is being prosecuted by out-of-jurisdiction counsel. That, too, may render plea discussions all the more difficult and burdensome. And there are other aspects of this case, aspects having to do with the people involved in or close to the case, that may render plea discussions a good deal more cumbersome than they might otherwise be. Accordingly, the court, in the exercise of its inherent authority, hereby orders facilitated plea bargaining.[2]

I well recognize that although mediation is the norm in civil litigation, its isomorph, facilitated plea bargaining, is less common (although by no means unheard of) in criminal litigation.[3] That, of course, is no reason not to employ it when appropriate—sparingly, but when appropriate—as I find it is here. Lawyers and judges are famous for our unwillingness to do something, even something useful, even something likely to aid in the pursuit of justice, unless that something has always been done before. The greatest rebuttal to that unwillingness was offered by one of the greatest judges of the 20th century:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.[4]

I recognize, too, that readers of judicial orders wince at citations to "inherent authority" as a source of judicial power. Undoubtedly

"inherent authority" is a term sufficiently vague to enable a judge to overreach if it is his intention to do so. I have no intention to do so. Trial judges routinely exercise, and appellate courts routinely approve the exercise of, inherent authority in a host of contexts without so much as a suggestion of judicial overreach. *See, e.g., Plank v. State,* 190 So. 3d 594 (Fla. 2016) [41 Fla. L. Weekly S93a] (inherent authority to adjudicate contempt); *Moakley v. Smallwood,* 826 So. 2d 221 (Fla. 2002) [27 Fla. L. Weekly S175b] (inherent authority to impose attorneys' fees for bad-faith conduct); *State v. Lewis,* 656 So. 2d 1248 (Fla. 1994) (criminal post-conviction court has inherent authority to allow pre-hearing discovery); *Bank of America, N.A. v. De Morales,* 314 So. 3d 528, 531 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2752a] ("The mortgagor is correct that the trial court had inherent authority to consider her motion for sanctions even after dismissal . . . as part of its jurisdiction over ancillary matters"); *Rodriguez v. City of South Miami,* 305 So. 3d 588 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D976b] (referring to trial court's "inherent authority to issue injunctions" in appropriate contexts); *Jimenez v. State,* 196 So. 3d 499, 501 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1632a] (inherent power to bar abusive *pro se* criminal litigant from future filings); *Medina v. Fla. East Coast Ry., L.L.C.,* 866 So. 2d 89, 90 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D170b] (trial court has "inherent authority to dismiss an action when it finds that a plaintiff has perpetrated a fraud on the court"); *Bettez v. City of Miami,* 510 So. 2d 1242, 1243 (Fla. 3d DCA 1987) ("It is well settled . . . that a trial court has inherent authority to reconsider . . . any of its interlocutory orders prior to entry of a final judgment or final order");[5] *State v. Wells,* 308 So. 2d 163, 165 (Fla. 1st DCA 1974) (In a criminal case, "[t]he order of dismissal was a legitimate exercise of the court's inherent authority"). The power of courts to order mediation in civil cases existed, and was long exercised, before that power was codified in Rules 1.700 *et. seq.* Such orders were entered as an expression of the court's inherent authority.

There is no evidence of a pandemic of judicial overreaching in the exercise of inherent authority. Just the opposite: Florida courts bear scrupulously in mind that, "A court must . . . exercise caution in invoking its inherent power, and it must comply with the mandates of due process." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 50 (1991). *See also Moakley, supra,* 826 So. 2d at 227 ("The inherent authority of the trial court . . . carries with it the obligation of restrained use and due process").

Given the many and far-reaching contexts in which Florida judges routinely exercise their inherent authority, there can be no serious suggestion that the exercise of that authority reflected in this order—the requirement that all counsel engage in discussions with a view to a just resolution of this case, which discussions are to be invigilated and promoted by someone qualified to invigilate and promote them[6]—is an abuse of discretion. It is not my intention to foment a procedural revolution. Ordering facilitated plea bargaining in routine criminal cases would be entirely at odds with that "obligation of restrained use" that is rightly binding upon circuit judges. Years may go by before another case comes before me in which such an order is called for. But it is called for here.

This matter is hereby referred to Retired Judge Norman S. Gerstein, who has very graciously offered his services to the court without fee in this matter. The court is deeply appreciative of his doing so. Within 15 days of the entry of the present order, Retired Judge Gerstein will "notify the parties . . . of the date, the time, and, as applicable, the place of the conference . . . and the instructions for access to communication technology that will be used for the conference." *See* Fla. R. Civ. P. 1.700(a)(2). As is customary, the parties will commit to the confidentiality of the proceedings. It is the court's desire that facilitated plea bargaining "be completed within 45 days of the first . . . conference unless extended by order of the court or by stipulation of the parties." *See* Fla. R. Civ. P. 1.710(a).

We take great pride in our system of trial by jury. But all cases cannot go to trial, and some cases should not go to trial. Earnest plea bargaining is thus a very necessary part of the criminal justice system. It is, as Oliver Wendell Holmes said (admittedly in a very different context), a "concession to the shortness of life." *Reeve v. Dennett,* 145 Mass. 23, 28 (Mass. 1887) (Holmes, J.).

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[1]*See* discussion *infra* at n.6.

[2]Facilitated plea bargaining is analogous to mediation in civil procedure, but is conducted pursuant to the court's inherent authority rather than pursuant to power vested by Fla. R. Civ. P. 1.700 - 1.730. Those civil rules, although not binding in the criminal context, are nonetheless instructive.

[3]For examples of the use of facilitated plea bargaining in the criminal justice system, *see, e.g.,* https://www.nccourts.gov/programs/district-criminal-court-mediation-program; https://kycourts.gov/courtprograms/mediation/Pages/felonymediation.aspx; https://www.osbar.org/public/legalinfo/1221_VictimOffenderMediation.htm. *See also* https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html; https://www.americanbar.org/content/dam/aba/migrated/dispute/docs/2010_BoskeyEssay_Winner_FloraGo.pdf

[4]The quote is from a family law case from 1953 written by Lord Thomas Denning. Denning has been described as the most influential English judge of the 20th century. Gary Slapper, "The Law Explored: Lord Denning," *The London Times,* August 29, 2007. Former Prime Minister Margaret Thatcher referred to Denning as "probably the greatest English judge of modern times," and former Prime Minister Tony Blair referred to him as "one of the great men of his age." The Lord Chief Justice, Lord Bingham, said, "Lord Denning was the best-known and best-loved judge of this or perhaps any generation" and "a legend in his own lifetime." *See* Ian Burrell, "Lord Denning, the century's greatest judge, dies at 100," *The Independent,* March 6, 1999.

[5]To the same effect, *see* Fla. R. Crim. P. 3.192: "Nothing in this rule precludes the trial court from exercising its inherent authority to reconsider a ruling while the court has jurisdiction of the case."

[6]Retired Judge Norman Gerstein served for three decades on the bench, and has extensive experience in complex criminal litigation. *See* https://www.normangerstein.com/about_us. Nor can his role as contemplated by this order run afoul of the limitations of *State v. Warner, supra;* or *Wilson v. State, supra. Warner* concerned itself with the extent, if any, to which a trial judge—the judge who would preside over trial and sentencing—may be involved in pretrial plea bargaining. The *Warner* court adopted the Michigan rule, *Warner* at 513 (citing *People v. Cobbs,* 505 N.W. 2d 208 (Mich. 1993)), pursuant to which the trial judge may (not must, but may), upon the invitation of at least one party, "actively discuss potential sentences and comment on proposed plea agreements." *Warner* at 514. Importantly, "To avoid the potential for coercion, a judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial." *Id. See also Wilson v. State,* 845 So. 2d 142 (Fla. 2003) [28 Fla. L. Weekly S311a].

Retired Judge Gerstein will have no involvement in the trial (if there is one) of this case. His responsibility will be to see to it that counsel for all interested parties have made every good-faith effort to consider, and if appropriate avail themselves of, mutually-beneficial plea-bargaining outcomes. He will be entirely without power to threaten or impose "alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial."

* * *

Contracts—Torts—Motion for summary judgment on complaint alleging fraudulent inducement and negligent misrepresentations brought by insurer pursuing subrogation claims on behalf of insured whose aircraft were damaged when foam suppression system in hangar leased from defendant improperly activated on multiple occasions—Independent tort— Summary judgment is entered in favor of defendant—Hangar "space permit" adequately covered subject matter of alleged fraudulent assurances that defendant would repair foam system—Defendant's failure to maintain or repair foam system was at most contractual breach—Resulting damages to aircraft were same in type, scope, and amount as damages suffered as result of defendant's potential breach of "space permit"—Further, there was no fraud in inducement where contract was already in place when alleged representations regarding repair of foam system were made

CH MANAGEMENT SERVICES, LLC, individually, and UNITED STATES AVIATION UNDERWRITERS, INC., as manager of UNITED STATES AIRCRAFT INSURANCE GROUP, INC., and as subrogee of CH MANAGEMENT SERVICES, LLC and CH ACQUISITIONS 2, LLC, Plaintiffs, v. MIAMI EXECUTIVE AVIA-

TION, LLC d/b/a SIGNATURE FLIGHT SUPPORT, Defendant/Counter-Plaintiff/Third Party Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, GENERAL REINSURANCE CORPORATION, LIBERTY MUTUAL INSURANCE COMPANY, and NATIONAL LIABILITY AND FIRE INSURANCE COMPANY, Third Party Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Complex Business Litigation. Case No. 2019-6842 CA 01. January 18, 2023. Michael A. Hanzman, Judge. Counsel: Steven E. Gurian, Marin, Eljaiek, Lopez, & Martinez, P.L., Coconut Grove; Rachel K. Beige, Patrick J. Folley, and Steven Gurian, Cole, Scott & Kissane, P.A.; David Garcia, Marin, Eljaiek, Lopez, & Martinez, P.L. Services, LLC, Coconut Grove, for CH Management Services, LLC, Plaintiff. Jason Goldstein and Maria Piva, Goldstein & Company, Coral Gables; Bryan D. Hull and James Evangelista, Tampa, for United States Aviation Underwriters, Inc., Plaintiff. John M. Murray, Jennifer Clark, and Nathan Wheat, Murray, Morin & Herman, P.A., Tampa, for Miami Executive Aviation, Defendant.

CORRECTED OMNIBUS ORDER*

This cause is before the Court upon:

1. Defendant Signature Flight Support's Motion for Partial Summary Judgment as to Plaintiffs' Second Amended Complaint (D. E. 222);

2. Plaintiff's Motion for Continuance of Hearing on Defendant's Motion for Partial Summary Judgment as to Plaintiffs' Second Amended Complaint (D. E. 257); and

3. Plaintiffs' Motion for Leave to Amend Complaint. (D.E. 242).

These motions have been fully briefed and the Court entertained oral argument on January 17, 2023. Based upon the submissions of the Parties, the Court's review of the record, and argument of counsel, it is hereby **ORDERED**:

1. Motion for Continuance: As Plaintiff's counsel conceded, the discovery that has yet to be completed has no bearing on the issue of whether the "tort" claims pled here are barred as a matter of law.[1] A continuance of the hearing on Defendant's Motion for Summary Judgment is therefore unwarranted. *See, e.g., Vancelette v. Boulan S. Beach Condo. Ass'n, Inc.,* 229 So. 3d 398, 400 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1422a] ("[a]bsent a non-moving party's demonstration of . . . the materiality of the discovery sought to be completed, a trial court cannot be faulted for denying a motion to continue . . . [a] hearing on the motions for summary judgment"); *Advent Oil & Operating, Inc. v. S & E Enterprises, LLC,* 48 So. 3d 70, 72 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2236a] (when additional discovery will not create "disputed issues of material fact as to that issue," summary judgment is not premature). The Motion for Continuance is **DENIED**.

2. Motion for Partial Summary Judgment: Relying on this Court's order in *Ruben v. DLP Capital Partners, LLC, v. DLP Real Estate Capital, Inc.,* 30 Fla. L. Weekly Supp. 71b (Fla. 11th Jud. Cir. April 13, 2022), and the binding precedent analyzed therein, Defendant insists that the Fraudulent Inducement/Negligent Misrepresentation claims pled here are not viable. The Court agrees.

The Court thoroughly addressed the issues presented here in *Ruben* and will not repeat its entire analysis. As explained in *Ruben*:

> [f]or decades our appellate courts, through two common law lines of precedent, have curbed tort claims in cases involving routine contract disputes, thereby maintaining (or attempting to maintain) a line of demarcation between contract and tort actions. Courts have been forced to judicially restrain these types of claims because plaintiffs routinely try to convert ordinary contract disputes into tort cases. There are a number of reasons why a party to a contract may attempt this conversion, such as: to avoid damage limitations or other contractual terms they find inconvenient; to secure non-contractual (and punitive) damages; or to bring claims against individuals who are not a party to the contract. One thing, however, is certain: the days of simple one count breach of contract cases are long gone.

Ruben, supra. This case illustrates precisely what the Court was referring to, as Plaintiff, an insurance carrier pursuing subrogation claims, ***literally*** converted this matter from an "ordinary contract dispute into [a] tort case" by abandoning the contract-based claims initially pled by its insured and replacing them with fraud claims—a metamorphosis undertaken for one reason and one reason only: to try and avoid a subrogation waiver.[2]

Plaintiff is an insurer pursuing subrogation claims on behalf of an insured, CH Management ("CH"), that stored aircraft in Defendant Signature's hangar. The Parties' landlord-tenant relationship was memorialized in a March 1, 2017 "Space Permit" that obligated Signature to maintain/repair the "Space" so that it would be suitable for the storage of aircraft. *See* Space Permit § 18 b. The Space Permit also contained a "Limitation of Liability" clause. *Id.* § 22.

Plaintiff alleges that on or around October 27, 2017, the foam suppression system in the hangar "unexpectedly and improperly activated." Second Amended Complaint ("SAC"), ¶ 21. At that time, Plaintiff's insured, CH, was already storing aircrafts in the hangar pursuant to the March 1, 2017 Space Permit. This "First incident" allegedly caused "over $1,620,000.00 of damage to the three Aircraft stored in the Hangar." SAC, ¶ 24.

Following the first incident, Defendant allegedly "assured" CH that "it would fix the issues with the Foam system in the Hangar so as to prevent a second malfunction." SAC, ¶ 26. In other words, Defendant "assured" CH that it would abide by its contractual obligation to fix/maintain the foam suppression system. SAC, ¶¶ 26-29. "As a result of Signature's assurances, CH elected to maintain the Aircraft in the Hangar." SAC, ¶ 30.

On May 14, 2018, "the Foam System in the Hangar again unexpectedly and improperly activated . . . ," engulfing CH's aircraft (registration N54OCH) and causing "$1,019,000.00" of damage to the plane. SAC, ¶¶ 33, 36. After this incident, "Signature conceded that the Foam System was in fact not functional—contrary to its prior assurances." SAC, ¶ 40. "In fact, a few days after the Second Incident, the Foam System again inexplicably activated." SAC, ¶ 41. CH then elected "to remove the Aircraft from the Hangar." SAC, ¶ 47.

As indicated earlier, CH filed this action advancing claims for breach of the Space Permit, negligence and constructive eviction, each of which were based on Defendant's alleged failure to properly maintain the Foam System. When its insurer assumed the litigation, and substituted in as Plaintiff, it dropped those claims, replacing them with claims for "Fraudulent Misrepresentation" (Count I) and "Negligent Misrepresentation" (Count II). Those are the only claims now pled.

As the Court explained in *Ruben,* two related but distinct common law doctrines cabin the ability to bring tort claims arising out of a contractual relationship. The first line of precedent forecloses tort claims, including claims for fraudulent inducement, based upon "alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract." *GVK Int'l Bus. Group, Inc. v. Levkovitz,* 307 So. 3d 144, 146 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1777a]; *B & G Aventura, LLC v. G-Site Ltd. P'ship,* 97 So. 3d 308, 309 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2197a]; *Hillcrest Pac. Corp. v. Yamamura,* 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D520a].[3]

The second line of precedent, referred to as the "independent tort doctrine," precludes tort claims unless a plaintiff can "adequately allege and prove both 'a tort independent from the acts that breach[ed] the contract' and non-duplicative damages grounded in tort." *Avant Design Group, Inc. v. Aquastar Holdings LLC,* 351 So. 3d 62, 70 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D2059a]; *Aanonsen v. Suarez,* 306 So. 3d 294, 295 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1519b]; *ESJ JI Operations, LLC v. Domeck,* 309 So. 3d 248, 249-50 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2513a]; *Island Travel & Tours, Ltd., Co. v. MYR Indep., Inc.,* 300 So. 3d 1236, 1239-40 (Fla. 3d DCA 2020)

[45 Fla. L. Weekly D704a]; *Peebles v. Puig,* 223 So. 3d 1065, 1068-69 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1080a] ("[i]t is well settled in Florida that, where alleged misrepresentations relate to matters already covered in a written contract, such representations are not actionable in fraud . . . . It is similarly well settled that, for an alleged misrepresentation regarding a contract to be actionable, the damages stemming from that misrepresentation must be independent, separate and distinct from the damages sustained from the contract's breach"). This "independent tort doctrine" reflects a judicial "unwillingness to introduce uncertainty and confusion into business transactions as well as the feeling that compensatory damages as substituted performances are an adequate remedy for an aggrieved party to a breached contract." *Lewis v. Guthartz,* 428 So. 2d 222, 223 (Fla. 1982). And in this District a tort is not considered "independent" unless a plaintiff alleges *both* conduct independent from the acts that breached the contract, *and* damages separate and apart from those realized from the breach. *Aanonsen,* 306 So. 3d at 295.[4]

The claims pled here are foreclosed by both of these common-law doctrines, as: (1) the Space Permit "adequately covers" the subject matter of the alleged fraud;[5] (2) the conduct that actually caused the harm—an alleged failure to maintain/repair the foam suppression system—was at most a contractual breach; and (3) the damages resulting from the alleged fraud (damage to the Aircraft) are the same in type/scope/amount as the damages suffered from the Defendant's potential breach of the Space Permit, regardless of whether Plaintiff elected to pursue that claim.[6] *See, e.g., Avant Design,* 351 So. 3d at 70. ("Aquastar presented no evidence of, and the trial court awarded no damages that were separate and distinct from, those damages it suffered as a result of Avant's breach of contract. We therefore reverse the Amended Final Judgment's award of damages for fraud against Avant").

While Plaintiff emphasizes that "[g]enerally, fraud in the inducement is an independent tort because the alleged misrepresentation inducing one to enter into the contract is unrelated to the obligations under the contract," *Island Travel,* 300 So. 3d at fn. 7 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D704a], the Court would point out that: (1) when an alleged fraud in the inducement *does* relate to "the obligations under the contract"—as is clearly the case here—the "tort" claim is subject to the common law limitations imposed by this long-standing precedent; and (2) Plaintiff has not even pled "inducement" claims, no matter how its "counts" are labeled. At the time these alleged false representations were made, CH had already entered into the Space Permit and its aircraft(s) were already stored in the hangar. The alleged misrepresentations were made *after* the contract was in force and effect. They did not "induce" CH to enter into the agreement. What these alleged representations may have "induced" was a decision by CH to "stay" in the contract, a claim of so-called "fraud in the performance" that is clearly subject to this precedent. *See, e.g., Bedoyan v. Samra,* 47 Fla. L. Weekly D1995a (Fla. 3d DCA Sept. 30, 2022); *see also Hotel Key Largo, Inc. v. RHI Hotels, Inc.,* 694 So. 2d 74, 78 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D952a] ("[m]isrepresentations relating to the breaching party's performance of a contract do not give rise to an independent cause of action in tort, because such misrepresentations are interwoven and indistinct from the heart of the contractual agreement").

Put simply, the "crux" of this case is contractual, and Plaintiff's damages were caused by a claimed contractual breach (*i.e.,* failure to maintain/repair the foam suppression system), notwithstanding the insurer Plaintiff's strategic decision to abandon the breach of contract claim. *See Avant Design,* 351 So. 3d at 70 ("[w]hile we do not blithely disregard Kaufman's evidence that, post-litigation, Avant made bookkeeping alterations to justify overcharges, the crux of this case is—and Aquastar's damages are occasioned by—Avant's breach of its contractual arrangement with Aquastar"); *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494-95 (Fla. 3d DCA 1994) ("[i]t is well established that breach of contractual terms may not form the basis for a claim in tort. Where damages sought in tort are the same [as those that may be sought] for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort").

Defendant's Motion for Summary Judgment is **GRANTED**.[7]

3. Motion for Leave to Amend: Plaintiff seeks to amend the pleading "to clarify that their allegations regarding Defendant's failure to disclose the condition of the Foam System forms the basis of a fraudulent concealment claim." Motion, ¶ 14.

As an initial matter, the proposed amendment appears futile, as Defendant had no obligation to disclose anything. *See, e.g., R.J. Reynolds Tobacco Co. v. Bessent-Dixon,* 313 So. 3d 173, 175 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D189c] (in a commercial transaction in which "the parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other"). More importantly, even if there was arguably a duty to disclose, *see, e.g., Prentice v. R.J. Reynolds Tobacco Co.,* 338 So. 3d 831, 840 (Fla. 2022) [47 Fla. L. Weekly S78a] ("when a defendant makes a statement that purports to tell the whole truth but does not, 'there is a duty to disclose the additional information necessary to prevent it from misleading the recipient' "), Plaintiff concedes that the proposed "fraudulent concealment" claim, if permitted, would be subject to the same ruling this Court will enter on Defendant's Motion for Summary Judgment directed at the affirmative misrepresentation counts. *MidAmerica C2L Incorp. v. Siemens Energy, Inc.,* 25 F.4th 1312, 1333 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C859a] (finding that claims for fraudulent misrepresentation and failure to disclose defects "failed because they are, in essence, simply a restatement of Secure's contract and breach of warranty claims. Florida's independent-tort doctrine requires a fraud claim to be 'independent of a breach of contract claim' "); *Temurian v. Piccolo,* 2019 WL 1763022, at *7 (S.D. Fla. April 22, 2019) (court found that the independent tort doctrine bars plaintiff's fraud in the inducement and fraudulent concealment, holding that "[f]undamental contractual principles continue to bar a tort claim where the offending party has committed no breach of duty independent of a breach of its contractual obligations"). As the Court has now disposed of those counts, the Motion for Leave to Amend is **DENIED** as moot.

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*Corrects an error on page 2 of the Court's prior Order.

[1]Although United States Aviation Underwriters, Inc., brings these claims as a subrogee of CH Management Services, LLC and CH Acquisition, LLC, and in its capacity as a manager of other insurance entities, for ease of reference the Court will refer to it as Plaintiff in the singular.

[2]Plaintiff's insured, which brought this case in 2019, pled claims for Breach of Contract, Negligence and Constructive Eviction, based upon Defendant's alleged failure to maintain its foam suppression system. Then, through a Second Amended Complaint, which introduced the insurer Plaintiff as the "real party in interest," the contract-based claims were abandoned and, for the first time, claims for "Fraudulent Inducement/Negligent Misrepresentation" were pled. This was hardly a coincidence. Defendant is an "additional insured" under Plaintiff's policy, and insists that Plaintiff waived the right to bring these claims against it in subrogation. There is, however, precedent suggesting that an insurer's subrogation waiver will not preclude independent tort claims. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Tyco Integrated Sec., LLC,* 2015 WL 3905018 (S.D. Fla. June 25, 2015). This Court has little doubt that once this insurance carrier "took over" the case, it jettisoned the contract-based claims and decided to ride the "tort" horse in the hopes of avoiding its subrogation waiver. That is the only conceivable reason why Plaintiff would not, at the very least, advance a breach of contract claim in the alternative. In any event, Plaintiff's motive for pursuing only "tort" claims is of no moment. The only relevant issue is whether those "tort" claims are foreclosed as a matter of law. They undoubtedly are.

[3]As pointed out in *Ruben,* the Fourth District has limited application of this doctrine to instances where "the later written contract expressly contradict(s) the alleged oral misrepresentations." *Output, Inc. v. Danka Bus. Sys., Inc.,* 991 So. 2d 941, 944 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2086a]. The Fifth District also has suggested that a fraud claim is not barred unless the contract actually "contradicts" the alleged

misrepresentation. *Dziegielewski v. Scalero,* 47 Fla. L. Weekly D2608a (Fla. 5th DCA Dec. 9, 2022). *See also Schwab v. Swire Realty, Inc.,* 2007 WL 9707023 (S.D. Fla. Apr. 3, 2007) (denying motions to dismiss, noting that unlike in *Hillcrest,* the allegations of "misstatements were *affirmed* by and contained in the Contract"); *Onemata Corp. v. Rahman,* 2021 WL 5175544, at *4 (S.D. Fla. Oct. 12, 2021) ("the Court finds that the alleged misrepresentations at issue in the fraudulent inducement claims are not contradicted by nor inconsistent with the terms of the Purchase Agreement and the contemporaneously entered contracts"). This rule is obviously easier to apply than one which bars fraud claims whenever a contract "adequately covers" the subject matter of the fraud, as the question of whether a subject is "adequately covered" by a contract is rather nebulous. But unless the Third District aligns itself with its sister courts, this Court must apply the "adequately covers ***or*** expressly contradicts" test. This distinction would make no difference here, as the claims pled also are barred by the independent tort doctrine. *See* discussion *infra.*

[4]The Fifth District disagrees, and holds that damages sustained by a breach of contract and as a result of a fraud in the inducement may be the same. *See La Pesca Grande Charters, Inc. v. Moran,* 704 So. 2d 710, 712 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D167a] ("[i]f a fraud is perpetrated which induces someone to enter into a contract, there is a cause of action for fraud and the remedies attendant to that particular tort are available. If there is no fraud inducing someone to enter into a contract, but the contract is breached, the cause of action sounds in contract and contract remedies are available. The fact that the measure of damages may be the same for both causes of action does not make the fraud claim disappear"). Nevertheless, this Court is bound by Third District precedent which holds that the alleged tort must be based on conduct separate and apart from any contractual breach, *and* that the plaintiff must allege and prove damages different from those sustained as a result of a breach.

[5]While our appellate court has not illuminated on when a contract "adequately covers" the subject matter of a proposed fraud claim, this requirement clearly is satisfied here.

[6]For obvious reasons, this precedent may not be side-stepped simply because a plaintiff, like the one here, strategically decides not to plead a breach of contract claim that was clearly available.

[7]The Court notes that Defendant has moved for summary adjudication on a number of grounds. This Order addresses only one. In the event this ruling is appealed, and our appellate court reverses and permits these claims to proceed, this Court will take up Defendant's remaining arguments. *See, e.g., PDK Labs. Inc. v. U.S. D.E.A.,* 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurs) ("[i]f it is not necessary to decide more, it is necessary not to decide more . . ."). The Court also notes that while labeled a Motion for Partial Summary Judgment, Defendant actually seeks Final Summary Judgment on all of Plaintiff's pending claims.

* * *

Condominiums—Mixed use development of condominium and commercial properties—Master declaration governing mixed-use development that includes condominiums is illegal and void to extent that it grants commercial operator of hotel right to appoint majority of condominium associations' boards of directors in perpetuity and ownership/control over common elements that Condominium Act mandates be controlled by all unit owners—Defendants' claim of waiver fails—Act provides that its provisions may not be waived if waiver would adversely affect rights of a unit owner or purpose of the provision—Argument that plaintiffs are equitably estopped from claiming that any part of master declaration is illegal/void is foreclosed as matter of law—Bankruptcy court proceeding that resulted in sale of hotel property to defendants does not bar plaintiffs' illegality claim under doctrine of res judicata because bankruptcy court did not consider or adjudicate plaintiffs' illegality claim, and nothing legally obligated plaintiffs to bring illegality claim in that court—No merit to argument that plaintiffs forfeited their right to challenge legality of contract by accepting benefits of the contract

CENTRAL CARILLON BEACH CONDOMINIUM ASSOCIATION, INC., a Florida not for profit corporation, NORTH CARILLON BEACH CONDOMINIUM ASSOCIATION, INC., a Florida not for profit corporation, and SOUTH CARILLON BEACH CONDOMINIUM ASSOCIATION, INC., a Florida not for profit corp., Plaintiffs, v. CARILLON HOTEL, LLC and Z CAPITAL PARTNERS, LLC, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Division. Case Nos. 2016-011172-CA-01, 2016-007886-CA-01 (Consolidated). January 30, 2023. Michael A. Hanzman, Judge. Counsel: Stevan Pardo and Joseph I. Pardo, Pardo Jackson Gainsburg, PL, Miami, for Central Carillon Beach Condominium Association, Inc., Plaintiff. Paul A. Shelowitz and Gabriel G. Mandler, Stroock, Stroock & Lavan LLP, Miami, for South Carillon Beach Condominium Association, Inc., Plaintiff. Eugene E. Stearns and Jason S. Koslowe, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, for North Carillon Beach Condominium Association, Inc., Plaintiff. Jeffrey M. Weissman and Brian S. Dervishi, Miami; and Avery Samet, AMINI LLC, New York, NY, for Defendants.

ORDER ON "ASSOCATIONS' MOTION FOR SUMMARY JUDGMENT ON CONDOMINIUM ACT CLAIMS" (ARGUMENT I)

I. INTRODUCTION

Before the Court is the "Associations' [Plaintiffs'] Motion for Summary Judgment on Condominium Act Claims" (D. E. 932). The Motion seeks summary judgment on a number of issues. This Order addresses only one: Plaintiffs' contention that the Master Declaration governing the mixed-use development at issue here is illegal/void because it grants a for-profit commercial enterprise control over condominium property, thereby divesting residential owners of the protections afforded by Chapter 718, *et seq.,* Florida Statutes ("Chapter 718" or the "Act"). The regime the Master Declaration implements is illegal, Plaintiffs say, because it strips away significant rights and benefits the Legislature, through Chapter 718, afforded property owners who chose to live in "little democratic sub societies" known as condominiums, and "distorts the condominium democracy into a dictatorship of unlimited control by the commercial developer entity . . . ." Mot, pp. 1, 2. *See, e.g., White Egret Condo., Inc. v. Franklin,* 379 So. 2d 346, 350 (Fla. 1979) ("[c]ondominium unit owners comprise a little democratic sub society . . .").

There is obviously nothing improper (or illegal) about forming a master association to own/operate property/facilities that are not statutorily required to be owned by condominium owners, and actually shared by multiple condominium buildings, or by condominium building(s) and a commercial enterprise(s). Many projects involve multiple condominium structures and/or commercial ventures which share components such as a common parking garage, common walkways, common amenities, etc. In such cases, a master association is often formed for purposes of owning/operating common property, and these master associations are not subject to Chapter 718, ***provided*** that they do not meet the Act's definition of an "association," and do not own/control property the Act says must be owned by unit owners. *See e.g., Raines v. Palm Beach Leisureville Cmty. Ass'n, Inc.,* 413 So. 2d 30 (Fla. 1982); *De Soleil S. Beach Residential Condo. Ass'n, Inc. v. De Soleil S. Beach Ass'n, Inc.,* 322 So. 3d 1189 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1291a]. But developers, like the initial developer here, began to overreach by employing master associations to retain, and expropriate from residents, ownership and control over condominium property that the Act mandates be owned/controlled by the owners of all units in proportion to their ownership interests (*i.e.,* through a democracy).

The initial developer here implemented its overreach by first recharacterizing statutory "common-elements" as "Shared Facilities." The developer then, through the Master Declaration, granted itself (as the Hotel Lot owner) the right to: (a) appoint a majority of the Master Association's Board of Directors in perpetuity; and (b) own, control and assess for the operation/maintenance of all Shared Facilities. Put simply, the developer used the Master Declaration/Association as a vessel to transport to itself perpetual control over the entire shared campus. Defendants' grip is so tight that, as its CEO acknowledged, the residents just "live in [their] hotel" and, as the Court said in an earlier Order, have no more rights "than would a transient hotel room occupant have over the hotel in which they book a room." (D. E. 875, p. 7).

Using a master declaration/association to divest condominium owners of their right to own/control the property within the confines of the declaration establishing their condominium, or components/facilities that are statutory "common elements" attempts to do indirectly that which a developer may not lawfully do directly. *See,*

e.g., Clermont-Minneola Country Club v. Loblaw, 143 So. 129, 134 (Fla. 1932) ("[i]t is a fundamental principle of law that a person will not be permitted to do indirectly what he is not permitted to do directly"); *IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting LLC,* 310 So. 3d 477, 481 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2272a] (invalidating provisions of declaration that illegally divested unit owners of their statutory rights to an undivided interest in "common elements" by reclassification). The fact that this Master Declaration overreaches does not, however, render the entire contract illegal.

As the Court said earlier, master associations serve a useful purpose in mixed-use developments that contain common property that is actually shared, such as parking garages, walkways, and common amenities. But to the extent the Master Association here goes further and grants the commercial operator ownership/control over property that Chapter 718 mandates be owned/controlled by all unit owners, the Court finds that it is illegal/void. The Court also finds that the affirmative defenses advanced fail as a matter of law. Accordingly, the Court **GRANTS** Plaintiffs' Motion and will invalidate the Master Declaration to the extent, but ***only*** to the extent, it vests the Hotel Lot owner with ownership/control of property the Legislature has decreed must be owned/controlled by unit owners as a whole. *See, e.g., Phillips v. Lyons Heritage Tampa, LLC,* 341 So. 3d 1171, 1175 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D1338a] ("an invalid or unenforceable provision is severable from an agreement").

II. THE CARILLON SHARED CAMPUS

The combatants here each own a "lot" within a shared campus known as the Carillon Resort and Hotel, a mixed-use real estate development located on Miami Beach.[1] The five lots that share this campus, defined by a Declaration of Covenants, Restrictions and Easements for Carillon Hotel and Spa (hereinafter the "Master Declaration" or "MD"), consist of (a) three condominium towers described as the "Condominium South Lot," the "Condominium North Lot," and the "Condominium Central Lot"; (b) a "Hotel Lot; and (c) a "Retail Lot."[2] Each record owner of an interest in these lots is a "Member" of the Master Association. MD, §§1.1 (gg) and 3.1.

The Condominium North Lot, Condominium Central Lot and Condominium South Lot were each submitted to the condominium form of ownership in accordance with Chapter 718. Each is subject to a separate declaration of condominium which establishes the North Carillon Beach Condominium Association, Inc., the Central Carillon Beach Condominium Association, Inc., and the South Carillon Beach Condominium Association, Inc. respectively.[3] The three condominium associations (collectively "Associations") are the Plaintiffs in this case. The Defendants are Z Capital Florida Resort, LLC ("Z Capital Resort")—an entity which purchased the Hotel Lot out of a bankruptcy in 2015, and Z Capital Partners, LLC ("Z Capital Partners"), a Delaware limited liability company which formed Z Capital Resort to take title to, and operate, the property.

The MD, as amended, governs the rights and obligations of the various lot owners, and only the proverbial "Philadelphia Lawyer" would have a snowball's chance in hell of successfully navigating this labyrinth. Two things, however, are certain: (a) the Hotel Lot owner (initially the original developer) owns and operates a for-profit commercial enterprise (Hotel/Spa/Restaurant) embedded within the shared campus; and (b) the Hotel Lot owner, through the powers granted by the MD, is vested with exclusive and perpetual control over the entire shared campus (other than the interior of individual units), as it owns, and has the right to operate, maintain and assess for all costs associated with what are defined as five categories of "Shared Facilities:" the "Condominium Central Shared Facilities," the "Condominium North Shared Facilities," the "Non-Retail Shared Facilities," the "Condominium South Shared Facilities," and the "General Shared Facilities." The Hotel Lot owner also has the right, in perpetuity, to appoint a majority of the Master Association's directors. *See* Articles of Incorporation of Carillon Hotel and Spa Master Association, Inc., Art. VI.

While discerning precisely which Shared Facilities fall into each of these five categories is an act of futility for even the most skilled reader, collectively the Shared Facilities encompass virtually all components of the campus other than the interior spaces of the condominium units, including: (a) utility, mechanical, electrical, telephonic, telecommunications, and plumbing systems; (b) heating, ventilation, and air conditioning systems; (c) trash rooms and trash disposal systems; (d) all structural components and air space; (e) roofs, insulation, and roof support elements; (f) elevators, utility and mechanical systems; (g) HVAC systems, sidewalks, driveways, landscaping and security systems; and (h) the hallways and lobbies in every building. The MD announces its intent to do away with "common elements," as defined by the Act, and openly acknowledges that "the Properties have been structured in a manner that minimizes the Common Properties and instead has most if not all typical common properties included as part of the Hotel Lot." MD, §§2.4; 4.1 ("[m]ost components which are typical 'common properties' of a development of this nature have instead been designated . . . as part of the Shared Facilities").

The Master Declaration again grants the Hotel Lot owner the right to own, operate and maintain Shared Facilities, as well as the right to assess residents a portion of the cost(s) of such operations/maintenance.[4] Despite buying/owning condominium units, residents have no say over how to operate/maintain any portion of the campus (other than the interior of their particular unit(s)), including: (a) when to replace/repair/upgrade any component defined as Shared Facilities; (b) when to renovate lobbies, elevators, hallways, roofs, exteriors, utility systems, etc.; (c) how much to budget for operating/maintaining any aspect of the shared campus; (d) what portions of their condominium buildings should be insured and at what cost; and (e) what reserves should be set aside for future repairs, a critical issue as the tragic collapse of the Champlain Towers South building reminded us. For all intents and purposes, the condominium owners/residents are nothing more than long-term hotel guests.

Though the Hotel Lot owner has the authority to assess residents for expenses incurred in operating/maintaining the Shared Facilities, the Master Declaration is, quite remarkably, silent as to the method to be employed in allocating those costs between the various lot owners. It does not, for example, direct that the allocation be based on "actual use," "square footage," "potential-use" or any other defined or ascertainable metric. The Hotel Lot owner therefore possesses discretion in deciding how to allocate the costs of the Share Facilities—discretion that must be exercised in good faith. *See, e.g., Avant Design Group, Inc. v. Aquastar Holdings LLC,* 351 So. 3d 62, 71 (Fla. 3d DCA 2022) [47 Fla. L. Weekly D2059a] (the implied covenant of good faith and fair dealing "comes into play 'when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards' "); *Sepe v. City of Safety Harbor,* 761 So. 2d 1182, 1185 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1591a] ("sole discretion does not permit a party to make a discretionary decision that violates the covenant of good faith"); *Cox v. CSX Intermodal, Inc.,* 732 So. 2d 1092, 1097-98 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D195a] ("where the terms of the contract afford a party substantial discretion to promote the party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable expectations of the other party").

A more reliable recipe for litigation is hard to imagine, and unit owners in these mixed-use communities—like those here—predictably claim that commercial operators, through use of their assessment power, force residents to subsidize the cost of operating their for-profit enterprise(s).[5]

III. DEFENDANTS' ACQUISITION OF THE HOTEL LOT

In 2014, the prior Hotel Lot owner, FL 6801 Spirits, LLC (and other related entities) ("FL 6801") affiliates of Lehman Brothers—filed a bankruptcy petition in the Southern District of New York. At that time the Associations were plaintiffs in pending state court lawsuits against FL 6801 which raised a number of claims in reliance and enforcement of the MD. None, however, challenged or questioned the legality of the MD. *See North Carillon Beach Condominium Association, Inc. v. FL 6801 Collins North LLC, FL 6801 Collins South LLC and FL 6801 Collins Central LLC,* case number 2014-4356; *Central Carillon Beach Condominium Association, Inc. and South Carillon Beach Condominium Association, Inc. v. FL 6801 Collins Central LLC,* Case No. 2014-5408.

Following a public auction, Defendant Z Capital Partners, on behalf of an affiliate to be later designated, entered into a Purchase and Sale Agreement ("PSA") to acquire the Hotel Lot (and its attendant contract rights) for $21.6 million. Each of the three Associations lodged objections to the proposed sale. Throughout the bankruptcy process, the Associations stressed that the Master Declaration was the "constitution" governing all aspects of the project that would bind any purchaser. *See, e.g.,* Association Objection to Sale Motion, ¶ 35 (objecting to sale procedures because the Debtors could not challenge the validity of the Master Declaration); ¶ 37 ("[c]learly, the Property is and shall remain subject to the Master Declaration, regardless of who ends up owning the Property"); Associations' Motion to Prevent Closing, ¶ 15 ("[t]he Master Declaration is more than just a contract . . . . Rather, the Master Declaration and related Tower Declarations (defined below) are required by Florida law, and are so essential that they are covenants that run with the Property"); ¶¶ 19-20 (insisting that the Master Declaration is binding on any purchaser). The Associations did not claim that any of the contract rights Defendants were attempting to acquire were illegal/void.

During the bankruptcy, the Associations also resisted the debtor's "Motion to Sell Property Free and Clear of Liens Under Section 363(f)," arguing that the Hotel Lot could not be sold free from the claims then pending in state court; the reason being that the state court actions did not involve a "*bona fide* dispute over the validity of the Master Declaration." Def. App. 6, ¶ 35. While the issue presented was somewhat complicated, and beyond the scope of this Order, a claim challenging the legality of the Master Declaration may have constituted a core proceeding under 28 U.S.C. §157, and within the Bankruptcy Court's jurisdiction. The Associations, however, never asserted that claim, either in the then pending state court cases or in the bankruptcy proceeding. For this reason, the Associations said that: (a) the Bankruptcy Court lacked jurisdiction to adjudicate their state law claims; and (b) the debtor could not deliver the property to Defendants unencumbered from those claims. The Defendants were therefore faced with the prospect of buying pending litigation.

On October 28, 2014, Defendant Z Capital Resorts, the entity Z Capital Partners formed to take title to the Hotel Lot, entered into a Term Sheet with the Central and South Associations which resolved the disputes between these particular parties. Through the Term Sheet, Z Capital Resorts agreed, among other things, to operate the Hotel Lot (and the exteriors and interiors of the North Tower and South Tower) with "a level of service equivalent or comparable to the Acqualina in Sunny Isles Beach, St. Regis in Bal Harbour and the Ritz-Carlton in Ft. Lauderdale." Term Sheet, p. 5. Z Capital Resorts also agreed to a number of other concessions demanded by the South and Central Associations. Approximately one month later, on November 24, 2014, Z Capital Resorts and the North Association executed a "Letter Agreement" which imposed upon the buyer additional obligations.[6] Upon execution of these hastily done "back-of-a-napkin" agreements, the Associations withdrew their objections to the sale. The Associations also agreed to, and did, dismiss their pending state cases with prejudice. *See* Term Sheet, p. 4; Letter Agreement, ¶ 7.

On November 26, 2014, the Bankruptcy Court approved the PSA pursuant to a Sale Order which recognized both the Term Sheet and Letter Agreement, and acknowledged that the Parties had resolved the Associations' objections. The Sale Order recited that the debtors were the lawful owners of the "Assets" being acquired (*i.e.,* the Hotel Lot and its attendant contract rights), and that those assets were being "sold subject to" the Master Declaration. Sale Order, p. 12.

To "facilitate the sale," the Bankruptcy Court also entered nine (9) agreed upon findings of fact, confirming certain rights granted to the debtors (and their successor—Z Capital Resorts) pursuant to the Master Declaration:

- The "Hotel Lot Owner" (as defined in the Master Declaration) (or any successor Hotel Lot Owner) has the exclusive right to determine from time to time, in its sole discretion and without notice or approval of any change, how and by whom the Spa (as defined in the Master Declaration) and spa facilities shall be used, if at all, including, without limitation, the right to approve users, determine eligibility for use, establish hours of use and guest policies, restrictions and/or prohibitions, and to allow use of the Spa and spa facilities by persons other than the Unit Owners (as defined in the Declarations).
- Each Unit Owner's right to use the Shared Facilities (as defined in the Master Declaration), including his or her "Limited Spa Rights," as that term is defined in Article 1.1(dd)(iv)(d) of the Master Declaration, are subject to the Hotel Lot Owner's right to permit other persons to use such facilities as the Hotel Lot Owner (or any successor Hotel Lot Owner) may designate in its sole discretion. This includes without limitation persons who are not members of the Associations or who are not owners of any portion of the Properties (as defined in the Master Declaration) and may include members of the public generally.
- The Hotel Lot Owner (or any successor Hotel Lot Owner) may grant and use general and specific easements over, under, and through the Shared Facilities at its sole discretion to whomever it so chooses.
- The owner (or any successor owner) of the Future Development Property as defined by Article 1.1(x) of the Master Declaration has the right to "annex" or add Future Development Property to the jurisdiction of the Master Declaration, provided that a Supplemental Declaration is duly executed and recorded in the Public Records of Miami-Dade County, as provided in Article 2.2 of the Master Declaration.
- The Hotel Lot Owner (or any successor Hotel Lot Owner) may levy assessments for, without limitation, the maintenance, repair, management, replacement and operation of the Shared Facilities. Included in the Shared Facilities are the Unit Owner's Limited Spa Rights, only as expressly set forth in Articles 1.1(dd)(iv)(d), 1.1(oo), and 4.4 of the Master Declaration. Such assessments for the Shared Facilities are separate from and in addition to the monthly Fixed Charge that Unit Owners are obligated to pay the Hotel Lot Owner (or any successor Hotel Lot Owner) in accordance with Article 16.3 of the Master Declaration.[7]
- The Hotel Lot Owner (or any successor Hotel Lot Owner) has broad rights under the Master Declaration to regulate the use of the Shared Facilities, including, without limitation, (i) the right to limit the availability of Unit Owners' use privileges, (ii) to change, eliminate or cease any or all of the spa features and/or services, and (iii) to impose reasonable non-discriminatory rules and regulations, policies, restrictions and/or prohibitions to govern the orderly use of such facilities.

• The Hotel Lot Owner (or any successor Hotel Lot Owner) may institute reasonable rules and regulations to operate and manage the Shared Facilities, including limiting maximum daily users to comport with legal occupancy limits.

• The Hotel Lot Owner (or any successor Hotel Lot Owner) may include the expense of Valet Parking Services (as defined in the Sale Motion) in the Condominium Tower' [sic] Shared Facilities Assessments (as defined in the Sale Motion).

• The Hotel Lot Owner (or any successor Hotel Lot Owner) may assess utility costs based upon square footage rather than actual usage.[8]

The Sale Order then recited that "if these findings . . . were not entered, the Purchaser (Z Capital Resorts) would not consummate the Sale[.]" *Id.* at 15. Conspicuously absent from this negotiated list is a finding that the MD was legal or in compliance with Chapter 718. Defendants apparently never insisted on the Bankruptcy Court making such a finding. Nor did Defendants secure a release of any illegality claims.

It is undisputed that during the bankruptcy proceedings the Associations: (a) never claimed that the MD, or any aspect of it, was illegal/void; (b) argued that any purchaser would be bound by the MD as a covenant running with the land; (c) opposed Defendants' effort to acquire the assets free and clear of the Associations' then pending state law claims, by correctly pointing out that those claims, as pled, did not present a *bona fide* dispute over the legality of the MD; and, (d) withdrew their objections to the sale after negotiating for, and receiving, valuable concessions from the Defendants.

It is also undisputed that the Associations never represented that the MD was, in all aspects legal, nor did they release any potential illegality claims. And Defendants—sophisticated corporate entities that employed sophisticated counsel—were more than capable of reading Chapter 718 and assessing whether the contract rights they were considering buying (or some of them) may be unlawful.

IV. THE LITIGATION

In 2016, approximately a year after Defendants consummated the purchase, the Plaintiffs brought this case. Over the now seven (7) years it has been pending, both sides have taken turns escalating matters in an effort to put pressure on the other, such as: (a) Plaintiffs' decision to up the *ante* by seeking over $400 million in alleged "diminution in value" damages; and (b) Defendants' reflective and unwise retort, which was to: (i) amend the MD in order to "clarify" that the legal fees they have (and will) spend defending this case are "costs" of maintaining/operating the Shared Facilities that can be passed on to the residents; and (ii) assess the residents $7.7 million to reimburse themselves those legal fees/costs. The Court quickly shut down that bold fee shifting attempt. (D. E. 875).

Though complicated, and up to now evolving, the Associations' claims can be placed into three (3) "buckets."

A. The Under-Performance Claims

First, Plaintiffs advanced the claim that Defendants breached the Term Sheet/Letter Agreement by, among other things, failing to: (a) achieve a Forbes 5-star or AAA 5 diamond rating; (b) brand the hotel a Flagship brand; (c) operate the hotel in a joint venture with Adrian Zecha, Jonathan Breene and Z Capital, led by Tom Wicky; (d) make good faith efforts to keep Canyon Ranch as the spa operator; and (e) operate the Property to a level of service equivalent or comparable to the Acqualina in Sunny Isles Beach, St. Regis Bal Harbour Resort, and Ritz-Carlton in Ft. Lauderdale.

Relying on "expert" testimony, the Associations claimed that these (and other) breaches of the Term Sheet/Letter Agreement resulted in damages of approximately $420 million, representing the alleged diminution in value of the 580 condominium units on the Property. The Court granted Defendants' Motion for Summary Judgment on this claim, concluding that the Associations lacked standing to seek damages measured by the alleged diminution of value of individual units they did not own. (D. E. 975). That Order disposed of the so-called "under-performance" claims.[9]

B. The Improper/Over-Assessment Claims

The Associations also brought claims, through a number of different legal theories, alleging that Defendants breached the Master Declaration and Letter Agreement (or, in the alternative, the duty of good faith and fair dealing inherent in these contracts) by improperly/over-assessing residents for the costs of the Shared Facilities. Those claims were recently tried to a jury, resulting in a verdict of approximately $16 million in favor of the Associations.

C. The Condominium Act Claims

Finally, the Associations advance what they describe as "Condominium Act Claims." The first, addressed in this Order, again alleges that the structure employed here is illegal/void, as it "distorts the condominium democracy into a dictatorship of unlimited control by the commercial developer entity—the Defendant Hotel Owner." Mot, p. 2.

Putting aside the claim that the global structure here is illegal/void, the Associations also insist that the Master Declaration contains a "Recreational Lease" which they may elect to purchase pursuant to §718.401. This is so, according to Plaintiffs, because the Master Declaration forces residents to pay monthly for use of, and access to, recreational facilities. While the Master Declaration never uses the term "lease," Plaintiffs urge the Court to elevate substance over form and conclude that the rights and obligations imposed by the Master Declaration *vis-á-vis* the Spa amenities constitute a lease because the contract "grant[s] access and use to recreational [and] other facilities in return for valuable consideration paid on a regular and periodic basis." Mot, p. 29. In Plaintiffs' view, "[t]hat's a lease," and §718.401 grants them the right to purchase the property subject to it (*i.e.,* the Spa). *See, e.g., Booker Creek Pres., Inc. v. Pinellas Planning Council,* 433 So. 2d 1306, 1308 (Fla. 2d DCA 1983) ("[i]f it looks like a duck and quacks like a duck, then it must be a duck").

Finally, Plaintiffs claim that they may "terminate the Master Declaration's provisions for Use/Access to, and Force Payments for the Spa," pursuant to section §718.302(1)—a statute that permits unit owners other than a developer to cancel any grant or reservation "that provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium . . . ." *Ainslie at Century Vill. Condo. Ass'n, Inc. v. Levy,* 626 So. 2d 229, 230 (Fla. 4th DCA 1993) (a lease involving property serving the unit owners, as well as a contract between the Association and the developer/developer's subsidiary, which provide for the complete operation and maintenance of these facilities "fall within the ambit of section 718.302(1) and are subject to the cancellation provision of section (d)"). This would relieve residents of their immutable obligation to pay fixed charges for access/use of the Spa Facilities, thereby forcing Defendants to compete in the "spa" marketplace.

As discussed earlier, this Order addresses only the first of three (3) Condominium Act claims: the claim that the MD, and the structure it implements, is illegal/void.

V. GOVERNING LAW

"Contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.,* 145 So. 3d 989, 993 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1871a]; *Castro v. Mercantil Commercebank, N.A.,* 305 So. 3d 623, 626 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1002a]. A declaration is a contract, *see. e.g., Cohn v. Grand Condo. Ass'n, Inc.,* 62 So. 3d 1120, 1121 (Fla. 2011) [36 Fla. L. Weekly S129a] ("[a] declaration of condominium . . . operates as a contract among unit owners and the

association"), and though it is not "negotiated" in the traditional sense, those who purchase condominiums are charged with knowledge of—and bound by—its provisions. *See, e. g., Providence Square Ass'n, Inc. v. Biancardi,* 507 So. 2d 1366, 1372 (Fla. 1987) (noting that condominium purchasers are charged with notice of the recorded documents); *Woodside Vill. Condo. Ass'n, Inc. v. Jahren,* 806 So. 2d 452, 461 (Fla. 2002) [27 Fla. L. Weekly S34a] ("we find that [owners] were on notice that the unique form of ownership they acquired when they purchased their units . . . was subject to change . . . and that they would be bound by properly adopted amendments"); *12550 Biscayne Condo. Ass'n, Inc. v. NRD Investments, LLC.,* 336 So. 3d 750, 755 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2401a] ("[t]he commercial Association members purchased their condominium units with the ability . . . to understand the terms in the publicly recorded REA and the Declaration which govern the parking and antenna easements"). So, like any other contract, a declaration will generally be enforced as written.

Like most legal "rules," this one has exceptions; one being where a contract (or any of its provisions) violates a statute or public policy and is therefore unlawful, void, and unenforceable. *See, e.g., Hernandez v. Crespo,* 211 So. 3d 19, 24 (Fla. 2016) [41 Fla. L. Weekly S625a] ("contractual provision that contravenes legislative intent in a way that is clearly injurious to the public good violates public policy and is thus unenforceable"); *Park v. Wausau Underwriters Ins. Co.,* 547 So. 2d 213, 215 (Fla. 4th DCA 1989) ("[t]he general rule is that a contract (such as an insurance policy) which is violative of a statute or public policy will not be enforced by the courts"). As our appellate court has made clear:

> an agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. We have consistently applied this rule to invalidate contracts that violate the law.

Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp., 261 So. 3d 613, 624 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2178a], citing *Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada v. Henley & Beckwith, Inc.,* 66 So.2d 818, 821 (Fla. 1953). Our appellate court also has cautioned that "this principle must be given special force in the condominium field in which the Legislature has found necessary statutorily to overcome" a developer's "self-dealing-type" agreements. *Palm Bay Towers Corp. v. Brooks,* 466 So. 2d 1071, 1074 (Fla. 3d DCA 1984).

Plaintiffs insist the Master Declaration is in jarring conflict with the Act and therefore illegal. Defendants disagree and claim that, in any event, these Associations have, for a number of reasons, relinquished the right to pursue this claim.

VI. ANALYSIS

A. The Illegality Claim

As Judge Miller explained in *IconBrickell,* "[a] condominium unit is a hybrid interest in real estate, entitling an owner both to the exclusive ownership and possession of a unit and an undivided interest as a tenant in common with other unit owners in the common areas." *IconBrickell,* 310 So. 3d at 480. Because "[c]ondominium ownership is created only by statute . . . all provisions of a condominium declaration must conform to the Act [§718, *et seq*.]." *Id.* "[A]nd to the extent that they conflict therewith, the statute must prevail." *Winkelman v. Toll,* 661 So. 2d 102, 105 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2110a]; *Tranquil Harbour Dev., LLC v. BBT, LLC,* 79 So. 3d 84, 86 (Fla. 1st DCA 2011) [37 Fla. L. Weekly D51b] ("[b]ecause a condominium is strictly a creature of statute, the language of the statutes in effect on the date of the declaration of condominium 'is as controlling as if engrafted onto' the declaration itself") (citation omitted); *Woodside Vill. Condo. Ass'n, Inc. v. Jahren,* 806 So. 2d 452, 455 (Fla. 2002) (" [c]ondominiums and the forms of ownership interests therein are strictly creatures of statute . . . [h]ence . . . courts must look to the statutory scheme . . . to determine the legal rights of owners and the association."); *see also*, §718.102, Fla. Stat. ("[e]very condominium created and existing in this state shall be subject to the provisions of this chapter").

Embedded throughout Chapter 718 is an unambiguous legislative edict: condominium property, including common elements, is to be owned and controlled by all unit owners, and control over such property must be exercised democratically. *See, e.g., White Egret Condo., Inc. v. Franklin,* 379 So. 2d 346, 350 (Fla. 1979) ("[c]ondominium unit owners comprise a little democratic sub society . . . ").

The Act begins by stating its "purposes"—one being: "to establish procedures for the creation, sale, and operation of condominiums." §718.102(2), Fla. Stat. It then mandates that: "[e]very condominium created and existing in this state shall be subject to the provisions of this chapter," making it abundantly clear that the field of condominium regulation has been fully pre-empted. §718.104, Fla. Stat. *See, e.g., R.R. v. New Life Cmty. Church of CMA, Inc.,* 303 So. 3d 916, 923 (Fla. 2020) [45 Fla. L. Weekly S261a] ("[w]hen a 'statute purports to provide a comprehensive treatment of the issue it addresses, judicial lawmaking is implicitly excluded"). This section then requires that the declaration, which when recorded creates the "condominium," identify the precise property being submitted to condominium ownership. §718.104(2), Fla. Stat. The declaration must also identify "[t]he undivided share of ownership of the common elements and common surplus of the condominium that is appurtenant to each unit stated as a percentage or a fraction of the whole," and specify "the ownership share of the common elements assigned to each residential unit . . . based either upon the total square footage of each residential unit in uniform relationship to the total square footage of each other residential unit in the condominium or on an equal fractional basis." §718.104(4)(f), Fla. Stat.

The Act defines "common elements" as "the portions of the condominium property not included in the units." §718.103(8), Fla. Stat. There are no exceptions. It then mandates that each unit shall own: (a) "[a]n undivided share in the common elements and common surplus"; and (b) the exclusive right to use and enjoy all "common elements" in accordance with their intended purposes. §§718.106(2) and (3), Fla. Stat. The Act also makes it clear that each unit owner's undivided share of the common elements "shall not be separated from [the unit] and shall pass with the title to the unit . . ." §718.107, Fla. Stat., and mandates that "common elements" include:

> (a) The condominium property which is not included within the units.
>
> (b) Easements through units for conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to units and the common elements.
>
> (c) An easement of support in every portion of a unit which contributes to the support of a building.
>
> (d) The property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements.

§718.108(1), Fla. Stat. The Act then decrees that "[t]he operation of the condominium shall be by the association . . .," making it clear that no one else may control condominium property. §718.111(1)(a), Fla. Stat.

These provisions, read singularly and as a cohesive whole, leave no doubt that condominium property must be owned and operated by the unit owners collectively, through their association, and a developer may not skirt this legislative command by conveniently

"recharacterizing" common elements as "Shared Facilities," "Shared Components" or anything else. *See, IconBrickell, supra.* If facilities/components serving a condominium fit within the statutory definition of "common elements," they are required to be owned/operated democratically by all unit owners. The Act makes no exception for condominiums located within, and a part of, a "mixed-use development."

This legislative choice makes perfect sense. When people decide to live in a condominium they relinquish the control they would otherwise have over their homes, and agree to abide by the will of the majority with respect to the operation of the property. As our Supreme Court explained:

> inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

White Egret Condo., Inc. v. Franklin, 379 So. 2d at 350. But the Legislature, as a matter of public policy, decided that property owners will "give up" only a "certain degree of freedom and choice," *id.;* not the right to have any say at all. *See, e.g., Century Vill., Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass'n,* 361 So. 2d 128, 133 (Fla. 1978) ("[i]n Florida, condominiums are creatures of statute and as such are subject to the control and regulation of the Legislature. That body has broad discretion to fashion such remedies as it deems necessary to protect the interests of the parties involved").

Here, through the use of the Master Declaration, the developer secured complete control over all aspects of the project, including all common elements appurtenant to the residential units. Unit owners, other than the Hotel Lot owner/developer, have no say in how the condominium they reside in will be operated. They cannot vote to replace or refurbish the exteriors of their buildings, the lobbies of their buildings, the components that provide utilities to their buildings, or any other facilities outside the four corners of their units. Nor do they have a say in how much money should be set aside in reserves for future needs. The Hotel Lot even owns the front doors to each resident's unit and—in a somewhat dystopian fashion—monitors their comings/goings through an electronic bracelet entry system. The condominium owners are, as the Court said earlier, nothing other than long-term hotel guests.

The problem inherent with these mixed-use developments is that owners of commercial enterprises integrated into residential condominium projects want to control the entire campus so as to ensure that their business venture will not be harmed should unit owners fail to maintain the property in accordance with their standards. Here, for example, the developer retained a hotel/spa that it markets as "Five-Star," as well as a high-end restaurant. It therefore wants to decide, by itself, when the buildings are painted; what the lobbies and elevators look like; what furniture is in the common areas of all three (3) buildings; who is hired to do the landscaping; how often the pool gets cleaned, etc. And it wants the right to assess residents for their fair share of the costs to maintain the campus to its liking. The flip side is that residents do not want to be at the mercy of a developer/commercial lot owner who also can "cut corners" and permit the campus to decay or, as happened here, end up bankrupt. The relationship between residents and commercial lot owners is hardly symbiotic, and often parasitic. The Legislature, however, has said condominium properties will be governed by majority rule, and constituents in these mixed-use developments will have to live with that legislative policy choice, even if they cannot do so in perfect harmony.

Allowing a developer to circumvent the statutory protections afforded by the Act by simply placing condominium associations under the umbrella of a master association, and using that master association to grant a commercial operator complete ownership of, and control over, property the Legislature has said must be owned/controlled by unit owners, would neuter Chapter 718 and render its protections anemic. A developer could simply retain a commercial unit—not place it within the condominium declaration, form a master association, put the commercial unit and the condominium association within the master association as "members," and, thru the master association, grant the commercial owner the right to own/control the entire project *sans* the inside of the condominium units. That is precisely what this developer did. As *IconBrickell* tells us, that is illega1.[10] The protections afforded by the Act may not be trumped by a developer-controlled entity, no matter what form is used in an attempt to circumvent them. Or, put another way, these statutory protections may not be eviscerated or diluted by creative lawyering.

Defendants do not deny that the MD gives the Hotel Lot ownership/control over property Chapter 718 says must be owned/controlled by others. They just say that this is "ok" because master associations are not governed by, and need not comply with, the Act. *See Dep't of Bus. Regulation, Div. of Land Sales v. Siegel,* 479 So. 2d 112 (Fla. 1985); *Raines v. Palm Beach Leisureville Cmty. Ass'n, Inc.,* 413 So. 2d 30 (Fla. 1982). Defendants read far too much into this precedent. These decisions simply hold that a master association that is not "the corporate entity responsible for the operation of a condominium," *see* §718.302, is not required to comply with the Act.[11] The Court obviously agrees, but Defendants miss the point. The fact that a master association may not be an "association" as defined by §718.302 does not mean it can be used as a vehicle to crash into a condominium and usurp ownership/control of property the Legislature has said no one other than unit owners may own/control.[12]

The Court concludes that the Master Declaration here is illegal/void to the extent, but ***only*** to the extent, it gives the Hotel Lot owner the right to own, control and assess for the cost of operating/maintaining Shared Facilities that are "condominium property which is not included within the units," or otherwise "common elements" as defined by Chapter §718.108(1).

B. Defenses

The Court next turns to the question of whether Plaintiffs' illegality claim may be avoided by any of Defendants' affuniative defenses. *See, e.g., Custer Med. Ctr. v. United Auto. Ins. Co.,* 62 So. 3d 1086, 1096 (Fla. 2010) [35 Fla. L. Weekly S640a] (an affirmative defense is an assertion of fact or law by a defendant that, if true, would avoid plaintiff's action). Defendants raise four distinct but related defenses: (a) waiver; (b) equitable estoppel; (c) *res judicata*/collateral attack on the Sale Order; and (d) Plaintiffs' acceptance of benefits under the MD and filing of affirmative claims based on the MD. The Court will address each.

i. Waiver

Disposing of Defendants' claim of waiver need not detain the Court long. Section 718.303(2) provides, in no uncertain terms, that "[a] provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision . . . . " *Id.* This type of legislation exists to protect against even "signed agreements" purporting to waive statutory rights and protections. *See, e.g., White v. Ferco Motors Corp.,* 260 So. 3d 388, 391 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2576a] ("[a]n individual cannot waive the protection of a statute that is designed to protect both the public and the individual . . . . A contractual provision that defeats the remedial and deterrent provisions of a statute is contrary to public policy and is unenforceable") (internal citation omitted); *Asbury Arms Dev. Corp., v. Fla. Dept. of Bus. Regulations, Div. of Fla. Land Sales & Condo.,* 456 So. 2d 1291, 1293 (Fla. 2d DCA 1984)

(condominium purchaser could not waive statutory right to terminate contract within fifteen days of receipt of all required documents).

For this reason alone, Defendants claim of waiver fails as a matter of law.

ii. Equitable Estoppel

The Court next turns to the question of whether Plaintiffs are equitably estopped from claiming that some of the contract rights Defendants purchased are illegal/void.

As an initial matter, the doctrines of waiver and estoppel are separate defenses, though "frequently" confused and "closely related." *SourceTrack, LLC v. Ariba, Inc.,* 958 So. 2d 523, 527 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D1419a]. And while one could debate whether the Legislature, in enacting §718.303(2), intended to bar the defense of waiver but permit the related defense of equitable estoppel, this Court must apply the statute as plainly written. *See, e.g., Boyle v. Samotin,* 337 So. 3d 313, 317 (Fla. 2022) [47 Fla. L. Weekly S111a] ("[t]his Court adheres to the 'supremacy-of-text 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' "); *Corfan Banco Asuncion Paraguay v. Ocean Bank*, 715 So. 2d 967, 970 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1407a] (courts "must enforce the law according to its terms. A legislature must be presumed to mean what it has plainly expressed"). As plainly written, §718.303(2) it does not foreclose an equitable estoppel defense.

Defendants correctly point out that "[e]quitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position," *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1076 (Fla. 2001) [26 Fla. L. Weekly S465a], and may be triggered whenever "one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury." *Id. Flagship Resort Dev. Corp. v. Interval Intern,, Inc.,* 28 So. 3d 915, 923 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D252a] ("[a] representation may take the form of words, acts, or '[c]onduct calculated to convey a misleading impression' "). Generally speaking, "[t]here are three elements required for an application of estoppel: "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *Beezley v. Deutsche Bank Nat'l Tr. Co. as Tr. for New Century Home Equity Loan Tr. Series 2004-A Asset Backed Pass-through Certificates, Series 2004-A,* 336 So. 3d 814, 817 (Fla. 2d DCA 2022) [47 Fla. L. Weekly D740a]; *Flagship Resort,* 28 So. 3d at 923.

Defendants then forcefully argue that Plaintiffs should be equitably estopped from now claiming that the MD, or any part of it, is illegal/void because: (a) they did not claim illegality during the bankruptcy proceeding; and (b) withdrew their objections to the sale after receiving valuable consideration. Unfortunately for Defendants, precedent that this Court agrees with forecloses this equitable defense as a matter of law. *See, e.g., S. Power Co. v. Cleveland Cnty.,* 24 F.4th 258, 270 (4th Cir. 2022) ("when a statute renders a contract illegal, plaintiffs cannot use equitable estoppel to enforce that contract"); *Colombus Life Ins. Co. v Wilmington Trust, N.A.,* 2021 WL 1712528, at *5 ((D.C.N.J. April 30, 2021) (equitable doctrines such as estoppel will not operate to defeat an illegality claim); *Chan v. Whatcom Opportunities Reg'l Ctr., Inc.,* 17 Wash. App. 2d 1043 (Wash. 2021) ("WORC argues on appeal, as it did in the trial court, that equitable estoppel is not available to remedy an illegal contract. WORC is correct; it has long been true that estoppel may not be utilized to enforce a contract found to be illegal"); ; *WRI Opportunity Loans II, LLC v. Cooper,* 65 Cal. Rptr. 3d 205, 219 (Cal. App. 2007) ("as a general rule, '[b]ecause an illegal contract is void, it cannot be ratified by any subsequent act, and no person can be estopped to deny its validity' "); *Mass. Mun. Wholesale Elec. Co. v. Town of Danvers,* 577 N.E.2d 283, 292-93 (Mass. 1991) ("[w]hen adjudicating rights between parties to a contract that is void ab initio, courts treat the contract as if it had never been made" and equitable doctrines cannot breathe life into such a contract); *P. I. P. Agency, Inc. v. ITT Life Ins. Co. of New York,* 70 Misc. 2d 740, 334 N.Y.S.2d 758, 760 (N.Y. Sup. Ct. 1972) ("Plaintiff's theory of equitable estoppel may not be invoked against an illegal contract"). Florida law appears to be in accord. *See, e.g., Dade County v. Bengis Assoc., Inc.,* 257 So. 2d 291 (Fla. 3d DCA 1972) (reversing order granting summary judgment entered on grounds that County was equitably estopped to enforce ordinance, "holding that a governmental entity is not estopped from the enforcement of its ordinances by an illegally issued permit which is issued as a result of a mutual mistake of fact"); *Abenkay Realty Corp. v. Dade County,* 185 So. 2d 777, 781 (Fla. 3d DCA 1966) (rejecting appellant's argument that county "was estopped to revoke its permit" based, in part, on the fact that "the permit was unauthorized and illegal *ab initio* . . ."); *One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC,* 884 So. 2d 1039, 1042 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D2298a] (rejecting argument that court of equity should give effect to illegal contract based on claim that party challenging it [Hynes] "is equitably estopped from denying [its] validity" because it "purchased the parcel with full knowledge of the [illegal] Agreement . . . and was aware that One Harbor claimed an interest in [the] property").

In any event, "[e]quitable estoppel must be applied with great caution," *Goodwin v. Blu Murray Ins. Agency, Inc.,* 939 So. 2d 1098, 1103 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D2375c], and only when necessary to prevent a party from "unfairly" taking inconsistent positions, and nothing in the record suggests that Plaintiffs partook in any conduct "calculated" to mislead Defendants into believing that the MD was, in all respects, legal. And as the Court pointed out earlier, Defendants are as sophisticated as a party can be, as are their attorneys. They had the ability to do due-diligence and decide for themselves whether the contract rights they were acquiring were lawful. Plaintiffs were under no obligation to counsel them on Florida law, or "warn" them that some of the contract rights they were bidding for might not be legal. And Defendants also repeatedly acknowledged in the PSA that they did not receive, or in any way rely upon, any representation or warranty by the debtor or any third party (*i.e.,* Plaintiffs). PSA, §§16(a), 21(a) (viii).

Defendants walked into this "hornet's nest" with eyes wide open, and purchased the Hotel Lot (and its attendant contract rights) "subject to Florida law." If it turned out that Florida law did not permit them to lawfully own some of the rights they claimed to have purchased, then so be it. "The law is the law" and "it must be served" no matter the "consequences." *Spencer v. EMC Mortg. Corp.,* 97 So. 3d 257, 262 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2068a] (Schwartz, Senior Judge, specially concurring).

iii. *Res Judicata*/Collateral Attack of the Bankruptcy Sale Order

Defendants next say that the illegality claim is barred by *res judicata* because it constitutes a collateral attack upon the Bankruptcy Court's Sale Order. The Court disagrees, as did the Bankruptcy Court. At no time did the Bankruptcy Court adjudicate, or even consider, the Associations' Condominium Act claims; the claim was not litigated as a core proceeding and, *ipso facto,* the Bankruptcy Court entered no final judgment adjudicating it; nothing legally *obligated* the Associations to raise and litigate those claims in the context of the bankruptcy reorganization proceeding; and the Bankruptcy Court issued an order

permitting these claims to be brought here. *See,* June 28, 2017 "Order Granting Motion to Abstain, Granting Leave to Amend Complaint, and Denying Motion to Dismiss" (authorizing the North Association to file an attached "Revised Complaint" which contained claims of illegality. *See* Revised Complaint, p. 53). The Bankruptcy Court pointedly observed:

> So the assets sold, to use a simplistic formulation, as is, where is. There were any number of issues that were lurking about, that were raised, some that weren't raised, which were not adjudicated, were not decided, and indeed, were purposefully not decided by the Court, because the parties settled . . . With respect to the contours of res judicata, the property was sold pursuant to the declarations. Nothing in the order constitutes an amendment or modifications of the declarations. **The declarations are enforceable subject to Florida law.** That was and is the intent of this Court in making the findings that I did, and that was my understanding as to a go-forward template and game plan for the parties to resolve their differences going forward.

Transcript of Hearing re: 16-01259-scc Pre-trial Conference, Adv. Pro. Docket No. 23. (Emphasis added).

At the end of the day, the debtor could only sell property it lawfully owned. And if some of the contract rights being acquired were illegal, that illegality was not cleansed simply because the assets were sold through a bankruptcy proceeding, any more than it would be cleansed in any other transaction.

Like the Bankruptcy Court, this Court finds that Plaintiffs' "Condominium Act claims" are not barred by *res judicata* because they do not constitute any attack—collateral or otherwise—on the Bankruptcy Court's Sale Order. The Assets were sold "subject to Florida law," and Plaintiffs are enforcing that law—nothing more or less.

iv. Plaintiffs' Acceptance of Benefits and Claims for Violations of the MD

As an initial matter, the defense based upon Plaintiffs' alleged acceptance of benefits and attempts to enforce the MD is a repackaged claim of estoppel that, as pointed out earlier, is precluded as a matter of law. But even if the Court were required to reach the merits, it rejects Defendants' argument that the Associations forfeited any illegality claim "because they accepted benefits under the Master Declaration," and have sued to enforce it. Def. Memo, p. 37.

Relying upon precedent standing for the unremarkable proposition that "[o]ne who accepts the benefits of a contract cannot, having retained these benefits, question the validity of the contract," *Billings v. City of Orlando,* 287 So. 2d 316, 318 (Fla. 1973), Defendants say that Plaintiffs have, since 2007, accepted and retained benefits under the MD—the "principal benefit" being the "Hotel's operation and maintenance of the Shared Facilities." Def. Memo, p. 39. Defendants posit that because a Developer/Hotel Lot owner has owned/operated the Shared Facilities since 2007, they are immunized from the claim that the authority they have been exercising is illegal. The Court disagrees.

Until and unless the MD (or any part of it) was invalidated by a court, the Associations and their members were obligated to abide by the contract and pay all assessments levied. Failing to do so would place their property at risk ofbeing liened and lost through foreclosure. The Plaintiffs, and their members, had no ability to simply disavow the Master Declaration, or any part of it. The "benefit" Plaintiffs allegedly received (Defendants' exercise of unfettered control over the shared campus) was forced upon them, and the Court rejects the circular argument that a party compelled to abide by an illegal contract—at the risk of losing their property if they failed to do so—forfeits the right to challenge the agreement's legality.

The Court also rejects Defendants' claim that Plaintiffs should be precluded from contesting the legality of the MD because they brought claims seeking to hold Defendants accountable for violating it. Whatever rights the Hotel Lot owner had (and still has) to assess, must be exercised in compliance with the contract. If it failed to do so, and instead forced residents to subsidize its commercial venture, the Associations were entitled to seek relief. And claims seeking to recover improper/over-assessments levied by the Hotel Lot owner are in complete hannony with Plaintiffs' insistence that certain aspects of this authority are, and always have been, illegal. *See, e.g., Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins. Co.,* 225 So. 3d 780, 787 (Fla. 2017) [42 Fla. L. Weekly S738a] (no "election of remedies" problem is presented unless claims are "opposite and irreconcilable").

Acceptance of Defendants' argument, in this context, would in fact force Plaintiffs to abandon clams seeking to recover millions of dollars they were wrongfully assessed as a condition to preserving their illegality claim. Nothing in the law required Plaintiffs to make that election. Plaintiffs were entitled to pursue damage claims for Defendants' past breaches of the MD without forfeiting their right to maintain that Defendants' authority to assess was, to a limited extent, illegal and must be judicially curbed going forward. Plaintiffs' claims for past breaches and illegality are perfectly consistent, the remedies sought are not mutually exclusive or even alternative, and neither claim had to be relinquished in order to maintain the other. Put simply, Plaintiffs were not obligated to give Defendants a "free pass" for improperly/over-assessing residents in order to preserve their illegality claim. They were permitted to say pay us what you have improperly/over-assessed us for and—at the same time—ask the Court to declare whether certain aspects of the MD are legal.

VII. CONCLUSION

These mixed-use projects, which integrate residential and commercial operations, are a fool-proof recipe for perpetual discourse and litigation. The interests of residential and commercial owners are not simpatico, which is precisely why developer/commercial lot owners, like the initial developer here (with the assistance of creative counsel), try to use master associations to maintain complete control over these shared-campuses *ad infinitum.* But one cannot do "indirectly what he is not permitted to do directly," *Loblaw, supra,* and a developer may not, through any form or artifice, own/control property the Legislature has declared must be owned/controlled by condominium unit owners.

If developers want to own/control all of a shared campus in perpetuity, they should rent the residential units, or sell the right "to live in their hotel." They cannot acquire that ownership/control by selling condominiums, placing the condominium association and commercial lots under the umbrella of a master association, and then use that master association as a vehicle to deliver a dictatorship, thereby skirting the protections afforded by Chapter 718.

The Associations' Motion for Summary Judgment on Condominium Act Claims (D. E. 932) is **GRANTED**.

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[1]These mixed-use developments are now ubiquitous, particularly in South Florida, and the Court has been inundated with lawsuits between various "lot" owners in a number of these projects. Most of these cases, like this one, involve claims brought by residential owners alleging that the owner of the commercial lot—which controls the shared campus—has over-assessed them for the cost of operating/maintaining commonly utilized property—typically defined as "Shared Facilities," "Shared Components" or the like.

[2]The North and South Condominium Towers house only residential condominiums, while the Central Tower houses residential units and hotel rooms owned by the Hotel Lot Owner.

[3]The Master Declaration, however, declares its intent "not to be deemed a condominium association . . . ." MD, §19.13.

[4]*See* MD §§16.2, 16.3 (permitting the Hotel Lot Owners to levy assessments and charges "for the operation and insurance of, and for payments of expenses . . . for the maintenance, operation and insurance of the Shared Facilities . . .")

[5]Here, for example, the Hotel Lot owner owns/operates what the Master Declaration defines as the "Spa." MD, §1.1(oo). The Spa is not within the definition of the

"Shared Facilities" and, per the Master Declaration, only costs to operate/maintain Shared Facilities may be assessed. *See* MD, §16.3. Thus, a reasonable reader would conclude that condominium owners cannot be assessed for the costs of operating/maintaining the Spa—a for profit business. But not so fast. Certain use/access rights, defined as "Limited Spa Rights," are included in the definition of "Non-Retail Shared Facilities" and, as one might expect, the "Non-Retail Shared Facilities" are one category of "Shared Facilities." Thus, these intangible Limited Spa Rights *indirectly* fall within the definition of Shared Facilities—although the Spa itself does not.

Relying on the fact that these Limited Spa Rights are Shared Facilities, and insisting that there are costs attributable to these purely intangible rights, Z Capital Resorts assesses residents 81% of the expenses incurred in operating/maintaining the vast majority of facilities/amenities within the Spa. This is permissible, according to Defendants, despite the fact that: (a) the Spa itself is not a Shared Facility; and (b) the Master Declaration imposes a monthly fixed fee upon unit owners for use/access to the spa facilities; a charge the Hotel Lot owner may (and does) escalate by 10% per year.

The residents see it differently. They first insist that no actual costs are attributable to these intangible rights (as opposed to the Spa itself) and, in any event, claim that they have been "double-charged" because they pay a fixed fee *and* assessments for use/access to these facilities. Plaintiffs also say, in the alternative, that Defendants have over-assessed the residents, because even assuming a right to assess at all, the 81% - 19% split is an "unfair" allocation. A jury recently agreed with this last argument. This is just but one of many disputes the Parties have had over the allocation of costs.

[6]Unlike the Term Sheet, the Letter Agreement was executed on the letterhead of Z Capital Partners, and the definition of Z Capital Florida Resorts, LLC included "its affiliates." The Court therefore ruled that under New York law, selected by the parties, an issue of fact existed as to whether Z Capital Partners was a party to, and bound by, the Letter Agreement. (D. E. 801). A jury has now concluded that Z Capital Partners was in fact a party to, and bound by, this contract.

[7]Contrary to Defendants' fervent insistence, the Bankruptcy Court did not determine whether any costs were actually attributable to these intangible "Limited Spa Rights" and thus assessable at all. The Bankruptcy Court did no more than recite what the MD says: that the "Limited Spa Rights" were included in the Shared Facilities, and that assessments for the Shared Facilities are separate from and in addition to the Fixed Charge paid to use the Spa. Nor did the Bankruptcy Court opine on what method should/could be used in allocating any assessable costs between the Hotel and residential owners. To the contrary, the Bankruptcy Court approved the Letter Agreement which required that any such allocation be "fair." *Id.,* ¶ 9. Nothing in the Sale Order immunized Defendants from an improper/overassessment claim. The Bankruptcy Court also did not find—as a matter of fact—that Defendants were not "double-dipping" by charging each resident a flat fee for access to the spa facilities, while at the same time assessing them for these same privileges.

[8]Contrary to Defendants' urging, the Bankruptcy Court did not opine on how "square footage" should be calculated for purposes of allocating these costs. Defendants, however, have included the interior square footage of all condominium units, despite the fact that each is separately metered and utility charges are paid by the individual owner(s). A jury concluded that this obviously flawed methodology was improper, and that residents have therefore been over-assessed millions of dollars for electricity charges.

[9]Defendants raised a number of other arguments directed at this "under-performance" claim which the Court did not need to, and did not, reach. *See, e.g., PDK Labs. Inc. v. U.S. D.E.A.,* 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurs) ("[i]f it is not necessary to decide more, it is necessary not to decide more . . .").

[10]*IconBrickell* is, in the Court's view, a proverbial "red cow"—a term used to describe a case directly on point, a commanding precedent. *See Corn v. City of Lauderdale Lakes,* 997 F.2d 1369 (11th Cir. 1993).

[11]The Parties actually dispute whether the Master Association falls within §718.302's definition. The Court need not delve into that question because it makes no difference.

[12]The Court notes that *IconBrickell* also involved a master declaration that hovered over a shared campus.

* * *

Forfeiture—Vehicle—Probable cause—Res judicata—Adversarial preliminary hearing—Timeliness—Attorney's fees—Initial ex parte finding of probable cause did not obviate the need for an adversarial preliminary hearing or otherwise constitute res judicata on the issue of probable cause—While police department complied with section 932.703 in obtaining the initial ex parte order finding probable cause, the statute clearly contemplates an additional determination of probable cause when a claimant requests an adversarial preliminary hearing—Because claimant timely requested an adversarial preliminary hearing, police department had a duty to set and notice the adversarial preliminary hearing to be held within ten days after request was received, which it failed to do—Court rejects police department's assertion of excusable neglect—Even if police department had filed a rule 1.090(b) motion seeking an enlargement of time based on excusable neglect, it would not apply to enlargement of deadlines in instant case which are set by statute—Police department failed to establish good cause for holding adversarial preliminary hearing beyond ten-day deadline—Although court was closed on date adversarial hearing was initially set because of inclement weather, police department failed to demonstrate that a hearing held on the initially scheduled date would have been timely—Even if court were to assume that the initially scheduled adversarial preliminary hearing was "as soon as practicable" after the ten-day deadline, police department did not act promptly in rescheduling the hearing after the court reopened—Claimant's motion to dismiss is granted and vehicle is to be returned—Claimant is not entitled to attorney's fees pursuant to section 932.704(10) where court did not make a finding of no probable cause, bad faith, or a gross abuse of agency's discretion

CITY OF CAPE CORAL POLICE DEPARTMENT, Plaintiff, v. REGAN ANTHONY BERESFORD and SAMUEL BERESFORD, Defendants. Circuit Court, 20th Judicial Circuit in and for Lee County. Case No. 22-CA-004050, CA Contraband Forfeiture. November 17, 2022. Joseph C. Fuller, Jr., Judge. Counsel: Mark Moriarty, Assistant City Attorney, City of Cape Coral, Cape Coral, for Plaintiff. Aaron O'Brien, The O'Brien Law Firm, Fort Myers, for Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before this Court on the Report and Recommendation of the General Magistrate dated November 2, 2022, **on the *Adversarial Preliminary Hearing*,** and previously filed with the Court [Editor's note: Attached below]. The Court, having fully reviewed and considered the Magistrate's Findings of Fact, Conclusions of Law, and Recommendations it is hereby:

ORDERED AND ADJUDGED:

1. The Report and Recommendation of the General Magistrate dated November 2, 2022, is ratified hereby ratified and approved, incorporated by reference, and adopted and made a part hereof.

2. The Court adopts each and every Finding and Recommendation contained in the Report and Recommendation of the Magistrate as the Order and Judgment of this Court, as if fully set forth herein and made part hereof.

IN RE: FORFEITURE OF 2011 Blue Hyundai Santa Fe, Florida tag: DPVA23, VIN: 5XYZG3AB5BG001615. November 2, 2022.

REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE

THIS CAUSE came before the undersigned General Magistrate for hearing on October 31, 2022, on the following matter: Adversarial Preliminary Hearing.

Present: ☒ Counsel for Petitioner: Mark Moriarty, Esq.
☒ Detective Patricia Bell, Cape Coral Police Department
☒ Counsel for Respondents: Aaron O'Brien, Esq.

The Magistrate has jurisdiction over this proceeding pursuant to the Order of Referral to **Magistrate Kimberly Davis Bocelli** dated September 19, 2022. No objection to the Order of Referral to the Magistrate was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having fully considered the arguments and presentations of counsel for the respective parties in open Court, the undersigned Magistrate makes the following findings of fact and conclusions of law ("Findings"):

1. Petitioner, City of Cape Coral Police Department ("Petitioner"), filed the Complaint for Civil Forfeiture, Rule to Show Cause and Final Order of Forfeiture on September 15, 2022, seeking forfeiture of the

following property: 2011 Blue Hyundai Santa Fe with Florida Tag DPVA23 and VIN 5XYZG3AB5BG001615 (the "Vehicle").

2. The Complaint states Respondents, Regan Anthony Beresford and Samuel Beresford ("Respondents"), may claim an interest in the Vehicle, and that Regan Anthony Beresford was provided a Notice of Seizure and Right to Adversarial Preliminary Hearing on September 2, 2022. Compl. ¶¶ 6, 9, Ex. B.

3. By Correspondence dated September 9, 2022 and sent by certified mail, Counsel for Respondents requested an Adversarial Preliminary Hearing pursuant to Section 932.703(2)(a), Florida Statutes.

4. Petitioner received Respondents' request for an Adversarial Preliminary Hearing on September 13, 2022.

5. On September 23, 2022, Counsel for Petitioner filed a Notice of Adversarial Hearing, setting the Adversarial Preliminary Hearing on October 3, 2022.

6. On September 27, 2022, Respondents filed a Motion to Dismiss and Request for Attorney's Fees, seeking dismissal of the action, the return of the Vehicle to Respondents, and an award of attorney's fees due to Petitioner's failure to set and notice the hearing to be held within ten (10) days after Petitioner's receipt of Respondents' request for an Adversarial Preliminary Hearing.

7. The Courts in Lee County, Florida were closed due to legal holidays and Hurricane Ian from Monday, September 26, 2022 through Friday, October 7, 2022, and reopened on Monday, October 10, 2022.[1]

8. On October 18, 2022, Counsel for Petitioner filed a Notice of Adversarial Hearing, setting the Adversarial Preliminary Hearing on October 31, 2022.

9. On October 25, 2022, Petitioner filed the City of Cape Coral Police Department's Motion in Opposition to Defendant's Motion to Dismiss and for Attorney's Fees ("Response"), asserting compliance with the forfeiture statute by timely obtaining a probable cause order, "res judicata bars a second[2] probable cause hearing," and the existence of good cause or excusable neglect. Petitioner's Exhibit B to the Response, titled "Beresford Timeline," sets forth a timeline of events.

10. The Court heard argument of Counsel for Petitioner and Counsel for Respondents at the hearing on October 31, 2022.

11. With the correction of the re-opening date for the Lee County Courthouse to October 10, 2022 (rather than October 12, 2022), the parties agreed to the Court's consideration of the Beresford Timeline. Additionally, the parties agreed to the Court's consideration of the emails attached to the Response.

12. Section 932.703(2)(c), Florida Statutes (2022), states in relevant part:

> If the court finds that the requirements specified in paragraph (1)(a) were satisfied and that probable cause exists for the seizure, the forfeiture may proceed as set forth in the Florida Contraband Forfeiture Act, and no additional probable cause determination is required *unless the claimant requests an adversarial preliminary hearing as set forth in the act.*

(emphasis added).

13. Section 932.703(3)(a), Florida Statutes (2022), states in relevant part:

> Notice provided by certified mail must be mailed within 5 working days after the seizure and must state that a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice. When a postseizure, adversarial preliminary hearing as provided in this section is desired, a request must be made in writing by certified mail, return receipt requested, to the seizing agency. The seizing agency shall set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter.

14. The plain text of the statute negates Petitioner's assertion that the initial, ex parte finding of probable cause obviates the need for an adversarial preliminary hearing or otherwise constitutes res judicata of the issue of probable cause. Although it appears Petitioner complied with the statute in obtaining the initial, ex parte Order Finding Probable Cause Pursuant to the Florida Contraband Forfeiture Act dated September 8, 2022 (Compl. Ex. C), the statute clearly contemplates an additional determination of probable cause when a claimant requests an adversarial preliminary hearing. *Id.* § 932.703(2)(c) ("[N]o additional probable cause determination is required unless the claimant requests an adversarial preliminary hearing."); *see also id.* § 932.704(5)(b) (requiring the court, upon receipt of the complaint, to review the complaint and the verified supporting affidavit to determine whether there was probable cause for the seizure "[i]f no person entitled to notice requests an adversarial preliminary hearing, as provided in s. 932.703(3)(a)").[3] Such requested adversarial preliminary hearing must be conducted with notice to the claimant(s) and an opportunity to be heard and to present evidence. *Sanchez v. City of W. Palm Beach,* 149 So. 3d 92, 96-98 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1874a] (finding due process requires giving a "person entitled to notice" an opportunity to litigate the issue of probable cause, which includes presenting relevant evidence).

15. Accordingly, upon a timely request by Respondents, Petitioner had a duty to set and notice the Adversarial Preliminary Hearing to be held within ten (10) days after the request was received or as soon as practicable thereafter.

16. It is undisputed that the subject Adversarial Preliminary Hearing was not held within ten (10) days after Respondents' request for an adversarial preliminary hearing was received by Petitioner on September 13, 2022, to wit: by Friday, September 23, 2022.

17. To the extent Petitioner asserts excusable neglect, the Court notes there was no motion filed pursuant to Rule 1.090(b), Florida Rules of Civil Procedure, seeking an enlargement of time due to excusable neglect. Further, even if one had been filed, it would not apply to the enlargement of deadlines set by statute. *See Samad v. Pla,* 267 So. 3d 476 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D726a] (finding Fla. Prob. R. 5.042(b), which is substantially the same as Fla. R. Civ. P. 1.090(b), does not apply to acts required to be done within a specified time by statute).

18. Accordingly, the crux of the dispute is whether the subject Adversarial Preliminary Hearing was conducted "as soon as practicable" after Friday, September 23, 2022.

19. This language has been interpreted to mean that the hearing must be held by the tenth day, unless there is good cause to go beyond the ten-day deadline. *Hernandez v. City of Miami Beach,* 23 So. 3d 163, 165 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2099a]. The seizing agency must promptly request an emergency hearing so that the court may schedule a timely hearing. *Id.* at 166 ("The best practice is represented by the City of Homestead, which made its emergency hearing request within twenty-four hours."); *Chuck v. City of Homestead Police Dept.,* 888 So. 2d 736, 754 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2829a] (finding hearings occurred as soon as practicable where the seizing authorities acted immediately in notifying the court of the need to schedule a hearing within the statutorily required ten days). Because this phase of the forfeiture process is initiated when the seizing agency sends the potential claimants a notice of their right to request an adversarial hearing, the seizing agency should be prepared to act quickly if a hearing is requested. *Hernandez,* 23 So. 3d at 166. "The Florida Contraband

Forfeiture Act does not authorize government entities to delay acting on a claimant's request for an adversarial hearing for reasons such as internal scheduling, agency, attorney, or officer workload, or agency or police procedures, which result in the court's inability to schedule a timely hearing." *Murphy v. Fortune,* 857 So. 2d 370, 371 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2472a]. Further, an unreasonable delay between the claimant's request for a hearing and the hearing being held constitutes a denial of due process. *Id.* The burden must fall on the seizing agency to see that the adversarial preliminary hearing takes place as soon as possible, and the burden is on the department to demonstrate that the hearing was timely held. *State Dep't of Highway Safety & Motor Vehicles v. Metiver,* 684 So. 2d 204, 205 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D2283a].

20. Because forfeitures are not favored in law or equity, forfeiture statutes must be strictly construed. *Hernandez,* 23 So. 3d at 165 (noting the Florida Supreme Court has strictly construed the forfeiture statutes, because forfeiture actions are harsh exactions and are generally not favored in either law or equity); *Murphy,* 857 So. 2d at 371.

21. The *Metiver* court affirmed the trial court's order granting the claimant's motion to dismiss and requiring the return of the seized property as a result of the seizing agency's failure to obtain a preliminary hearing within ten (10) days of the claimant's request, where the hearing was set five (5) days past the 10-day deadline. 684 So. 2d at 204.

22. Facing a delay of similar length, the *Hernandez* court reversed an order finding probable cause at an adversarial preliminary hearing, where the hearing was set five (5) calendar days after the expiration of the 10-day deadline and the trial court had denied the claimants' motion to dismiss. 23 So. 3d at 165 (noting the deadline was Friday, February 1, 2008 and the hearing was scheduled on Wednesday, February 6, 2008). The appellate court remanded the case with directions to dismiss the forfeiture action. *Id.* at 166-67.

23. In the instant action, Petitioner received the request for an adversarial preliminary hearing on Tuesday, September 13, 2022, and e-mailed Respondents' Counsel to coordinate the hearing three (3) days later on Friday, September 16, 2022. Petitioner did not file the Notice of Adversarial Hearing until one week later, on Friday, September 23, 2022, setting the hearing on Monday, October 3, 2022. Petitioner has not demonstrated that the hearing set on October 3, 2022, if actually held on that date, would have been timely. The emails attached to the Response do not reflect a prompt request by Petitioner for an emergency hearing, notifying the Court of the need to schedule a hearing within the statutorily required ten days.[4]

24. The Court notes that the October 3, 2022 hearing did not occur due to court closures associated with Hurricane Ian; however, the hearing was already untimely when not conducted by Friday, September 23, 2022, which was prior to any applicable court closures.

25. Even assuming, without so deciding, that the October 3, 2022 hearing was as soon as practicable after September 23, 2022 and, therefore, timely, Petitioner did not act promptly in rescheduling the hearing after the court re-opened. Although the Lee County Courthouse reopened on Monday, October 10, 2022 and Cape Coral City Hall re-opened and the City Attorney's Office returned to work on Tuesday, October 11, 2022, Petitioner did not request a new date for the hearing until the following Monday, October 17, 2022. The emails attached to the Response do not reflect a prompt request by Petitioner for an emergency hearing, notifying the Court of the need to schedule a hearing within the statutorily required ten days.[5] At that time, Respondents' Motion to Dismiss was pending and Petitioner was on notice of the request to dismiss the action for failure to hold the adversarial preliminary hearing timely. On October 18, 2022, Petitioner filed the Notice of Adversarial Hearing, re-setting the hearing on Monday, October 31, 2022, which was twenty-one (21) days after the courts re-opened. Accordingly, Petitioner has not demonstrated that the hearing set on October 31, 2022, was timely.

26. Therefore, the Motion to Dismiss should be granted and Petitioner should return the Vehicle to Respondents as set forth more particularly in the Recommendation below.

27. Respondents' request for attorney's fees pursuant to Section 932.704(10), Florida Statutes (2022), should be denied. First, because the Motion to Dismiss was granted, the Court did not proceed to determine the issue of probable cause and, therefore, did not make a finding of no probable cause. Without a finding of no probable cause, the statutory basis for an award of attorney's fees contained in the first sentence of subsection (10) does not apply. Second, although granting a motion to dismiss the action would likely constitute "the close of forfeiture proceedings," the Court does not find "the seizing agency has not proceeded at any stage of the proceedings in good faith or that the seizing agency's action which precipitated the forfeiture proceedings was a gross abuse of the agency's discretion." Without a finding of bad faith or gross abuse of discretion, the statutory basis for an award of attorney's fees contained in the second sentence of subsection (10) does not apply. However, the Court notes that this does not address, and is without prejudice to, any other basis for attorney's fees Respondents may assert. *Id.* ("Nothing in this subsection precludes any party from electing to seek attorney's fees and costs under chapter 57 or other applicable law.").[6]

28. **All parties have ___ / have NOT _X_ waived the ten (10) day period in which to file exceptions to this Report and Recommendation of General Magistrate.**

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Court enter its Order Adopting Report and Recommendation of the General Magistrate and order as follows:

The Motion to Dismiss and Request for Attorney's Fees is GRANTED in part and DENIED in part as follows:

1. GRANTED as to Respondents' request to dismiss this action for failure to comply with the time requirements for an Adversarial Preliminary Hearing set forth in Section 932.703(3)(a), Florida Statutes. Accordingly, this action is dismissed and Petitioner shall return the Vehicle to Respondents within five (5) days of entry of an order adopting this Report and Recommendation; and

2. DENIED as to Respondents' request for an award of attorney's fees pursuant to Section 932.704(10), Florida Statutes.

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[1]More specifically, Monday, September 26, 2022 and Wednesday, October 5, 2022 were previously designated as legal holidays.

[2]The Court notes that Respondents requested an adversarial preliminary hearing, which is the only hearing at which probable cause is determined. The initial, ex parte finding of probable cause is based upon a sworn affidavit and does not involve a hearing. Accordingly, the reference to a "second" hearing is inaccurate.

[3]The Court acknowledges that the applicable statute was amended in 2016 to add the requirement for an initial, ex parte determination of probable cause; however, the amended statute did not eliminate and therefore re-affirmed, the requirement for an adversarial preliminary hearing upon a timely request. Additionally, the 2016 amendment to the statute did not change the text pertaining to the 10-day time requirement, and the case law interpreting such time requirement would continue to apply.

[4]The September 16, 2022 10:37 AM email on behalf of Petitioner makes no mention of a request for hearing within ten (10) days or by any specific deadline. Response at p. 3 of Ex. B8. Accordingly, the Court was not on notice of a request for an emergency hearing.

[5]The October 17, 2022 3:30 PM email on behalf of Petitioner makes no mention of a request for hearing within ten (10) days or by any specific deadline. Accordingly, the Court was not on notice of a request for an emergency hearing.

[6]In the Motion to Dismiss, Respondents reserved the right to seek fees under Chapter 57, Florida statutes, but no such motion or other request is before the Court at this time.

* * *

Insurance—Homeowners—Bad faith—Civil remedy notices that fail to specify statutory provisions allegedly violated by insurer and that incorporate wholesale provisions of bad faith statute and insurance policy do not meet strict requirements of section 624.155

MASSEY CONSTRUCTION GROUP, INC., a/a/o Russell Suiter, Plaintiff, v. HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County. Case No. 2022-CA-001008. November 29, 2022. Lauren L. Brodie, Judge. Counsel: Andrew N. Walker, Mike Fink Law Firm, P.A., Fort Myers, for Plaintiff. William B. Collum and Erin C. Isdell, Butler Weihmuller Katz Craig LLP, Tampa, for Defendant.

ORDER ON DEFENDANT'S AMENDED MOTION TO DISMISS AND FINAL ORDER DISMISSING ACTION

This matter comes before the Court on Defendant's Amended Motion to Dismiss (filed September 19, 2022). The Court heard argument on the motion on November 2, 2022. Having reviewed the Complaint, the Amended Motion to Dismiss, and the parties' written submissions; having benefited from the parties' oral argument; and having reviewed the applicable law, the Court grants Defendant's Amended Motion to Dismiss, and dismisses this case with prejudice for the reasons addressed herein.

Introduction

This is a lawsuit for bad faith arising out of a residential property insurance claim. First-party bad faith exists only by statute. That statute is Florida Statute § 624.155. Section 624.155 in derogation of the common law. *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So. 2d 1278 (Fla. 2000) [25 Fla. L. Weekly S172a]; *Julien v. United Prop. & Cas. Ins. Co.,* 311 So. 3d 875 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D486d]. As such, it must be strictly construed.

The statute requires, as a condition precedent to suit, that the complainant serve the insurer and the Department of Financial Services with specific notice, called a Civil Remedy Notice ("CRN"), of the allegations that might form the basis of a later lawsuit for bad faith. Fla. Stat. § 624.155(3). The requirements of the CRN are found in Florida Statute § 624.155(3)(b):

> (b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
>
> 2. The facts and circumstances giving rise to the violation.
>
> 3. The name of any individual involved in the violation.
>
> 4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
>
> 5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

The statute says a complainant "shall" do these things. Where a complainant does not, a court must dismiss the lawsuit because the CRN does not meet the requirements of the statute. *Julien,* 311 So. 3d 875.

Plaintiff's CRNs Do Not Comply With the Requirements of Florida Statute § 624.155(3)(b)

Plaintiff filed two separate CRNs (numbered 469642 and 503166), both of which are attached to Plaintiff's complaint and which are substantively identical.

The CRNs attached to Plaintiff's complaint do not contain the specificity required by Florida Statute § 624.155(3)(b), and these deficiencies are not mere technical defects—they are statutory requirements that Plaintiff failed to abide by. The Fourth District's *Julien* decision controls the outcome here.

Plaintiff's CRNs here are substantively similar to the CRN in *Julien,* of which the Court takes judicial notice. Plaintiff's CRNs contain no meaningful information providing notice to Defendant.

Plaintiff's CRNs alleged that Defendant violated numerous separate statutes and administrative code provisions. Plaintiff's CRNs make broad, generic allegations with only passing reference in the midst of the narrative providing some detail about the claim but still no detail as to how Plaintiff contended Defendant violated each statutes and administrative code provision alleged to have been violated. As in *Julien,* Plaintiff here failed to state with specificity the statutory provisions allegedly violated.

Further, Plaintiff here goes even further with respect to the statutory references than the plaintiff in *Julien,* by incorporating wholesale provisions of the bad faith statute into the CRNs with no explanation of even what statutes Plaintiff alleged Defendant to have violated, much less how Defendant violated the incorporated statutes. In the sixth paragraph of its narrative in both CRNs, Plaintiff states as follows:

> Accordingly, the Florida legislature addressed the need for a bad faith action against an insurer in §624.155, Fla. Stat.; the Complainant adopts and incorporates all provisions of that statute into this Civil Remedy Notice including all of the applicable provisions of §624.155(1)(i).

This wholesale incorporation is not permissible in a CRN under *Julien.*

As with the CRN in *Julien,* Plaintiff here incorporated into their CRNs the entire insurance policy, by starting with insurance policy language that the policy provisions included "but [are] not necessarily limited to", and also ending the policy language with the same "not necessarily limited to" language. Specifically, Plaintiff includes and incorporates the entire policy in both CRNs and, in the narrative, does not address what, or even how, the following broadly-included policy language is applicable to the alleged violations:

> MASSEY CONSTRUCTION GROUP, INC. (THE "COMPLAINANT") IS A THIRD-PARTY CLAIMANT/ASSIGNEE OF AN ASSIGNMENT OF BENEFITS ("AOB"). COMPLAINANT ASSERTS THAT, INCLUDING BUT NOT NECESSARILY LIMITED TO, THE FOLLOWING POLICY PROVISIONS ARE SPECIFICALLY RELEVANT AND APPLICABLE: The Declaration Page for the effective policy period. The "Agreement" provision provides that the insurer will provide the listed coverages in exchange for the insured's payment of required premiums and compliance with other policy provisions such as post-loss duties. Definitions—"Insured" is defined as the insured of the policy and residents of the household; "Insured Location" is defined as the "residence premises" and the structures and grounds used for a residence on the real property described on the Declarations Page; "Occurrence" is defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in "property damage" during the policy period; "Principal Building" is defined as the dwelling on the real property described on the Declarations Page; "Property Damage" is defined as physical injury, or destruction of, or loss of use of tangible property; "Residence Premises" is defined as the family dwelling, structures and grounds described on the Declarations Page. "Coverage A - Dwelling" covers the dwelling on the residence premises including attached structures against sudden and accidental direct loss to the property. "Coverage B—Other Structures"

covers other structures on the residence premises set apart from the dwelling by clear space. "Coverage C—Personal Property" covers personal property owned by the insured while the property is anywhere in the world. "Coverage D - Loss of Use" covers additional living expenses to ensure normal standard of living where the dwelling on the residence premises is not fit to live in. The provision for "Additional Coverages provides for coverage for: "Debris Removal" to remove debris created by damage from a covered event; "Reasonable Repairs" to cover reasonable and necessary costs incurred to protect covered property from further damage; "Trees, Shrubs and Lawns" to cover damage to trees, shrubs and law damaged on the residence premises from a covered peril; "Property Removal" to cover removal of debris resulting from damages resulting from a covered peril; "Loss Assessment" to cover reimbursement of the insured's expenses for any assessment against the insured by a corporation or homeowner's association for damages incurred by a covered peril; "Landlord Furnishings" to cover damages to the insured's identified property." Perils Insured Against" provides that Coverage A and Coverage B are insured against physical loss to the property covered under Coverage A and Coverage B. Coverage C is insured against sudden and accidental direct loss to the property covered under Coverage C including windstorm and hail coverage subject to certain limitations and exclusions. The section "Conditions" provides conditions to coverage under the policy including: "Duties After Loss" provides for obligations of the insured to comply with the terms of the policy after providing notice of a loss including cooperation with the insurer for investigation of the claimed loss; "Loss Settlement" provision provides the method utilized to settle and pay claims under the policy; "Mediation" provision provides the insured and the insurer the right to submit coverage amount disputes to a mediation process; "Appraisal" provision provides a mediation and appraisal process which either the insurer or the insured may use to resolve disputed claims of loss; "Suit Against Us" provision provides for conditions governing the insured's ability to conduct litigation against the insurer; and the "Loss Payment" provision provides the method utilized to settle and pay claims under the policy. All endorsements to the policy modifying the relevant portions of the policy and effective as of the asserted date of loss, including but not limited to, endorsements relating to the covered perils of a hurricane or windstorm.

The CRN in *Julien* included the substantively similar to the including of the entire policy language as Plaintiff did in its CRNs. Like *Julien,* "[Plaintiff], it seems, listed every statutory provision and every policy provision available to [it]" without regard to whether or not they apply. *Id.*

Florida Statute § 624.155(3)(b)(3) requires that a CRN state with specificity "the facts and circumstances giving rise to the violation." The CRNs herein generally describe the insurance claim. The CRNs explain that Defendant investigated the claim, acknowledged coverage for the claim, and acknowledged coverage for repairs Defendant determined to be owed. After describing this background of the claim, the CRNs resort again to conclusory allegations devoid of factual support, similar to the CRN in *Julien* which this Court reviewed. Rather than complying with the statute, Plaintiff's CRNs "are vague and 'shotgun' in nature.

Plaintiff argues that they "substantially" complied with § 624.155(3) and that is sufficient. Plaintiff is incorrect, as strict compliance with the statute is required. Specifically, Florida Statute § 624.155 is in derogation of the common law rule that precluded a lawsuit for first-party bad faith. "Because this statute is in derogation of the common law, it must be strictly construed." *Talat*, 753 So.2d at 1283.

Conclusion

The CRNs filed by Plaintiff do not meet the strict requirements of the statute. The Fourth District's decision in *Julien* is on-point, dispositive, and binds this Court.

The defects in the CRN cannot be cured as the parties agree that all contractual damages have been paid. Therefore, dismissal with prejudice is appropriate. Given this analysis, the Court need not reach the other, alternative grounds in Defendant's Amended Motion to Dismiss.

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

1. Defendant's Amended Motion to Dismiss (filed September 19, 2022) is **GRANTED**. This action is **DISMISSED WITH PREJUDICE**. Plaintiff, MASSEY CONSTRUCTION GROUP, INC. a/a/o RUSSELL SUITER, shall take nothing by this action and Defendant, HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, shall go hence without day.

2. Given this dismissal, the case management conference scheduled for December 16, 2022 at 9:00 A.M. is **CANCELLED**.

3. The Court reserves jurisdiction to determine attorneys' fees and costs following the filing of a motion seeking entitlement, if any such motion is filed.

* * *

Volume 30, Number 12
April 28, 2023
Cite as 30 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Personal injury protection—Coverage—Medical expenses—Where policy provides that insurer will only pay 80% of reasonable charges and may limit amounts to schedule of maximum charges, insurer did not violate No-Fault Act when it paid all charges at 80% of billed amount—Insurer was not required to pay 100% of charges that were less than schedule of maximum of charges

MITCHELL R. GREENBERG D.C., INC. d/b/a INJURY TREATMENT SOLUTIONS, a/a/o Victoria Mercer as Parent and Natural Guardian of Minor Dalton Mercer, Plaintiff, v. AMICA MUTUAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-026941-O, Division 73. February 9, 2023. Andrew Cameron, Judge. Counsel: Michael LaPorte, Laderman Laporte Law, Orlando, for Plaintiff. Justin L. Seekamp, Dutton Law Group, P.A., Orlando, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S LACK OF DAMAGES AND PLAINTIFF'S FAILURE TO COMPLY WITH THE CONDITIONS PRECEDENT OUTLINED IN FLORIDA STATUTE §627.736(10)

THIS CAUSE, came before the Court at the January 25, 2023 hearing on the Defendant's Motion for Summary Judgment as to Plaintiff's Lack of Damages and Plaintiff's Failure to Comply with the Conditions Precedent Outlined in Florida Statute §627.736(10). After having reviewed Defendant's motion 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, it appears that good and sufficient grounds have been shown for GRANTING Defendant's Motion for Final Summary Judgment for the reasons set forth below. The Court being fully advised in the premises, it is Ordered and Adjudged as follows:

1. Plaintiff brought this Personal Injury Protection ("PIP") action against Defendant on July 05, 2022 for purportedly underpaid PIP benefits for dates of service August 25, 2021 to November 29, 2021 following a motor vehicle accident that occurred on August 24, 2021. Within the four-corners of Plaintiff's Complaint the Plaintiff generally avers that Defendant failed to pay PIP benefits to Plaintiff and was otherwise not-specific as to any specific claims of underpayment to Plaintiff.

2. On August 01, 2022, Defendant filed its Answer and Affirmative Defenses. Specifically, stating:

> "The specific policy of insurance under which the subject claim is being made provides that payments will be made at 80% (eighty percent) of the submitted charges for reasonable, related and medically necessary care with 80% paid with PIP benefits. Here, Plaintiff's charges for the compensable, received, and non-duplicate "at issue" dates of service of "August 25, 2021 to November 29, 2021" were paid to Plaintiff at 80% of the timely submitted charges prior to the initiation of this suit [TOTAL RECEIVED CHARGES: $6,850.00; $6,850.00 X 80% = $5,480.00; TOTAL PAID: $5,480.00]"

3. On September 15, 2022, Defendant filed the subject Motion for Final Summary Judgment regarding the proper payment according to the applicable policy of insurance, which relied on the policy at issue, Florida Statutes, binding case law, and the Affidavit of LaShaneika Ephraim.

4. On September 28, 2022, Plaintiff filed Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment and Motion for Protection From Deposition regarding the "statutory BA" argument. Plaintiff's Response in Opposition claimed that the issues in the suit were Defendant's policy contracted to utilize the payment methodologies found in Florida's PIP statute and whether Defendant's payment of all of Plaintiff's charges at 80% of the billed amount when less than the schedule of maximum charges is violative of "*Wick* and its progeny." Plaintiff otherwise filed no additional summary judgment evidence to rebut the summary judgment evidence submitted by Defendant.

5. It is uncontroverted by Plaintiff that this case involves a claim for Florida No-Fault C'PIP') benefits arising from a motor vehicle accident on August 24, 2021, involving the claimant. Further, the Insured's policy of automobile insurance provided $10,000 in PIP benefits subject to the terms and conditions of the insurance policy and Fla. Stat. 627.736. Additionally, the insurance policy did not include additional Medical Payments coverage, commonly referred to as "MedPay."

6. Defendant contends that it properly paid 80% of the amount billed for all of the dates of service and charges submitted to Defendant by Plaintiff for the August 25, 2021 to November 29, 2021 dates of service [**TOTAL CHARGED: $6,850.00; $6,850.00 x 80% = $5,480.00; TOTAL PAID: $5,480.00**]. While the Plaintiff contends that Defendant should have paid certain codes, although not identified by Plaintiff, that were less than the schedule of maximum charges at 80% of 200% of the Medicare Fee Schedule.

7. In reading the statute as a whole, along with the binding Second DCA opinion, and Florida Supreme Court opinion, this Court agrees with Defendant, AMICA's payments to Plaintiff were proper at 80% of the amounts billed by Plaintiff.

8. A plain reading of AMICA Mutual Insurance Company's policy makes it clear that they will only pay 80% of "reasonable charge" and that "any amounts payable under this coverage for medical expenses *MAY* be limited by the schedule of maximum charges." Thus, as the Supreme Court noted, "setting a ceiling but not a floor." *MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Company,* No. SC18-1390 at p. 17 (Fla. December 9, 2021) [46 Fla. L. Weekly S379a].

9. In *State Farm Mutual Automobile Insurance Company v. MRI Associates of Tampa, Inc. d/b/a Park Place MRI,* 252 So.3d 773 (Fla.2d DCA 2018) [43 Fla. L. Weekly D1149a], the Second DCA Court described how the Florida Supreme Court in *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 975 (Fla. 2017) [42 Fla. L. Weekly S38a] - expressly rejected the argument that an insurer's policy must completely disclaim the reasonable charge methodology to elect the schedule of maximum charges, specifically stating: "Accordingly, we reject Park Place's argument that State Farm's policy contains an .unlawful hybrid method' of reimbursement calculation and is therefore impermissibly vague." *Id.* at 778.

10. In F.S. 627.736(1)(a), the Legislature mandated that an insurer is obligated to pay "**(e)ighty percent of all reasonable expenses** for medically necessary" services (Emphasis added). The remaining 20 percent is charged to the Insured as a co-payment, or may be covered by Medical Payments Coverage, if the insured purchased such coverage. In this case, the Insured did not have Medical Payments Coverage.

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

12. The No-Fault Act has only ever required PIP insurers to pay 80% of reasonable medical expenses. see ch.77468. $ 33, Laws of Fla. This 80% reimbursement requirement is found in $ 627.736(1):

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

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

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

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

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

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

> "The permissive nature of the statutory notice language [in (5)(a)5.] does not in any way signal that the insurer will be so constrained by such an election. On the contrary, the language signals that the insurer is given an option that may be used in addition to other options that are authorized. This notice language echoes the underlying authorization to limit reimbursements under the schedule of maximum charges: 'The insurer may limit reimbursement to 80 percent of the [listed] schedule of maximum charges.' $ 627.736(5)(a)1., Fla. Stat. (emphasis added). Given the full context of these provisions, a reasonable reading of the statutory text requires that reimbursement limitations based on the schedule of maximum charges be understood-as State Farm contends-simply as an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates.
>
> *See MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Company,* No. SC18-1390 at p. 17 (Fla. December 9, 2021).

17. AMICA Mutual Insurance Company's policy provides clear and unambiguous notice that it will pay only 80% of properly billed medical expenses and that it would limit payment of expenses to 80% of properly billed reasonable charges. Accordingly, as a matter of law, AMICA Mutual Insurance Company did not violate the No-Fault Act where it paid all of the Plaintiff's submitted charges for the August 25, 2021 to November 29, 2021 dates of service at 80% of the properly billed medical expenses.

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

19. Therefore, in this case AMICA Mutual Insurance Company accepted the charges for the August 25, 2021 to November 29, 2021 as reasonable, as allowed by the binding Second DCA and Florida Supreme Court opinions, and pursuant to (1)(a): paid "(e)ighty percent of all reasonable expenses. .," by paying the provider $5,408.00, with the remaining balance as the Insured's co-payment. Any other interpretation would be at odds with the PIP coverage mandate of Section (1)(a), provisions of Section (5)(a), and the AMICA Mutual Insurance Company's policy form, as well as eradicating the insured's statutory and contractual obligation under the policy to be responsible for the 20% co-payment.

20. In support of its argument, Plaintiff substantially relies on the decision of *GEICO Indemnity Company v. Accident & Injury Clinic, Inc. a/a/o Frank Irizarry,* 290 So. 3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b], *GEICO Indemnity Company v. Muransky Chiro., P.A., a/a/o Carlos Dieste,* 323 So. 3d 742 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1513a], and more recently *Hands On Chiropractic PL a/a/o Justin Wick v. GEICO General Ins. Co.*, Case No. 5D20-2705 (Fla. 5th DCA September 10, 2021) [46 Fla. L. Weekly D2023a]. In the GEICO cases, GEICO paid 80% of the charges, which were billed at less than 200 percent of the Medicare Fee Schedules. *Id.* at 2. The medical provider argued that GEICO was required to pay 100% of any charges that were billed at less than 200% of the applicable Medicare fee schedule. *Id.* Importantly, the applicable GEICO insurance policy specifically provided: "A charge submitted by a provider, for an amount less than the allowed amount above, ***shall*** be paid in the amount of the charge submitted." *Id.* (Emphasis added).

21. But, again, AMICA Mutual Insurance Company's policy language is different, the policy form states:

> **We will pay. . .**
>
> If an Insured receives initial services and care within 14 days after the motor vehicle accident, ***80% of reasonable expenses for medically necessary***:
>
> a. Medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and rehabilitative services; and
>
> b. Prosthetic devices.
>
> However, medical expenses do not include massage or acupuncture regardless of the person, entity, or licensee providing the massage or acupuncture. (Emphasis added).

22. Plaintiff s reliance on the GEICO decisions are misplaced as GEICO's policy language specifically stated that it shall pay 100% of the amount of the charge submitted, in contravention of the very language of the PIP statute. It is undisputed that there is no such language in AMICA Mutual Insurance Company's policy. Thus, unlike the policy language at issue in GEICO, which changed the sentence in the statute from "the insurer may pay," GEICO changed it in their policy to "a provider . . . shall be paid," no such statutory change exists in AMICA Mutual Insurance Company's policy.

23. Specifically, in Footnote three to the opinion in *Hands on Chiropractic,* the Court states:

> "In Geico's Florida Policy Amendment FLPIP 01-13, Geico contrac-

tually elected to always pay the billed amount in full where the billed amount was less than 80 percent of the 200 percent of the applicable fee schedule."

There is no such language in the AMICA Mutual Insurance Company's policy, and no such finding by any appellate court in the State of Florida in reviewing the AMICA Mutual Insurance Company's policy.

24. The Fourth and Fifth DCA opinions are not binding opinions in this AMICA Mutual Insurance Company case, as the Fourth and Fifth DCA deal with very specific language of the GEICO policy.

25. The Defendant has paid 80% of the bills submitted, the remaining 20% that Plaintiff is attempting to collect from the Defendant is actually the Insured's co-payment, which the Insured has not contracted for under optional Medical Payments Coverage with Defendant. Therefore, it is hereby ORDERED:

a. Defendant, AMICA MUTUAL INSURANCE COMPANY's, Motion for Final Summary Judgment is GRANTED.

Plaintiff, MITCHELL R. GREENBERG D.C. INC. D/B/A INJURY TREATMENT SOLUTIONS A/A/O VICTORIA MERCER AS PARENT AND NATURAL GUARDIAN OF MINOR DALTON MERCER shall take nothing by this action, and Defendant shall go hence without day. This Court reserves jurisdiction to determine the amount of attorneys fees and costs owed by Plaintiff to Defendant.

* * *

Insurance—Automobile—Standing—Assignment—Under terms of policy subject to laws of Louisiana, post loss anti-assignment clause of policy is valid and enforceable—Motion to dismiss suit brought by insured's assignee is granted

PREMIER PROMOTIONS USA, INC., a/a/o Donna Dukes, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2022-SC-027340-O. January 27, 2023. Andrew Cameron, Judge. Counsel: John Lagrow, Malik Law, Maitland, for Plaintiff. Timothy Jones, Goldstein Law Group, Plantation, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COMPLAINT

THIS CAUSE came to be fully heard before this Court, and this Court being fully advised by the parties this Court finds the Louisiana State Farm insurance policy at issue in this action was issued to a Louisiana resident and pursuant to the terms of the policy is subject to the laws of the state of Louisiana. The Supreme Court of Louisiana has consistently held that public policy does not preclude post loss anti-assignment clauses. *In re Katrina Breaches Litigation,* 63 So. 3d, 955 (LA 2011). As such the anti-assignment clause of the Louisiana State Farm Policy is valid and enforceable therefore, no assignment of benefits were made or sought by the Plaintiff. It is hereby **ORDERED and ADJUDGED**: Defendant's Motion to Dismiss Complaint is **Granted. Plaintiff's Complaint is dismissed without prejudice.**

* * *

Consumer law—Debt collection—Attorney's fees—Amount

PABEL LIMA, Plaintiff, v. EDGEWATER OF HOMESTEAD CONDO. ASSN., INC., et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2022-026165-CC-23. Section ND03. February 6, 2023. Linda Singer Stein, Judge. Counsel: Robert Wayne and Shawn Wayne, Law Office of Robert Wayne, for Plaintiff.

FINAL JUDGMENT OF ATTORNEY'S FEES AND COSTS FOR TRIAL COUNSEL

THIS CAUSE having come before this Court on Plaintiff's Motion to Tax Attorney's Fees and Costs on February 2, 2023, via Zoom, and the Court having reviewed the file and court docket, including the Default Final Judgment of Liability previously entered in favor of the Plaintiff as well as the Affidavit of Robert Wayne, the Fee Expert Report and Affidavit and the retainer agreements filed and submitted into evidence, it is hereby ORDERED and ADJUDGED as follows:

1. This evidentiary attorney fee hearing was properly noticed before the Court and the Court finds that Plaintiff's counsel is entitled to attorney's fees and costs in accordance with Florida Statutes and pursuant to the relevant factors in *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), *Standard Guaranty Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), as well as the appropriate factors in the Statewide Uniform Guidelines for Taxation of Costs.

2. Mr. Robert Wayne testified that he has been a member of the Florida Bar in good standing for 52 years, with a focus on real estate, consumer debt and consumer protection litigation. In support of his fee request, Mr. Wayne submitted a retainer agreement and affidavit into evidence reflecting the total time he incurred in prosecuting the instant FCCPA matter up through entitlement.

3. Both the retainer agreement and affidavit of Mr. Wayne reflect an hourly rate of $500.00, which was reduced from his standard hourly rate. The retainer and affidavit were admitted into evidence and Mr. Wayne's affidavit reflected a total time of 9.1 hours for work and services performed up through entitlement which was granted by this Court on October 10, 2022.

4. Mr. Wayne testified as to the reasonableness of the time he incurred in prosecuting this matter, that such time was commensurate with that of similar attorneys in the locale and field, that none of the time he incurred was duplicative, and that his hourly rate was reasonable given his decades of prior experience and years of practice.

5. The Court was also provided with a detailed written report and analysis prepared by Mr. Wayne's qualified fee expert, Bryan Dangler Esq., who also provided testimony as to the reasonableness of Mr. Wayne's hourly rate and time expended in the case, as well as his experience, efficiency, and diligence, given the circumstances surrounding the instant matter.

6. The Court finds that a reasonable hourly rate for Mr. Wayne is $500.00 and the Court also finds that the reasonable hours expended by Mr. Wayne in this cause is 9.1 hours.

7. Mr. Dangler testified as to the *Quanstrom* factors and testified that he believed that Mr. Wayne's reduced hourly rate and time expended was extremely reasonable under the circumstances and facts presented.

8. Accordingly, this Court finds that the 9.1 hours incurred and expended by Mr. Wayne at a reasonable hourly rate of $500.00/hour is **GRANTED** for a total fee amount of $4,550.00.

9. Plaintiff is entitled to recover the expert witness fees of attorney Bryan Dangler Esq. based upon the holding and reasoning contained in the cases of *Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985), and the Court finds that attorney Bryan Dangler reasonably expended 3.5 hours. The Court finds that a rate of $425.00/hour is a reasonable hourly rate for the services of Mr. Dangler per his report and affidavit filed, along with his resume and the testimony he provided during the hearing. The total award for Mr. Dangler being **GRANTED** is 3.5 hours at $425.00/hour which equals $1,487.50

10. Therefore, Plaintiff's counsel Robert Wayne of the Law Office of Robert Wayne ***shall recover from both Defendants*** jointly and severally the following:

a. Reasonable attorney's fees in the amount of $4,550.00

b. Expert witness fees for Bryan Dangler, Esq. in the amount of $1,487.50

c. Costs in the amount of $430.85

For a total sum of ***$6,468.35***, which shall be subject to post judgment interest at the statutory rate from the date this judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which let execution issue.

IT IS ALSO ORDERED that judgment debtor EDGEWATER OF HOMESTEAD CONDOMINIUM ASSOCIATION, INC et.al, whose mailing address is 2520 NW 97 AVE SUITE 220 DORAL, FL 33172 and judgment debtor SOLUTIONS PROPERTY MANAGEMENT GROUP INC whose mailing address is 2520 NW 97 AVE SUITE 220 DORAL, FL 33172 shall both separately complete under oath a Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on judgment creditor ROBERT WAYNE ESQ. at 1225 SW 87 Ave, Miami Florida 33174 within 45 days from the date of this Final Judgment, unless the Final Judgment is satisfied or post judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper and to compel the judgment debtor to complete the 1.977 form, including all required attachments, and to serve it on the judgment creditor's attorney.

* * *

Insurance—Personal injury protection—Affirmative defenses—Amendment—Motion for leave to amend affirmative defenses to plead exhaustion of policy limits is denied where insurer was aware of exhaustion defense over a year before it filed its answer, which failed to raise that defense, and waited 27 months after filing answer to seek amendment—Further, right to assert defense was waived where motion to amend was untimely under order setting pretrial deadlines

FIRST CHIROPRACTIC CARE CORP., a/a/o Sergio Vildosola, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-003686-SP-21. Section HI01. February 13, 2023. Milena Abreu, Judge. Counsel: David S. Kuczenski, Schrier Law Group, Miami, for Plaintiff. Madeline Torres, Law Office of George Cimballa, House Counsel for Geico General Ins. Co., Fort Lauderdale, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO AMEND

Docket Index Number 30, 31, 32, and 37

THIS CAUSE having come before this Court on January 27, 2023, on Defendant's Motion for Leave to Amend Affirmative Defenses to include an exhaustion of benefits defense over twenty-seven (27) months after initial responsive pleading was filed, and Plaintiff's Second Motion for Sanctions. This Court having heard arguments of both parties and the Court being otherwise fully advised, it is hereby ORDERED AND ADJUDGED as follows:

BACKGROUND FACTS

On September 10, 2019 Plaintiff filed this lawsuit. Plaintiff effected service on October 8, 2019. On October 9, 2019 Defendant served its Answer raising no affirmative defense. On the same day, Defendant also filed its discovery requests, including Requests for Admissions, Interrogatories and Requests for Production. On November 30, 2021, this Court issued the UNIFORM CASE MANAGEMENT ORDER SETTING PRETRIAL DEADLINES AND RELATED REQUIREMENTS. Additionally, this Court issued the Jury Trial order on October 13, 2022. On December 6, 2022, exactly one year and 6 (six) days after the entry of the Uniform Case Management Order, Defendant filed the present Motion for Leave to amend its pleadings.

Per the Court's review of Defendant's Motion for Leave and Defendant's Response to Plaintiff's Second Motion for Sanctions, Defendant acknowledges in its Motion that that the personal injury protection benefits for this claim exhausted with the payment mailed on or about May 29, 2018, or approximately one (1) year, four (4) months and nine (9) days before the present Answer was filed was filed. It clarified this knowledge in paragraph 8 of its Motion for Leave stating, "In this case, Defendant was made aware that policy limits were exhausted in the demand response, prior to filing of the suit." The Court finds that Defendant was aware of the exhaustion defense well before the original Answer was filed, and four (4) years, six (6) months, and six (6) days before it filed this Motion for Leave to Amend.

It is clear that a party cannot present evidence at trial or summary judgment regarding an unpled affirmative defense. *See e.g., Meigs v. C.F. Lear*, 191 So.2d 286 (Fla. 1st DCA 1966) (dismissing appeal and affirming a denial of motion for summary judgment holding that *summary judgment is not to be used as a substitute for parties' pleadings* and where defenses of estoppel and statute of limitation were not raised in the pleadings *such defenses did not constitute issues in case in which parties could submit evidence either at trial or in summary judgment* proceedings); *Straub v. Muir-Villas Homeowners Ass'n, Inc.*, 128 So.3d 885, 890 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D2655a] (finding error in trial court's consideration of an unpled defense); *B.B.S. v. R.C.B.*, 252 So.2d 837 (Fla. 2d DCA 1971) (an affirmative defense must be pleaded and not raised by motion for summary judgment); *Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865, 875 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D183a] (where a party pleads one claim but tries to prove another, it is error for a trial court to allow argument on the unpled issue at trial); *Bloom v. Dorta-Duque*, 743 So.2d 1202, 1203 (Fla. 3d DCA 1999) [24 Fla. L. Weekly D2532a] (a party cannot be found liable under a theory that was not specifically pled); *Bank of America v. Asbury*, 165 So.3d 808, 809 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1230a] ("[l]itigants in civil controversies must state their legal positions within a particular document, a pleading, so that the parties and the court are absolutely clear what the issues to be adjudicated are"); *Assad v. Mendell*, 550 So.2d 52, 53 (Fla. 3d DCA 1989) (a party should not suffer the unfair surprise and prejudice of legal claims and theories not encompassed by the pleadings). Exhaustion of benefits is a complete defense to a PIP claim. *Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]. Exhaustion of Benefits is an affirmative defense that must be pled.

Despite the exhaustion occurring as Defendant asserts on May 29, 2018, or approximately one (1) year, four (4) months and nine (9) days before the present Answer was filed, Defendant failed to raise the affirmative defense of exhaustion in its response to the Plaintiff's Complaint.

In Defendant's Requests for Admissions to Plaintiff also served on October 9, 2019, not one of Defendant's Request for Admissions included an Admission on the benefits exhausted. The remaining discovery requests appear typical for this type of litigation absent an exhaustion of benefits.

Defendant's motion for leave to amend in paragraph 2 asserts, *Additional investigation has revealed defenses available to this Defendant, which were not raised in the original Answer.* The part of this paragraph that states, "*Additional investigation*" leads one to believe that investigation conducted after the October 9, 2019 date of the filing of the initial answer, that additional investigation occurred that uncovered this defense. This statement, however, contradicts the time line of this lawsuit because Defendant has admitted that it was aware of the exhaustion defense one (1) year, four (4) months and nine (9) days before it filed its initial Answer to the complaint.

On October 13, 2022, this Court set the case at issue for trial to occur the week of February 6, 2023. Paragraph 6, of the Court's UNIFORM CASE MANAGEMENT ORDER SETTING PRETRIAL DEAD-

LINES AND RELATED REQUIREMENTS, the Court set various deadlines, including paragraph g which states,

> OBJECTIONS TO PLEADINGS AND ALL OTHER PRETRIAL MOTIONS, except for motions in limine, shall be filed by August 1, 2022 and heard no later than October 1, 2022. Any motion not filed and heard prior to the expiration of this deadline may be deemed waived or denied absent extraordinary circumstances which could not have been prudently anticipated, or by order of the Court entered prior to the expiration of the applicable time limitation

On December 13, 2022, fifty-five (55) days prior to trial, the Defendant filed its Motion for Leave to Amend its Affirmative Defenses to include the exhaustion defense. No allegation has been proffered by Defendant stating that any delays were caused by Plaintiff or any other extraordinary circumstances that caused Defendant delay. Counsel for Defendant was counsel of record on this case as of January 20, 2022.

On January 27, 2023, this Court heard arguments on Defendant's Motion for Leave to Amend its Affirmative Defenses to include an exhaustion defense, almost fifty-six (56) months after exhaustion. The Plaintiff opposed the Defendant's motion arguing the Defendant waited too long to seek the amendment and, in the alternative, sought sanctions against the Defendant for failing to raise this defense in a timely fashion.

Plaintiff relied on multiple on-point cases including but not limited to cases with the same Defendant as the case at issue. Plaintiff cited, *Hallandale Open MRI, LLC (a/a/o Deanna Moore) v. Security National Ins. Co.*, 23 Fla. L. Weekly Supp. 628b (Broward Cty. Ct. 2015) (Miranda, J.); *Injury Treatment Ctr. of Coral Springs, Inc. v. State Farm Mut. Auto. Ins. Co.,* 21 Fla. L. Weekly Supp. 700c (Fla. Broward County, Cty. Ct. 2014) (Dishowitz, J.); *A-1 Open MRI, Inc. v. United Auto. Ins. Co.,* 20 Fla. L. Weekly Supp. 288b (Fla. Broward County, Cty. Ct. 2012) (Schiff, J.); *Madrid LLC v. State Farm Fire and Cas. Co.,* Case No.: 11-11432 COCE 56, Order on Case Management Conference (Fla. Broward County, Cty. Ct. March 7th 2014) (Pratt, J.) (unpublished order); *Rivera-Morales M.D. v. State Farm Mut. Ins. Co.,* 22 Fla. L. Weekly Supp. 271a (Fla. Miami-Dade County, Cty. Ct. 2013) (Gonzalez-Paulson, J.). In one of Plaintiff's cited cases, *Medview of Florida, Inc. (a/a/o Kuldevi Maraj) v. Geico Gen. Ins. Co.*, Case No. 15-007567 COCE 55 (Broward Cty. Ct., Nov. 1, 2017), Geico was sanctioned for failing to provide any explanation for not advising plaintiff during litigation that benefits were exhausted.

During the hearing, Defendant did not provide an explanation as to why Defendant waited nearly 27 months to amend. Defendant argued that it provided notice of the exhaustion to a non-party billing company who submitted a demand letter in 2018. Counsel for the Defendant provided in its response to Plaintiff's Second Motion for Sanctions that non-party Florida Premium Billing & Collection Services submitted a Demand Letter to which Defendant allegedly issued the payment it claims exhausted the benefits on this claim. Florida Premium Billing & Collection Services is <u>not</u> a party to this litigation. Defendant attached the alleged letter from Florida Premium Billing & Collection Services, which on its face appears that it was not submitted by Plaintiff, nor Plaintiff's counsel. Defendant did not provide any legal authority that a non-party billing and collections company has any legal obligation to notify Plaintiff that the benefits are exhausted. Further, Plaintiff was not copied on the demand letter response.

The Court finds that exhaustion should have been pled as an affirmative defense at the onset. Defendant waited nearly twenty-seven months after filing its original answer, and after the deadlines set forth in this Court's Uniform Trial Order Setting Pretrial Deadlines and Related Requirements passed to seek the subject Leave to Amend. Defendant notified Plaintiff of the exhaustion of benefits affirmative defense by way of filing its Motion for Leave to Amend its Answer and Affirmative Defenses. Notwithstanding Defendant's prior knowledge, Defendant provided no explanation of the reasons for the significant delay.

The Court takes note that the Fifth District Court of Appeal in *Rosario v. Procacci Commercial Realty, Inc.*, 717 So. 2d 148 (Fla. 5th DCA 1998) [23 Fla. L. Weekly D2108b] states that "Under Florida Rule of Civil Procedure 1.190(a), refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile."

The Court finds as to Defendant's "Amended" Affirmative Defense that Plaintiff would be prejudiced by the allowing of this amendment. As stated in *Affiliated Healthcare Centers, Inc. a/a/o Joseph Mora v. United Automobile Insurance Company*, 19 Fla. L. Weekly Supp. 143a (Broward Cty. 2011);

> "[t]he test of prejudice is the primary, but not only consideration. *New River Yachting Center, Inc. v. Bacchiochi*, 407 So. 2d 607, 609 (Fla. 4th DCA 1981). In considering prejudice, the Court must consider the timeliness of the motion. The Court also keeps in mind that this is a civil case, with a recommended resolution standard of 18 months."

Additionally, the Court recognizes that "[g]ranting or denying a motion to amend. . .lies within the discretion of the Court. . . [and] Florida appellate Courts have consistently affirmed the denial of untimely motions to amend. *New River Yachting v. Bacchiocchi,* 407 So. 2d at 608-09 (Fla. 4th DCA 1981)." See also *Affiliated Healthcare Centers, Inc. a/a/o Jonathan Ponce v. United Automobile Insurance Company*, 18 Fla. L. Weekly Supp. 485b (Broward Cty. 2010). *Orthopaedic Clinic of Daytona Beach, P.A. a/a/o Robert Frierson v. United Services Auto. Assn.*, 19 Fla. L. Weekly Supp. 395a (7th Jud. Cir., Judge Warren, January 17, 2012).

The Court finds no greater prejudice to the Plaintiff then to be completely barred from presenting its claim, if the Court were to grant Defendant's untimely motion to now include an exhaustion of the benefits.

The Court finds that the Defendant should not be permitted to materially change its position at this point in the litigation when ***Defendant knew or should have known*** of this defense/affirmative defense prior to filing its Answer.

Finally, the Court finds as to Defendant's "Amended" Affirmative Defense that it is untimely and as such, pursuant to paragraph 6-g of the Court's UNIFORM CASE MANAGEMENT ORDER SETTING PRETRIAL DEADLINES AND RELATED REQUIREMENTS**,** Defendant ***waived its right to assert this affirmative defense***. Defendant issued the checks for PIP benefits that exhausted the policy of insurance. Thus, the Defendant was the only party aware of the exhaustion. The Defendant had the opportunity to learn of the exhaustion multiple times during this fifty-six (56) month window when it was preparing for hearings or upon receipt of the various court orders.

For example, after receiving the Court's Summons and Notice, which Ordered the Defendant to file a response to the Complaint, that the Defendant should have reviewed its file before responding to the Court's Order. Additionally, the Defendant knew or should have known of the exhaustion on October 9, 2019 when filing its Answer. Lastly, Defendant knew or should have known of the exhaustion on October 9, 2019 when it filed its Requests for Admissions to Plaintiff by merely including a request that benefits had been exhausted.

Florida Rule of Civil Procedure 1.140(h)(1) states "[a] party waives all defenses and objections that the party does not present either by motion under subdivisions (b), (e), or (f) of this rule or, if the

party has made no motion, in a responsive pleading except as provided in subdivision (h)(2)." Under FRCP 1.140(h)(1), the Defendant has waived its right to assert this defense/affirmative defense. FRCP 1.140(b) further states that "[e]very defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading. . . ." See also *Douglas Rapid Rehabilitation, Inc. a/a/o Nicole Bowen v. United Automobile Insurance Company*, 18 Fla. L. Weekly Supp. 312b (Broward Cty. Ct. 2010). Defendant did not raise this affirmative defense in its Answer.

Furthermore, the Supreme Court of Florida defined waiver as "the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707 (Fla. 2005) [30 Fla. L. Weekly S115a].

ACCORDINGLY, it is ORDERED and ADJUDGED that Defendants Motion for Leave to Amend its Answer and Affirmative Defenses is denied and Plaintiff's Motion for Sanctions is reserved.

* * *

Torts—Conversion—Business property—Damages—Former employee who admits liability for surreptitiously performing factory reset on work-based computer that permanently deleted all of former employer's software, electronic documents, and email and ensuring that data could not be recovered from server owes damages in amount of wages paid to employees for data deletion mitigation efforts that have already been made, wages for mitigation efforts reasonably certain to be incurred in future, and services of outside vendor to recover data—Attorney's fees—Plaintiff awarded attorney's fees and costs as prevailing party and as sanction for defendant's failure to attend mediation

ONLINE COMMERCE CORP., Plaintiff, v. SCOTT AMATO, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22027547. Division 53. February 1, 2023. Robert W. Lee, Judge.

FINAL JUDGMENT FOR PLAINTIFF

WHEREAS, this case was tried non-jury before the Court on January 24, 2023 on the issue of damages. At trial, the Plaintiff called three witnesses, Frank Haggar, Sahaludeen Jabar and Regina Cardona. The Plaintiff also offered 9 exhibits identified in its pretrial exhibit list as 1 through 9, which were accepted into evidence as Plaintiff's trial exhibits 1 through 9. The Defendant did not appear at the trial.

Default as to Liability

In the Complaint, the Plaintiff alleges that Defendant is liable for converting its business property by surreptitiously using his IT skills to perform a factory reset on his work-issued computer, which permanently deleted all company software, electronic documents and email spanning the entire duration of Defendant's employment, and for ensuring that Plaintiff's data could not be recovered by deleting all of his assigned mapped folders and files which were backed up on the company's local server. Complaint ¶ 8 and 14-16. As a result of a default entered against Defendant on July 22, 2022. Defendant admits all well-pled factual allegations of the Complaint. *Donohue v. Brightman,* 939 So. 2d 1162, 1164-65 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2661a]. Consequently, liability has been established by default and the trial was limited to the issue of the Plaintiff's damages.

Damages

The Plaintiff's witnesses, all employees of the Plaintiff and co-workers of the Defendant, testified about their involvement and efforts in discovering, investigating, unsuccessfully attempting to restore and ultimately recreating the company data deleted by the Defendant, as well as their time spent and compensation from the Plaintiff for such activities. Frank Haggar also testified about Plaintiff's employee Sami Slim's participation and time spent with him on the data deletion mitigation efforts. Under the Restatement, in addition to the value of an item converted, damages also may include "the amount of any further pecuniary loss of which the deprivation has been a legal cause [. . .] and [. . .] compensation for the loss of use not otherwise compensated." Restatement (Second) of Torts § 927(2)(b), (d). Accordingly, the money paid by Plaintiff to its employees and outside vendors for data deletion mitigation efforts is an appropriate measure of damages in this case. See *Me Tech. v. Brownstein,* 2020 U.S. Dist. LEXIS 215907, (S.D. Fla. Nov 13, 2020) (Finding that the proper measure of damages for the unauthorized deletion of a company's social media data by a former employee is the cost of re-creating the data and restoring it to the place it occupied but for the loss and approving of the "employee hours method" to calculate such damages).

According to the unrebutted testimony of the Plaintiff's witnesses, Frank Haggar spent 40 hours on data deletion mitigation efforts, Sami Slim spent 30 hours, Sahaludeen Jabar spent 44 hours and Regina Cardona spent 50 hours on such efforts. In addition, Frank Haggar provided a reasonable estimate that he and Regina Cardona would be required to spend an additional 10 and 20 hours respectively on such efforts, due to a recurring issue with collecting data needed for encryption key codes which had been deleted by the Defendant.

Included in the admitted trial exhibits were weekly paystubs evidencing the gross weekly compensation paid by the Plaintiff to the three trial witnesses and to Sami Slim during the data deletion mitigation process. The witnesses also testified that their pay was based on a 40-hour week, which provides a basis to calculate an effective hourly rate of $84.88 for Frank Haggar,[1] $35.65 for Sahaludeen Jabar, $120.19 per hour for Sami Slim and $19.23 per hour for Regina Cardona paid by the Plaintiff for their data deletion mitigation efforts. In multiplying the effective hourly rates by the amount of hours spent on data deletion mitigation efforts through the date of trial, the Plaintiff demonstrated that it has paid $3,395.20 to Frank Haggar (40 hours @$84.88), $1,568.60 to Sahaludeen Jabar (44 hours @ $35.65), $3,605.70 to Sami Slim (30 hours @ $120.19 per hour) and $961.50 (50 hours @ $19.23 per hour) for such efforts in addressing the company data deleted by the Defendant. Through Frank Haggar, the Plaintiff also demonstrated that it would incur future data deletion mitigation costs of $848.80 to be paid to Frank Haggar (10 hours @ $84.88) and $384.60 to be paid to Regina Cardona (20 hours @ $19.23). The Court finds that there is sufficient evidence and a reasonable basis using the "employee hours method" for an award to the Plaintiff of $11,731.00 for past damages and $1,233.40 for damages reasonably certain to be incurred by the Plaintiff in the future, both of which were caused by the Defendant's deletion of data.

In addition, Sahaludeen Jabar testified that the Plaintiff engaged the services of an outside vendor, ERM Protect, to attempt to recover the data Defendant deleted from his workstation computer and identified Plaintiff's trial Exhibit 2 as the invoice for such services costing $2,200.00. The Court finds this evidence sufficient to award the Plaintiff $2,200.00 to compensate it for its out of pocket expenses in attempting to mitigate the data deleted by the Defendant.

Attorney's Fees and Costs

On December 12, 2022, after notice and hearing, this Court entered an Order Granting Plaintiff's Motion for Sanctions due to Defendant's failure to attend mediation. Rule 1.720(f), Fla. R. Civ. P. In this Order, the Court awarded entitlement to attorney's fees to the Plaintiff. In addition, Plaintiff is entitled to an award for taxable costs as a prevailing party in this litigation pursuant to §57.041 Florida Statutes.

On January 24, 2023, Plaintiff filed an Affidavit in Support of Fees and Costs providing an itemization of time expended by Plaintiff's counsel in connection with mediation and itemization of taxable costs

incurred by the Plaintiff in this case. In particular, Plaintiff seeks an award of attorney's fees consisting of 3.4 hours at a rate of $350 per hour totaling $1,190.00 for the efforts of Plaintiff's counsel, William R. Scherer, III, in preparing for and attending the mediation in which Defendant failed to appear. Plaintiff also requests and award of $1,513.55 for prevailing party taxable costs, consisting of charges from the mediator, filing costs, service of process costs and court reporter expenses for the depositions of non-party witness Detective Anthony Cassini and Defendant, Scott Amato.

Defendant has not filed an objection to the fees or costs sought by the Plaintiff. The Affidavit of William R. Scherer, III, setting forth his background and experience demonstrates that his hourly rate is reasonable and customary based on the prevailing rates in Broward County and that the activities and time reflected in the supporting time records were reasonable. Moreover, the costs sought by Plaintiff consisting of charges from the mediator, filing costs, service of process costs and court reporter expenses for the depositions of non-party witness Detective Anthony Cassini and Defendant, Scott Amato are in accordance with the Statewide Uniform Guidelines For Taxation Of Costs In Civil Actions. Fla. R. Civ. P., Appx. II.

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

1. Plaintiff, ONLINE COMMERCE CORP., shall have, receive, and recover from the Defendant, SCOTT AMATO, [Editor's note: Address redacted], Davie Florida 33325 and [Editor's note: Address redacted], Homestead Florida 33032, the following:

a. Compensatory damages in the amount of $12,964;

b. Taxable costs in the amount of $1,513.55 pursuant to §57.041 Florida Statutes;

c. Attorney's fees in the amount of $1,190.00 pursuant to the Court's December 12, 2022 Order Granting Plaintiff's Motion for Sanctions.

2. Judgment shall be entered in favor of the Plaintiff, ONLINE COMMERCE CORP. and against the Defendant, SCOTT AMATO in the total amount of $15,667.95, **FOR WHICH SAID AMOUNT LET EXECUTION ISSUE.**

3. The Court reserves jurisdiction to consider requiring that Defendant, SCOTT AMATO, complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments.

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[1]Frank Haggar testified that in addition to the weekly pay reflected in his paystub, his company received additional weekly compensation from the Plaintiff at a flat rate of $1,080.00, which was added to the paystub's gross pay to determine the effective hourly rate paid by Plaintiff.

* * *

Insurance—Personal injury protection—Coverage—Golf cart modified to be licensed and driven on roadways of state is motor vehicle as defined by PIP policy and statute

TROPICAL CHIROPRACTIC GROUP, INC., Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE21007500. Division 81. February 13, 2023. Tabitha Blackmon Eves, Judge. Counsel: Nathan J. Avrunin, Nathan J. Avrunin, P.A., Weston, for Plaintiff. Maxwell M. Nelson, Progressive PIP House Counsel, Fort Lauderdale, for Defendant.

AMENDED ORDER ON CROSS-MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS MATTER, having come before the Court for hearing on January 26, 2023 and the Court having reviewed the relevant motions and responses from both the Plaintiff and Defendant, having reviewed the Court file, including record evidence presented, having heard argument of counsel for both parties, and being otherwise fully advised in the premises, the Court finds as follows:

The facts of the case are not in dispute. On October 17, 2020, Mr. Stephen Engasser was on a group camping trip at Fisheating Creek Outpost. One of the party, Paul Jenner, brought his modified golf cart to the campout. The vehicle was modified to be permitted to be driven on the roadways and displayed a current license plate. After dark, they set off on Mr. Jenner's modified golf cart with Mr. Engasser sitting backwards on the rear. The golf cart travelled down US 27 then began off-road. The golf cart hit a puddle twice, each time throwing Mr. Engasser off the golf cart and injuring him and totaling the golf cart. Mr. Engasser sought medical attention for his injuries from, and assigned his right to receive Personal Injury Protection (PIP) benefits to, Tropical Chiropractic Group, Inc.

In this case the parties filed a pretrial stipulation in which they agreed that the issues before the Court are: 1) Whether the services provided by Plaintiff to Stephen Engasser were necessary to treat him for injuries related to the loss of October 17, 2020 and, 2) whether there is PIP coverage for Stephen Engasser for this loss under the policy with Defendant based on the circumstances of the loss.

The Plaintiff's Motion for Summary Judgment contains the affidavit of Scott Herman, D.C. who is the owner, treating physician and corporate representative of Plaintiff. In the affidavit Dr. Herman discusses his initial examination and findings and the course of chiropractic treatment that he recommended and then administered to the patient. The affidavit meets the Plaintiff's *prima facia* burden that the services were reasonable, necessary, and related to the accident pursuant to Florida Rule of Civil Procedure 1.510(a). The Defendant did not file anything in opposition and affirmatively states that they are not contesting necessity and relatedness but instead are defending solely on their position that Mr. Engasser was not travelling in a motor vehicle as defined by the policy and Florida Statute §627.736 and §627.732(3)

Therefore, the issue before the Court is whether Mr. Jenner's modified golf cart is a "motor vehicle" for purposes of the PIP statute and Progressive's policy.

Mutually coordinated for hearing today are the parties' cross-motions for summary judgment. Subsequent to the parties noticing their cross-motions for summary judgment, the Plaintiff filed and noticed for today its "Motion to Determine Confession of Judgment and/or Admit Affidavit of Stephen Engasser in Support of Plaintiff's Motion for Summary Judgment and In Opposition to Defendant's Motion for Summary Judgment". The Defendant opposes the substance of the motion but did not object to it being heard and considered.

The Plaintiff's motion is premised on Stephen Engasser having sought both PIP benefits and Uninsured Motorist benefits from Progressive. Plaintiff filed the affidavit of Stephen Engasser with an attachment that as of January 5, 2023 Progressive accepted the demand and tendered the policyholder's uninsured policy limits. The Plaintiff asserts that this payment was based on Mr. Engasser's personal injury attorney filing a civil remedy notice that was about to expire. The Plaintiff contends that the definitions of "motor vehicle" are similar enough between the Defendant's policies that this Court should treat the payment as a confession to the PIP benefits as well. The Plaintiff asserts that because Progressive had initially denied responsibility for both the uninsured motorist and PIP claim but later made payment for the uninsured motorist policy long after the PIP lawsuit had been filed that this serves as a confession and Defendant has waived its coverage defense and is estopped from taking an opposite position contesting coverage.

The Defendant asserts that the definitions in its two policies are not the same and that the two policies fall under different statutes with different definitions so that a payment on one does not create an obligation to pay the other. Defendant argues that there was no admission of liability, that coverage cannot be extended by waiver and

estoppel, and there was no voluntary payment of PIP benefits after this lawsuit was filed.

The Court does not address the other arguments presented, but finds that although a civil remedy notice may have prompted payment for uninsured motorist benefits, that since no lawsuit had been filed against Progressive for Uninsured Motorist benefits that there has not been a confession.

Therefore, the sole issue before this Court is whether the modified golf cart meets the policy and statutory definition of a "motor vehicle". If the modified golf cart that Mr. Engasser was travelling in was a "motor vehicle" there would be coverage through Progressive for PIP benefits, otherwise, Mr. Engasser's bills would not be reimbursable by PIP. Progressive maintains that golf carts are manufactured and designed to be utilized on a golf course and therefore can never be changed to be a vehicle for which PIP would provide coverage. The Plaintiff argues that the Defendant's reading of the definition of "motor vehicle" is too narrow.

First, the Court notes that this appears to be case of first impression. Although the parties located cases involving golf carts, none of them were "modified golf-carts" seeking PIP coverage. The Plaintiff points to *Meli Orthopedic Ctrs of Excellence, LLC, a/a/o John Colonel v. Geico Gen. Ins. Co.,* 28 Fla. L. Weekly Supp 350a (Judge Florence Barner, 17th Jud. Cir. Cty Court, May 11, 2020). In that case, a judge in this circuit needed to determine if a person qualified as an "additional driver" which would qualify them for PIP benefits due to an accident in a similarly modified golf cart. The Defendant argues that in that case Geico and Plaintiff *stipulated* that the modified golf cart qualified as a low speed vehicle under §320.01(41) and was permitted to be operated on the streets under §316.2122 and that the did not actually make that finding.

In analyzing whether the policy and PIP statute qualify the modified golf cart that Mr. Engasser was travelling in as a motor vehicle for which PIP coverage is afforded, this Court notes that:

> When interpreting insurance policies ambiguities are resolved in favor of the consumer and increased coverage. *Taurus Holdings, Inc. v. U.S. Fidelity and Guar. Co.,* 913 So.2d (Fla. 2005) [30 Fla. L. Weekly S633a] ("Under Florida law, insurance contracts are construed according to their plain meaning. Ambiguities are construed against the insurer and in favor of coverage.")
>
> [W]here policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. *Container Corp.* [*of America v. Maryland Cas. Co*], 707 So.2d [733,] 736 (Fla. 1998) [23 Fla. L. Weekly S163a]; *Berkshire Life Ins. Co. v. Adelberg,* 698 So.2d 828, 830 (Fla. 1997) [22 Fla. L. Weekly S513a]. In addition, "when an insurer fails to define a term in a policy, . . . the insurer cannot take the position that there should be a 'narrow, restrictive interpretation of the coverage provided.' " *State Comprehensive Health Ass'n. v. Carmichael,* 706 So.2d 319, 320 (Fla 4th DCA 1997) [23 Fla. L. Weekly D49a]; see also *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So.2d 1245, 1247 n. 3 (Fla. 1986); *National Merchandise Co. v. United Serv. Auto Ass'n,* 400 So.2d 526, 530 (Fla. 1st DCA 1981).
>
> *State Farm Fire & Cas. Co. v. CTC Development Corp,* 720 So.2d 1072 (Fla. 1998) [23 Fla. L. Weekly S527a].

Progressive's policy on page 10 defines "motor vehicle" as "any self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of the State of Florida and any trailer or semi-trailer designed for use with such vehicle. A motor vehicle does not include a mobile home or any motor vehicle which is used in mass transit. . . ."

There is no doubt that the modified golf cart qualifies as a "self-propelled vehicle with four or more wheels" under Progressive's policy which mirrors the definition of "motor vehicle" in Florida Statute §627.732(3). As low speed vehicles, golf carts need to be licensed to travel on the roadways and be insured under PIP.

Progressive points to the handbook put out by the manufacturer cautioning people to not modify the golf cart to make legal to drive on the roadways, as proof that the golf cart Mr. Engasser was travelling in was not designed to be utilized on the roadways. Plaintiff argues that Progressive's reading of the definition is too limited and that the modified golf cart was required to be, and was, licensed for travel on the roadways and had been designed that way as evidenced by the addition of features that were required to make it street legal such as: modified tires not permitted on a golf course, a faster engine that exceeds 20 m.p.h., seatbelts, headlights, taillights, side mirrors, and a license plate holder. There was testimony that the owner would travel to work using the modified golf cart on public roadways. The Plaintiff argues even if the vehicle was not *initially* designed to be driven on the roadways it has *now* been designed to do so. *See* Florida Statute §320.01(1)(a) and Florida Statute §627.732(3). Defendant counters that a golf cart that its original manufacturer states should not be driven on public roads cannot be "designed and required to be licensed for use on the highways of the State of Florida," regardless of subsequent modification, and relies on Part IIA of its policy, §627.732(3), and *State Farm v. Baldassini,* 909 F. 2d 1363 (S.D. Fla. 2012) for this proposition. *Baldassini* is a case that did not involve a modified golf cart.

Both parties cite *Herring v. Horace Mann Ins. Co.,* 795 So.2d 209 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2344a]. In that case the court found that "[b]ecause the policy language creates an ambiguity as to whether there is coverage for a golf cart when it is not being used for golfing, we must construe the policy in favor of the insured". *Id.* at 212 citing *Union Am. Ins. Co. v. Maynard,* 752 So.2d 1266, 1268 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D648a]. Therefore, the court found that a golf cart qualified for coverage under the homeowner's insurance policy as a recreational vehicle. The Maynard court noted that golf carts are not "generally designed for use on public roads" but notes that in that case "there is no indication or claim that the golf cart was anything other than a standard golf cart and there is no claim that it was designed in some special manner for use on public roads or that it was otherwise subject to registration."

In concluding that an insurance company policy needed to provide PIP benefits, the Fifth District Court of Appeal found that "a golf cart that had been modified, inter alia, to exceed a speed of twenty miles per hour, fell within the statutory definition of a 'low speed vehicle' and, as such, was a 'motor vehicle' as defined in section 324.021." *Angelotta v. Security Nat. Ins. Co,* 117 So.3d 1214, 1215 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1477a] *rev. denied* 130 So.3d 1277 (Fla. 2013). The Supreme Court also concluded that a non-modified golf cart was a "motor vehicle" for purposes of applying the dangerous-instrumentality doctrine. *Mesiter v. Fisher,* 462 So.2d 1071 (Fla. 1984)("A golf cart is clearly a motor vehicle.")

This Court finds that this golf cart modified to be licensed and driven on the roadways of Florida is either a low speed vehicle pursuant to 320.01(41) or a motor vehicle as defined by the PIP statute Florida Statutes §627.736 and §627.732(3). The Court finds that the Defendant's proposed interpretation of the term "motor vehicle" imposes restrictions not specified in the statute that the golf cart be "initially" or "originally" designed for use. Those restrictions are not contemplated or specified in the statute and there are plenty of examples where an item not originally designed for a purpose is later taken and designed for a different purpose irrespective of the original intent. The Court while not finding that the Defendant confessed judgment by paying the uninsured motorist benefits, does find the definitions similar enough that Progressive doing so is another persuasive factor to finding coverage for the PIP benefits as well.

ORDERED AND ADJUDGED that the Plaintiff's Motion for Final Summary Judgment is GRANTED and the Defendant's Motion for Summary Judgment is DENIED. The Plaintiff is directed to submit to the Court a proposed final judgment into the CMS portal within thirty (30) days from the date of this Order, failing which the Court may dismiss this case without further notice or hearing.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend complaint to replace initially pled breach of contract count with action for declaratory relief based on "budget neutrality" issue is denied—Amendment that would allow medical provider to avoid summary judgment on defective demand letter defense and liability for attorney's fees and costs as a consequence of rejecting settlement offer would result in prejudice to insurer

ADVANCED DIAGNOSTIC GROUP, a/a/o Carlos Ramos, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22000607. Division 61. January 4, 2023. Corey Amanda Cawthon, Judge. Counsel: Stephanie Vera, Steinger, Greene & Feiner, Fort Lauderdale, for Plaintiff. Kevan Carbon, Williams, Leininger & Cosby, P.A., North Palm Beach, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS CAUSE having come before the Court on October 12, 2022 for hearing on Plaintiff's Motion to Amend Complaint, and the Court having reviewed the Motion and the relevant portions of the Court file; heard argument of counsel; reviewed relevant legal authorities; and being otherwise sufficiently advised in the premises, finds as follows:

BACKGROUND

1. This case arises out of a claim for Personal Injury Protection ("PIP") benefits where Plaintiff filed its initial Complaint against Defendant on December 29, 2021, alleging breach of contract for Defendant's alleged failure to pay personal injury protection benefits for treatment rendered to Carlos Ramos.

2. Defendant served its Answer and Affirmative Defenses on or about February 7, 2022, raising two affirmative defenses: (1) that Defendant had properly paid at fee schedule, and (2) the Plaintiff's pre-suit demand letter was statutorily invalid. Plaintiff filed its Reply to Defendant's Answer and Affirmative Defenses on or about February 21, 2022.

3. Thereafter, multiple sets of written discovery were exchanged between the parties, some of which was specifically tailored to address Defendant's demand letter defense.

4. Additionally, on or about June 24, 2022, the Defendant served Plaintiff with a Proposal for Settlement, which was not accepted by Plaintiff and therefore expired.

5. Thereafter, Plaintiff filed its Motion to Amend Complaint on September 13, 2022. Plaintiff seeks to amend its Complaint to completely replace the initially pled breach of contract count with an action for declaratory relief based on the "budget neutrality" issue formally for the first time in this action.

6. It should be noted that Defendant filed its pending Motion for Summary Judgment regarding Inadequate Presuit Demand and Motion for Sanctions under F.S. 57.105 on or about October 13, 2022, citing to Defendant's affirmative defense regarding invalid pre-suit demand letter and the 4th DCA case of *Chris Thompson, P.A. a/a/o Elmude Cadau v. Geico Indemnity Co.*, 47 Fla. L. Weekly D1588b (Fla. 4th DCA, July 27, 2022).

7. Defendant contends that Plaintiff is attempting to amend its complaint to change the breach of contract count originally pled to a petition for declaratory relief regarding the budget neutrality issue in order to avoid entry of summary judgment in Defendant's favor and to avoid any risk of its part that has arisen due to Plaintiff's failure to accept Defendant's Proposal for Settlement.

ANALYSIS & OPINION

8. "Leave to amend shall be given freely when justice so requires and it should not be denied unless the privilege has been abused or the complaint is clearly not amendable." *Dingess v. Florida Aircraft Sales and Leasing, Inc.*, 442 So.2d 431, 432 (Fla. 5th DCA 1983).

9. Additionally, leave to amend a complaint "should not be denied unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile." *See Collado v. Baroukh, et al.*, 226 So.3d 924 (Fla. 4th DCA, 2017) [42 Fla. L. Weekly D1916a].

10. In this case, as this is Plaintiff's first request for leave to amend and the case has not yet been set for trial (Although the Court does note that a Uniform Order Setting Pretrial Deadlines was issued on October 24, 2022, which includes a projected trial period of July 3, 2023-July 31, 2023), it does not appear to this Court that the privilege has not been abused. As such, the Court must determine whether the amendment sought would cause prejudice to the Defendant in this matter.

11. Cases "have analyzed this element primarily in respect to the defendant's ability to prepare for the new allegations prior to trial on the merits." *See Dimick v. Ray*, 774 So.2d 830 (Fla. 4th DCA, 2000) [26 Fla. L. Weekly D93a].

12. In this case, Defendant contends that it has incurred numerous resources defending this action and participating in discovery thus far. Defendant further contends that, prior to the 4th DCA's issuance of its decision in *Chris Thompson*, the Defendant had weighed the strength of its defenses to the instant case, and decided to serve Plaintiff with a Proposal for Settlement, which was not accepted and thus expired. Defendant argues that Plaintiff is seeking to amend its Complaint to avoid summary judgment in favor of Defendant, thus risking being liable for Defendant's attorney fees and costs, and that permitting amendment will remove a defense that Defendant has relied on since the inception of this action.

13. Based on the procedural posture of this case, the arguments set forth by both parties, and the case law cited in both parties' motions and memorandums of law submitted regarding this issue, the Court finds that, if the amendment sought by Plaintiff were permitted at this juncture, that amendment would result in prejudice to the Defendant in this matter.

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

1. Plaintiff's Motion to Amend is hereby **DENIED**.

* * *

Insurance—Personal injury protection—Discovery—Failure to comply—Sanctions—Insurer's pleadings, including exhaustion of benefits defense, are stricken, and default is entered against insurer based on willful, deliberate, and contumacious failure of insurer's in-house counsel to comply with discovery orders and on sword and shield doctrine

PATH MEDICAL ACQUISITION COMPANY, INC., Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22003968. Division 82. January 26, 2023. Kal Evans, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. David Cruz, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS AND DEFAULT

THIS CAUSE, having come before the Court on Plaintiff's Motion for Sanctions and Default, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby **ORDERED AND ADJUDGED**, as follows:

Findings of Fact

1. That on January 18, 2021 the Plaintiff filed the instant action.

2. That on February 22, 2022 the Plaintiff served their initial

discovery.

3. That on March 24, 2022 the Defendant filed an Answer and affirmative defenses. One of the affirmative defenses claimed that benefits were exhausted.

4. The Plaintiff, after reviewing the initial responses to discovery, identified several payments that the Plaintiff claimed were improperly assessed against the available PIP benefits because the assignor had no liability for and / or were not provided for under the adopted payment methodology in the policy and / or no support was produced and that the Defendant acted in bad faith when they assessed these payments against the available benefits. These payments were to Ceda Orthopedic Group (for CPT J3301 and Q9967) and for a lost wage payment. The Plaintiff contended that the payment to Ceda Orthopedic Group for CPT J3301 and Q9967 were for services that the assignor had no liability for under the at-issue policy and / or were not compensable under the at-issue policy. The Plaintiff contended that the lost wage payment was not provided for under the policy because nothing had been produced with the original discovery responses that pertained to same other than that the Defendant issued a payment that they alleged was for lost wages. Based on the foregoing the Plaintiff, on April 13, 2022, issued two supplemental interrogatories which asked for an explanation and basis of the above noted payments and a request for production which asked for the documentation that the Defendant used and / or relied upon to support their answers to the interrogatories.

5. When the Defendant failed to respond to the April 13, 2022 discovery within the time limits prescribed under the Florida Rules of Civil Procedure the Plaintiff submitted an ex parte motion to compel to the Court on July 8, 2022.

6. The Court on July 13, 2022 entered an order which compelled the Defendant to "comply with the original discovery demand within ten (10) days from the date of this Ex Parte Order, by serving its *answers* to Plaintiff's Supplemental discovery requests, failing which sanctions may be imposed."

7. On July 15, 2022, the Defendant filed an objection to the supplemental requests claiming that they were vague, ambiguous, overbroad, work-product, proprietary trade secret and therefore privileged, irrelevant and that the Defendant is not obligated to proffer definitions or standards of reasonableness.

8. On August 1, 2022, the Plaintiff filed a second motion to compel regarding the supplemental discovery which asked the Court to overrule all asserted objections and to order the Defendant to fully and completely answer the discovery and to preclude the Defendant from introducing evidence that the above noted payments were for valid claims and that benefits were exhausted in the payment of valid claims. Part of the motion included a discussion of the sword and shield doctrine. The Plaintiff scheduled the matter for an October 20, 2022 hearing.

9. Just prior to the hearing the parties submitted an agreed order which overruled all asserted objections and gave the Defendant twenty days to answer. The Court appended to this order that **"[f]ailure to adhere to the order shall result in sanctions including Default, absent good cause shown. The Motion to Compel was initially granted over 3 months ago."**

10. On November 9, 2022, the Defendant, despite having *agreed* to overrule all objections and to fully and completely answer the discovery, filed a response to the interrogatories *objecting* that they were irrelevant and trade-secret. On November 9, 2022, the Defendant, filed a response to the production objecting that the request was overbroad and outside the scope of discovery. The Defendant also added to the production objection that they would provide copies of the requested items, yet nothing was ever produced.

11. The Court issued orders on July 14, 2022 and October 20, 2022, both of which were violated. Both orders cautioned regarding sanctions for violation, however, the October order directly stated that Dismissal or Default were included.

Findings of Law

11. The Court reviewed the above findings of fact and applied same to the factors enunciated in *Kozel v. Ostendorf,* 629 So.2d 817 (Fla. 1993):

> 1)whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

In relationship to the Kozel factors:

> 1)The Court finds that the Defendant's failure to comply with two separate discovery orders (one of which was agreed), their failure to answer the interrogatories and produce the requested documents was willful, deliberate and contumacious. This Court warned the Defendant on July 13, 2022 that sanctions might be imposed if they fail to answer the discovery and then on October 20, 2022 warned the Defendant that "[f]ailure to adhere to the order shall result in sanctions including Default, absent good cause shown." Despite two prior orders, one of which was an *agreed* order the Defendant failed to actually answer either of the interrogatories and failed to produce any of the requested documents.
>
> 2)The Defendant was told on two occasions that failure to answer the discovery would result in sanctions.
>
> 3)The Defendant/client was personally involved in that defense counsel is in-house counsel which only represents the Defendant and that the Defendant filed responses to the interrogatories that were contrary to the Court's orders—one of which was agreed to by the parties.
>
> 4)The delay has materially and significantly prejudiced the Plaintiff. This case has been pending for 12 months with the at-issue discovery going unanswered for 9 months. It has prevented the Plaintiff's from being able to prosecute this action and address the Defendant's affirmative defenses. It has also unnecessarily caused the Plaintiff to spent time filing motions, scheduling hearings and attending hearings that he should not have been forced to do.
>
> 5)Defense counsel did not offer a reasonable justification for their noncompliance with their discovery obligations and the orders of this Court. This Court gave the Defendant several opportunities during the hearing to offer good cause for their failure comply with the Court's orders but the Defendant failed to offer good cause.
>
> 6)The delay has created significant problems of judicial administration in unnecessarily taking up the time and resources of the Court, judge's staff and clerk's office. The Court has spent its time and resources repeatedly addressing the same matter over and over.

Based on the foregoing the Court hereby strikes the Defendant's pleadings and enters a default against them.

12. Notwithstanding that the Court has struck the Defendant's pleadings for the failure to comply with said discovery orders the Court separately strikes the Defendant's affirmative defense of exhaustion and prohibits them from relying on the payments to Ceda for CPT J3301 and Q9907 and the payment for lost wages as part of their claimed exhaustion. The Court strikes the Defendant's affirmative defense of exhaustion for two separate and distinct reasons. First, it is an appropriate sanction based upon the above findings of fact and findings of law when the Court applied the above noted *Kozel* factors. Second, it is appropriate under the sword and shield doctrine. Despite two Court orders compelling the Defendant to answer the supplemental discovery, including one where the Defendant *agreed* to overrule

their objections and answer the discovery, the Defendant still refuses to answer and continues to reassert objections—including that the facts and calculations as to how it calculated how much to pay for lost wages was privileged trade secret information. Under the sword and shield doctrine, as set forth in *DePalma v. DePalma,* 538 So.2d 1290 (Fla. 4th DCA 1989) a Court may strike an affirmative defense when privilege is used as a sword and shield. *See also Jenney v. Airdata Winan, Inc.,* 846 So.2d 664 (Fla. 2nd DCA 2003) [28 Fla. L. Weekly D1341c]; *Darley v. Marquee Enterprises, Inc.,* 565 So.2d 715 (Fla. 4th DCA 1990); and *S. Bell Tel & Tel Co. v. Kaminester,* 400 So.2d 804 (Fla. 3rd DCA 1981). This Court finds that the Defendant is using the facts and calculations as to how it calculated how much to pay for lost wages as a sword and shield. The Court hereby strikes the affirmative defense of exhaustion and prohibits the Defendant from relying upon the payments to Ceda for J3301 and Q9907 and the lost wage payment for any claimed exhaustion.

13. This Court also finds that based on the Defendant's responses to the supplemental discovery they are unable to establish that the payments to Ceda and the payment for lost wages were payments that were in accordance with the at-issue policy, that the assignor had any liability for and that said payments were properly assessed against the available benefits. Under Rule 1.510 summary judgment can be granted if a party lacks the evidence to prove a particular point. *See In Re: Amendments to Florida Rule of Civil Procedure 1.510*, SC20-1490 "If the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." Under the rules of summary disposition and based on the Defendant's inability to answer the discovery requests pertaining to the payments to Ceda and for lost wages that the Defendant is unable to establish that the payments to Ceda and for lost wages were in accordance with Florida Statute 627.736 and the instant policy.

* * *

Insurance—Pretrial deadlines—Motion to dispense with uniform order setting pretrial deadlines on grounds that case involves purely legal issues resolvable by summary judgment is denied where case has been pending for 230 days with no summary judgment hearing on calendar

BERGTOLD CHIROPRACTIC CLINIC, P.A., Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22037031. Division 53. February 3, 2023. Robert W. Lee, Judge.

ORDER DENYING PLAINTIFF'S MOTION TO DISPENSE OR DEFER UNIFORM ORDER SETTING PRETRIAL DEADLINES, ETC.

This cause came before the Court for consideration of the Plaintiff's Motion to Dispense or Defer Uniform Order Setting Pretrial Deadlines, Etc., and the Court's having reviewed the Motion and Court docket, the Court rules as follows:

The Motion is DENIED. While the Plaintiff asserts that this "case involves purely legal issues which the parties intend to fully resolve via Motion for SummaryJudgment," the Court notes that this case has been pending for 230 days, with no hearing on the calendar for a summary judgment motion. Certainly, if the only issues in this case were "purely legal" in this case with no apparent ties to Broward County, they could have been brought before the Court before now. If the Plaintiff chooses to file its cases in Broward County, although there are no ties to Broward County, it needs to be prepared to play by the rules in place in the Seventeenth Judicial Circuit.

* * *

Insurance—Personal injury protection—Complaint—Amendment—Motion to amend breach of contract complaint to allege action for declaratory relief on issue of applicability of budget neutrality adjustment is denied—Medical provider's ability to litigate budget neutrality issue in context of breach of contract action renders amendment futile, amending would prejudice insurer by foreclosing its defective demand letter defense, and privilege to amend has been abused in view of foreclosure of insurer's defense and delay in filing motion to amend until 171 days after initial complaint was filed

PRECISION DIAGNOSTIC OF LAKE WORTH LLC, a/a/o Valerie Puigdollers, Plaintiff, v. LIBERTY MUTUAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX22031342. Division 82. January 19, 2023. Kal Evans, Judge. Counsel: Thomas J. Wenzel and Patrick Calixte, for Plaintiff. Oner J. Kiziltan, Marshall, Dennehey, Warner, Coleman & Goggin, Fort Lauderdale, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS CAUSE having come before the Court on January 12, 2023 at 9:30 a.m., regarding Plaintiff's Motion to Amend Complaint, and the Court having reviewed the file and hearing arguments of counsel, it is found that:

Plaintiff, Precision Diagnostic of Lake Worth, LLC a/a/o Valerie Puigdollers, brought the instant suit on or about May 23, 2022 with a single count Complaint for breach of contract for an alleged failure to pay Personal Injury Protection (PIP) benefits against Defendant, Liberty Mutual Insurance Company. One hundred and seventy-one (171) days after the initial Complaint was filed, Plaintiff filed its Motion to Amend Complaint attaching the proposed Amended Complaint. Plaintiff argued in its motion it had learned of additional issues that needed to be litigated and therefore, was seeking to amend its Complaint.

The proposed amended complaint was itself a "pure action for declaratory relief" pursuant to Florida Statute Chapter 86 (2015). Plaintiff pled in the amended complaint it was in need of a judicial declaration regarding whether Defendant's application of a budget neutrality adjustment was permitted pursuant to Fla. Stat. §627.736 (2015). Additionally, Plaintiff claimed it was unsure as to its rights and the obligations of the Defendant under the subject insurance policy and Florida Law, therefore presenting a bona fide, actual, present, and practical need for a judicial declaration. It is an abuse of discretion to disallow amendment of a pleading unless it clearly appears the amendment would prejudice the opposing party, the privilege to amend has been abused, or the amendment would be futile. *Grover v. Karl,* 164 So. 3d 1285, 1287 (Fla. Dist. Ct. App 2015) [40 Fla. L. Weekly D1388a]. During oral arguments, Defendant argued that all three of these elements were met in the instant case.

Defendant argued Plaintiff's Motion was futile as it requested to amend the complaint due to a "Budget Neutrality" issue being present in this immediate suit. Defendant cited a recent decision in this jurisdiction in *Functional Evaluation Testing of Florida v. United Automobile Insurance Company*, Broward County Case Number CONO-21-020747. In that case, Plaintiff's Counsel was able to litigate the Budget Neutrality issue to final judgment. The Plaintiff, Functional Evaluation Testing of Florida, whom was also represented by Plaintiff's Counsel in this suit, filed a Complaint containing a single count for breach of contract, similarly to this complaint at issue. Defendant argued that there was no longer a bona fide controversy because Plaintiff prevailed on this issue. Plaintiff's Counsel's ability to argue the Budget Neutrality issue in the breach of contract suit demonstrates the futility of amending its current complaint from a breach of contract cause of action to a request for declaratory relief. The Court finds this argument persuasive and relies on *Functional Evaluation Testing of Fla*. Simply put, Plaintiff's argument that the

amendment is not futile does not pass muster and amendment would be futile.

As to Prejudice, Defendant argued granting Plaintiff's Motion would prejudice Defendant as it would impede Defendant's ability to defend the suit under one of its affirmative defenses. Defendant pled Plaintiff failure to comply with a mandatory condition precedent under Fla. Stat. §627.736(10) (2015) by failing to serve Defendant with a statutorily compliant demand letter as required under the statute. Defendant argued that because Chapter 86 does not require Plaintiff to serve Defendant with a pre-suit demand letter as a mandatory condition precedent, allowing the amendment would render this defense as inapplicable. This Court further agrees against amendment as amending would impede the Defendant's ability to argue this defense two-hundred and thirty-four (234) days after the lawsuit was filed.

Finally, Defendant argued that Plaintiff's request for an amendment demonstrates a clear abuse of the privilege to amend due to the above referenced issue of negating Defendant's demand letter affirmative defense. This Court agrees. Additionally, the Court finds that the privilege to amend was abused due to the simple timeline involved. Plaintiff's suit is two-hundred and thirty-four (234) days old. Plaintiff's Motion for Leave to amend was filed with the Court one-hundred and seventy-one (171) days after the initial complaint was filed. This court finds these delays as substantial. The Plaintiff demonstrated no due diligence in having its Motion heard in a timely fashion.

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

1. Plaintiff's Motion to Amend Complaint is hereby **DENIED.**

* * *

Volume 30, Number 12
April 28, 2023
Cite as 30 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal or disqualification—Judge who presides over insurance cases and who has filed a hurricane-related claim with an insurance company that has cases coming before the judge should disclose that they have filed a pending hurricane-related claim to all litigants in judge's division with hurricane-related insurance claims, and recuse themselves from any cases involving the same insurance company with whom judge has filed their claim—In event judge settles case, judge must disclose existence of claim and its settlement for a reasonable period of time after its occurrence due to direct dealings between judge and insurance company—If case proceeds to litigation where judge is represented by counsel, and counsel comes before the judge on any contested or uncontested matter, judge must automatically recuse themself for a reasonable period of time after litigation ends

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-01. Date of Issue: February 1, 2023.

ISSUES

Issue 1: Under what circumstances must judges disclose and/or recuse themselves from hurricane-related cases when they have filed an insurance claim with an insurance company that also has cases coming before them?

ANSWER: Pursuant to Canon 3E and its commentary, the inquiring judge(s) should 1) disclose that they have a filed a pending hurricane-related insurance claim to all parties or their attorneys with hurricane-related insurance claims in their division; and 2) recuse themselves from any cases involving the insurance company with whom the judge has filed their claim.

Issue 2: What if the case settles?

ANSWER: If the case settles, the inquiring judge must disclose the existence of the insurance claim and its settlement for a reasonable period of time after its occurrence due to the direct dealings between the judge and the insurance company.

Issue 3: What if the insurance case proceeds to litigation?

ANSWER: If the case proceeds to litigation, and the judge is represented by an attorney, and that attorney comes before the judge on either a contested or uncontested matter, the judge must automatically recuse himself or herself for a reasonable period of time after the litigation ends.

FACTS

The inquiring judge's judicial circuit was impacted by Hurricane Michael. As a result of the devastation, the judges impacted by the hurricane filed insurance claims with insurance providers. Many of the judges serve in the civil division and are concerned about the proper course of action with insurance-related cases that come before them involving the same insurance company with whom they have also filed a claim.

DISCUSSION

1. WHERE THE JUDGE HAS A PENDING HURRICANE INSURANCE CLAIM:

This inquiry is governed by Fla. Code Jud. Conduct, Canon 3E(1). Canon 3E sets forth rules governing disqualification. That Canon provides, in relevant part, that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . .

While there is no JEAC opinion that specifically addresses the first question, Canon 3E's subsection (1) makes clear that the facts and circumstances requiring disqualification must be analyzed in light of the intent of the rules so that even the appearance of impropriety is avoided.

"A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." *W.I. v. State,* 696 So. 2d 457, 458 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1634c]; Commentary, Canon 3E(1).

If a party receiving such information from the judge requests disqualification of that judge, disqualification is not automatically required. Each request must be considered on its own merits.

Section 38.05, Florida Statutes, authorizes a judge on his or her own motion to recuse himself or herself. The decision to recuse one's self based upon Canon 3E(1) is left up to each judge.

It should be noted that this Committee's response addresses only the ethical implications and not the legal requirements for recusals. If a motion for recusal is made and it is legally sufficient, then the judge should grant the motion and recuse. *See*, e.g., *Leigh v. Smith*, 503 So. 2d 989 (Fla. 5th DCA 1987).

Therefore, pursuant to Canon 3E and its commentary, the inquiring judge should 1) disclose to all parties or their attorneys with pending hurricane-related insurance cases in their division that they have a filed a pending hurricane-related insurance claim; and 2) recuse himself or herself from any cases involving the same insurance company with whom the judge has filed a claim.

2. WHERE THE JUDGE HAS REACHED A SETTLEMENT ON THE INSURANCE CLAIM:

One Committee opinion addressed a recommended course of conduct where a settlement is reached between the judge and the insurance company. In Fla. JEAC Op. 19-24 [27 Fla. L. Weekly Supp. 661b], the inquiring judge had a claim with an insurance company. The judge in that inquiry advised the Committee that the insurance claim resolved without any animosity between the insurer and the judge. Nor were there any circumstances that would give rise to the belief that the judge received favorable treatment from the insurance company requiring the judge to be automatically disqualified from presiding over any case involving that same company. Based on the particular facts given by the inquiring judge that the claim was settled as a routine matter, the Committee opined disqualification was not mandatory.

It was advised nevertheless that the inquiring judge *"should disclose the existence of the claim and its settlement for a reasonable period of time after its occurrence*" due to the direct dealings between the judge and the insurance company who also appeared before the judge. Fla. JEAC Op. 19-24.

A reasonable period of time was determined by the Committee to be from several months to one-year, based upon Fla. JEAC Ops. 12-09 [19 Fla. L. Weekly Supp. 674a] and 11-17 [19 Fla. L. Weekly Supp. 148a].

3. (A) WHERE THE JUDGE'S INSURANCE CLAIM GOES INTO LITIGATION:

In Fla. JEAC Op. 95-18 [3 Fla. L. Weekly Supp. 302a], the Committee advised that once litigation commences, in an abundance of caution, the inquiring judge should disclose the status of the litigation and any information that the parties or their lawyers may consider relevant, even if the judge believes there is no basis for disqualification.

(B) WHERE THE JUDGE HAS HIRED AN ATTORNEY FOR THE INSURANCE LITIGATION:

If the judge is represented in the insurance litigation by an attorney, and that attorney comes before the judge on either a contested or

uncontested matter, the judge must automatically recuse themselves, even if no party files a motion for recusal. The judge must disqualify himself or herself from proceedings in which the attorney for one of the parties currently represents the judge or a family member or has done so recently. Fla. JEAC Ops. 20-23 [28 Fla. L. Weekly Supp. 746a], 12-37 [20 Fla. L. Weekly Supp. 193a], 99-13 and 05-15 [12 Fla. L. Weekly Supp. 1200a]. In Fla. JEAC Ops. 99-13 and 05-15, it was suggested that the inquiring judge should file an administrative order recusing in every case involving the judge's lawyer or the lawyer's law firm.

Fla. JEAC Op. 86-09 suggests that a judge should continue to disqualify himself or herself from cases in which a party is represented by the same attorney who formerly represented the judge for several months after the representation has ended. The Committee has not created a bright-line rule as to what that reasonable length of time might be, but some opinions of the Committee have suggested time periods ranging from several months to one year. Fla. JEAC Ops. 20-23 [28 Fla. L. Weekly Supp. 746a], 01-17 [9 Fla. L. Weekly Supp. 345a] and 12-37 [20 Fla. L. Weekly Supp. 193a].

REFERENCES

Florida Statutes, Section 38.05.
W. I. v. State, 696 So. 2d 457 (Fla. 4th DCA 1997).
Leigh v. Smith, 503 So. 2d 989 (Fla. 5th DCA 1987).
Fla. Code of Jud. Conduct, Canon 2 and 3E(1).
Commentary to Canon 2 and Canon 3E(1), Fla. Code Jud. Conduct.
Fla. JEAC Ops. 86-09, 95-18, 99-13, 01-17, 05-15, 11-17, 12-09, 12-37, 19-24, and 20-23.

* * *

Judges—Judicial Ethics Advisory Committee—Disclosure, recusal, or disqualification—All remaining magistrates are not required to automatically disqualify themselves from cases in which a former magistrate appears as counsel of record

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-02. Date of Issue: March 1, 2023.

ISSUE

Whether all magistrates would be required to disqualify themselves from all cases in which a former magistrate appears as a counsel of record.

ANSWER: No.

FACTS

A judicial officer wishes to know whether the departure of a general magistrate to join a private law firm that regularly appears before the court's magistrates will require the remaining magistrates to automatically disqualify themselves on all cases in which the former magistrate appears as counsel of record. The querant is particularly concerned about our prior opinions in Fla. JEAC Ops. 04-06 [11 Fla. L. Weekly Supp. 373a] and 10-36 [18 Fla. L. Weekly Supp. 322b].

DISCUSSION

We can answer this inquiry fairly succinctly. Fla. Code Jud. Conduct, Canon 3E(1) requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Past Judicial Ethics Advisory Committee opinions have expounded upon this canon, addressing recusal or disclosure based on a judicial officer's prior legal employment. *See e.g.*, Fla. JEAC Ops. 04-06 [11 Fla. L. Weekly Supp. 373a], 10-36 [18 Fla. L. Weekly Supp. 322b], and 20-23 [28 Fla. L. Weekly Supp. 746a]. In those instances, we have opined on circumstances where the judicial officer has joined a court from a firm or agency, and the issue arises as to whether the judicial officer's former colleagues could appear in front of him or her. *See, e.g.*, Fla. JEAC Op. 04-06 [18 Fla. L. Weekly Supp. 322b] (opining that "[t]wo years is a reasonable period of time for a judge to disqualify himself or herself from hearing any cases handled by the judge's former law firm, so long as at the end of two years there are no financial ties between the judge and former law firm . . . .").

The concern underlying this query seems to be that the general magistrates of a judicial circuit are akin to a law firm or an agency, such that, following this general magistrate's departure, the remaining magistrates are "placed in the shoes" of a newly appointed judicial officer vis-à-vis the departing magistrate. For purposes of the judicial canons applicable to general magistrates, however, that is not an apt comparison. In the context of judicial ethics, a general magistrate is more akin to a constitutional officer than to an attorney at a law firm or governmental agency. *Accord Burns v. Burns*, 153 Fla. 73 (Fla. 1943) (opining that a court magistrate (there referred to as a special master) "is a highly important and responsible officer of the court, acting for and under the appointment of the court, and vested with considerable authority of a judicial nature by the statutes"); Fla. R. Civ. P. 1.490(a) ("Every person appointed as a general magistrate shall take the oath required of officers by the Constitution and the oath shall be recorded before the magistrate discharges any duties of that office."); 1.490(d) ("Every magistrate shall perform all of the duties that pertain to the office according to the practice in chancery and under the direction of the court. . . . All grounds of disqualification of a judge shall apply to magistrates."). Indeed, although employees of a court, general magistrates are expressly subject to many of the Judicial Canons. *See* Fla. JEAC Op. 17-21 [25 Fla. L. Weekly Supp. 767a] ("General magistrates clearly fall within [the Code of Judicial Conduct's judge] definition.").[1] So we answer the question in the negative; automatic recusal is not required under the facts that have been reported.

That said, general magistrates working together in the same court are obviously colleagues. It is certainly not uncommon for colleagues to develop close friendships. If that is the case with any individual general magistrate concerning the resigning magistrate, they should disclose that relationship if their former colleague comes before them in a case. *See* Fla. JEAC Op. 04-35 [12 Fla. L. Weekly Supp. 267a]; *see also Stevens v. Americana Healthcare Corp. of Naples*, 919 So. 2d 713, 715 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D401a] ("As the Commentary to Canon 3E(1) suggests, the judge's obligation to disclose relevant information is broader than the duty to disqualify. Thus a judge's disclosure of a social or personal relationship with a party or a lawyer for a party does not automatically trigger an obligation to disqualify . . . .").

REFERENCES

Fla. R. Civ. P. 1.490(a), (d)
Burns v. Burns, 153 Fla. 73 (Fla. 1943).
De Clements v. De Clements, 662 So. 2d 1276 (Fla. 3d DCA 1995).
Stevens v. Americana Healthcare Corp. of Naples, 919 So. 2d 713 (Fla. 2d DCA 2006).
Fla. Code Jud. Conduct, Canons 2 and 3E(1)
Fla. JEAC Ops. 04-06; 04-35; 10-36; 17-21; 20-23

[1]We emphasize that our remarks about the comparability between magistrates and judges is limited to the context of the judicial canons' applicability. *Accord De Clements v. De Clements*, 662 So. 2d 1276, 1281 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2207b] (en banc).

* * *