Volume 30, Number 2, June 30, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 53-134

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.

- **LICENSING—DRIVER'S LICENSE SUSPENSION—REFUSAL TO SUBMIT TO BREATH TEST—DUAL LICENSES. A hearing officer did not err in upholding the suspension of a licensee's non-commercial driver's license while simultaneously setting aside the disqualification of the licensee's commercial license based on the lack of an implied consent warning regarding the disqualification of that license in the event of a breath test refusal.** *NIN v. STATE, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. Circuit Court, First Judicial Circuit (Appellate) in and for Escambia County. March 29, 2022. Full Opinion at Circuit Courts—Appellate Section, page 53a.*

- **INSURANCE—HOMEOWNERS—INSURED'S ACTION AGAINST INSURER—CONDITIONS PRECEDENT TO SUIT. Section 627.70152, Florida Statutes (2021), which requires that homeowners provide the insurer with a notice of their intent to initiate litigation at least ten business days before commencing a suit against their insurer, applies retroactively to any suit arising under the homeowners' policy on or after the effective date of the statute.** *HUNT v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY. Circuit Court, First Judicial Circuit in and for Santa Rosa County. February 23, 2022. Full Text at Circuit Courts—Original, page 71a.*

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.

Subject Matter Index and Tables

Page prefixes in the subject matter index and tables identify the courts in the following manner:

10CIR 25	**Circuit Court - Appellate** (**Bold** type) (10th Circuit, page 25)
20CIR 10	Circuit Court - Original (20th Circuit, page 10)
CO	County Court
M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

VENUE

* * *

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

Florida Statutes and Rules of Procedure construed in opinions reported in this issue.

FLORIDA STATUTES

TABLE OF STATUTES CONSTRUED (continued)

FLORIDA STATUTES (continued)

RULES OF CIVIL PROCEDURE

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

* * *

Volume 30, Number 2
June 30, 2022
Cite as 30 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Appeals—Certiorari challenge to order upholding suspension of licensee's non-commercial driver's license but setting aside disqualification of commercial license due to failure to read implied consent warning regarding disqualification of that license in event of breath test refusal—Arguments regarding holding two licenses simultaneously that were not presented to hearing officer and concern alleged findings that hearing officer did not actually make have been waived—Hearing officer did not err in upholding suspension of non-commercial license while setting aside commercial license disqualification

RAIKO NIN, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 1st Judicial Circuit (Appellate) in and for Escambia County. Case No. 2021-CA-0199, Division F (Civil). March 29, 2022. Counsel: Jason Cromey, for Petitioner. Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TERRY D. TERRELL, Senior Judge.) **THIS CAUSE** is before the Court on the Petition for Writ of Certiorari, filed January 29, 2021. Upon review of the petition, response, reply, appendix, and relevant legal authority, the Court finds that the Department's suspension of Petitioner's Class "E" driving privilege pursuant to section 322.2615, Florida Statutes, will be upheld and the petition denied.

Pertinent Facts and Procedural History

Petitioner was stopped after law enforcement observed his pickup truck swerving within his lane. Petitioner was ultimately arrested for driving under the influence. At the time of his arrest, Petitioner held a Class "A" Commercial Driver's License (CDL).

The law enforcement officer read the Implied Consent Warning to Petitioner, requesting he submit to a breath test and Petitioner refused. Notably, Petitioner was only read the Implied Consent Warning related to the suspension of a non-commercial driver's license, which did not include any verbiage about the disqualification of his commercial driving privilege. Because he refused the breath test, Petitioner's CDL privilege was disqualified and his regular driving privilege was administratively suspended in accordance with sections 322.64 and 322.2615, Florida Statutes, respectively. Petitioner requested a formal review of both actions, and an evidentiary hearing was convened before a hearing officer on December 22, 2020. The hearing officer issued a decision on December 30, 2020, sustaining the suspension of Petitioner's driving privilege and setting aside the disqualification of his CDL.

Jurisdiction

Jurisdiction to review a decision of the Department upholding or invalidating a suspension is by petition for writ of certiorari to the circuit court in the county in which formal or informal review was held. §§ 322.31; 322.2615(13), Fla. Stat. Therefore, this Court has jurisdiction to review the petition.

Standard of Review

On certiorari review of an administrative action, a circuit court's review is limited to 1) whether procedural due process was accorded; 2) whether the essential requirements of law were observed; and 3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a].

The essential requirements of law are observed when the hearing officer applies the correct law. *See id.* (application of correct law is synonymous with the observation of the essential requirement of law). When the correct law is applied there is no basis for certiorari relief even if the reviewing court disagrees with the agency's application of the law to the facts. *See Dep't of Highway Safety and Motor Vehicles v. Carillon,* 95 So. 3d 901, 903 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1801a]; *Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]. "The competent, substantial evidence standard requires the circuit court to defer to the hearing officer's findings of fact unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings." *Dep't of Highway Safety and Motor Vehicles v. Hirtzel,* 163 So. 3d 527 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a] (citations omitted). "The circuit court in this process performs a 'review'; it does not sit as a trial court to consider new evidence or make additional findings." *Vichich v. Dep't of Highway Safety and Motor Vehicles,* 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2290a]. A circuit court's certiorari review is limited to the issues raised before the hearing officer. Where an argument or objection is not made before the hearing officer, the issue is waived on certiorari review. *See Dep't of Hwy. Safety & Motor Vehicles v. Lankford,* 956 So. 2d 527, 527-28 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a].

The Petition

Petitioner asserts there was no competent, substantial evidence that he possessed both a commercial (Class "A") and non-commercial (Class "E") driver's license at the time of his refusal to submit to a breath or urine test. He further contends that the hearing officer departed from the essential requirements of law by finding Petitioner "possessed two different driver's licenses at the same time" and by upholding the suspension of Petitioner's Class "E" driving privilege.

Discussion

Petitioner argued at the administrative hearing that both the suspension of his Class "E" and the disqualification of his Class "A" license should be invalidated because only the general Implied Consent Warning was provided to Petitioner. Notably, Petitioner did not argue that Petitioner did not have a Class "E" license, that he was precluded by law from simultaneously possessing a Class "A" and Class "E" license, or that it would be legally incorrect for the hearing officer to suspend his general driving privileges while allowing him to retain his Class "A" license. Additionally, Petitioner mischaracterizes the findings of the hearing officer. The record shows that the hearing officer never made a finding that Petitioner "possessed two different driver's licenses at the same time." Consequently, as this argument was not presented to the hearing officer at the administrative hearing, and no such finding was made by the hearing officer, Petitioner has waived certiorari review regarding this issue. *See Francis v. Fl. Dep't of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 367a (Fla. 3d Cir. Ct., Jun. 11, 2020).

To the extent Petitioner alleges that the hearing officer departed from the essential requirements of law by upholding the suspension of his general driving privilege, this argument is without merit. When a person's license is suspended for refusal to submit to a breath, blood, or urine test, a hearing officer's scope of review is limited to whether the factors espoused in section 322.2615(7)(b)1-3, Florida Statutes, have been proven by a preponderance of the evidence. The record shows the hearing officer applied the correct law when upholding the suspension of Petitioner's general driving privilege. "[I]t does not follow that because his CDL privilege remains unaffected that he is somehow immunized against suspension of his regular driving privilege." *Berrios v. Dep't of Highway Safety and Motor Vehicles,* 29 Fla. L. Weekly Supp. 276a (Fla. 13th Cir. Ct., June 23, 2021).

Consequently, the essential requirements of law were observed, and Petitioner has shown no basis for certiorari relief. *See Dep't of Highway Safety and Motor Vehicles v. Carillon,* 95 So. 3d 901, 903 (Fla. 1st DCA 2012) [37 Fla. L. Weekly D1801a]; *Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a].

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

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Venue—Rule requiring that hearing be held at nearest hearing office in county where arrest occurred is not applicable to hearing conducted using communications technology—If rule did impose venue restriction for hearing conducted using communications technology, Department of Highway Safety and Motor Vehicles had authority to suspend rules under executive orders related to COVID-19 pandemic—Moreover, in absence of any prejudice to licensee from having hearing conducted by hearing officer in another county, any venue error was harmless—Lawfulness of detention—Deputy who stopped licensee for speeding and observed him stumbling out of vehicle had reasonable suspicion to detain licensee for DUI investigation—Fifteen- to thirty-minute detention while awaiting arrival of DUI investigator was lawful where detention was based on reasonable suspicion of DUI

EDWARD BRETT, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Clay County. Case No. 10-2021-CA-000670-AXXX, Division A. March 14, 2022. Petition for Writ of Certiorari arising from the decision of the State of Florida Department of Highway Safety and Motor Vehicles sustaining an administrative suspension of Petitioner's Florida driver's license. Counsel: Susan Z. Cohen and David M. Robbins, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

OPINION

(STEVEN B. WHITTINGTON, J.) Petitioner, Edward Brett, ("Petitioner") commenced this action by timely filing a petition seeking certiorari review of a decision by Respondent, Department of Highway Safety and Motor Vehicles ("Respondent"), which had canceled Petitioner's driver's license. Petitioner filed his petition pursuant to sections 322.2615(13) and 322.31, Florida Statutes. The Court has jurisdiction pursuant to Article V, Section 5(b), Florida Constitution and Florida Rule of Appellate Procedure 9.030(c)(3).

I. Factual Background and Procedural History

On March 8, 2021, Deputy Borchardt of the Clay County Sheriff's Office stopped Petitioner for speeding. During the stop, Petitioner attempted to exit his vehicle, and Deputy Borchardt observed Petitioner lose his balance as he exited his vehicle. Suspecting Petitioner was driving under the influence, Deputy Borchardt contacted Deputy Riley of the Clay County Sheriff's Office to conduct a driving under the influence (DUI) investigation.

Prior to Deputy Riley's arrival, Deputy Klidies arrived on the scene. Deputy Klidies however was not involved with the stop, investigation, or arrest, and did not come into contact with Petitioner. Deputy Borchardt estimated it took Deputy Riley approximately fifteen minutes to arrive on the scene. When Deputy Riley made contact with Petitioner, he detected an odor of an alcoholic beverage, and noticed Petitioner had slurred speech and bloodshot, watery eyes. Deputy Riley requested Petitioner submit to field sobriety exercises. Petitioner first agreed to the exercises and poorly completed two exercises. When asked to start the third exercise, Petitioner refused. Thereafter, Deputy Riley placed Petitioner under arrest for DUI and transported Petitioner to the Clay County jail. At the jail, Petitioner did not consent to a breath test. As a result of Petitioner's arrest and refusal to submit to a breath test, Respondent suspended Petitioner's driver's license.

The Petitioner timely requested a formal review of the suspension with the Bureau of Administrative Reviews (BAR). On March 19, 2021, Petitioner received a Notice of Formal Review Hearing from a hearing officer located in Tampa, Florida scheduling his hearing for April 8, 2021. Petitioner sent a letter objecting to the hearing being held in Tampa or any other location, except Jacksonville, which was the closest BAR to where the arrest occurred. Nevertheless, a telephonic formal review hearing with the hearing officer located in Tampa, Florida was held on April 8, 2021, with a continued hearing held by videoconference on June 24, 2021. On July 2, 2021, the hearing officer entered an order upholding the suspension of Petitioner's driver's license.

II. Standard of Review

On certiorari review of an administrative decision, this Court's duty is to determine whether procedural due process was accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent, substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). This Court's duty is not to reweigh evidence or to substitute its judgment for the findings of the hearing officer. *Educ. Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals,* 541 So. 2d 106, 108 (Fla. 1989).

III. Application of Standard of Review to Petitioner's Claims

Petitioner raises two claims upon which he seeks relief. The Court finds that neither claim entitles Petitioner to relief.

A. Location of Hearing

For claim one, Petitioner argues the hearing officer departed from the essential requirements of law and denied him his right to due process when the hearing officer violated the venue restriction imposed under Florida Administrative Code Rule 15A-6.009 requiring his hearing be conducted in Jacksonville. Respondent contends that Petitioner has misinterpreted rule 15A-6.009. Respondent asserts the rule only imposes a venue restriction for in-person hearings, but there are no venue limitations for hearings conduct using communications technology, such as in Petitioner's case. Further, Respondent contends that Executive Orders 20-52 and 21-45 issued by the Governor in response to the COVID-19 pandemic allowed it to suspend any of its rules, if strict compliance of the rule would "prevent hinder, or delay necessary action in coping with the emergency."

> At the time of Petitioner's hearing, rule 15A-6.009 provided that Hearings shall be held at the nearest Department Hearing Office assigned to the county where the arrest occurred or the notice of suspension or disqualification was issued. The Hearing Officer is authorized to conduct all hearings using communications technology approved by the department.

Fla. Admin Code R. 15A-6.009. In 2013, the rule was changed to this verbiage to clarify jurisdiction for hearings at BAR offices and to provide "greater flexibility for Hearing Officers and witnesses to appear telephonically in lieu of personal appearances at BAR offices."

It is arguable that the rule provides the clarity the Department intended when it proposed the change in the rule. The lack of clarity in the rule creates an ambiguity in the rule. As such, the Court gives great deference to the Department's reasonable interpretation of the rule. *See Florida Dept. of Educ. v. Cooper,* 858 So. 2d 394, 396 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2539d] ("[I]f the statutory language is ambiguous, the interpretation given the statute by the agency charged with its enforcement is entitled to great deference and should not be overturned unless it is clearly erroneous. If the agency's interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed." (internal citations omitted)).

Even assuming the rule required a venue restriction for hearings using communications technology, the Department had the authority under the executive orders to suspend its rules in light of the COVID-19 pandemic. The COVID-19 pandemic created a number of challenging issues with many agencies across the State of Florida. The Court will not second guess the Department's decision to forego its rule in order to meet its mandatory statutory obligation of scheduling a hearing within thirty days after a request for a formal review. *See* § 322.2615(6)(a), Fla. Stat. ("If the person whose license was suspended requests a formal review, the department must schedule a hearing within 30 days after such request is received by the department and must notify the person of the date, time, and place of the hearing."). Notably, the Florida statutes do not impose any venue restrictions for formal review hearings. "[I]t can be said that giving greater weight to a rule implemented pursuant to a statute than to the requirements of the statute violates a clearly established principle of law." *Dep't of Highway Safety & Motor Vehicles v. Snelson,* 817 So. 2d 1045, 1048 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1331a].

Moreover, there is no evidence that Petitioner suffered any prejudice. Petitioner had notice and an opportunity to be heard. Petitioner was able to cross-examine witnesses and present his case before the hearing officer. Therefore, to the extent there was any error, that error was harmless.

B. Legality of Arrest

For claim two, Petitioner argues the hearing officer departed from the essential requirements of law and denied him his right to due process because the hearing officer's ruling was not based on competent, substantial evidence. First, Petitioner asserts Deputy Borchardt lacked reasonable suspicion to detain him for a DUI investigation based only on the unlawful speeding and the loss of his balance while exiting his vehicle. Second, Petitioner asserts his detention prior to the DUI investigation was unlawfully prolonged. Petitioner points out that Deputy Borchardt estimated it took Deputy Riley approximately fifteen minutes to arrive on the scene to conduct the DUI investigation. However, Petitioner argues it took Deputy Riley between thirty and forty minutes to arrive. Moreover, Petitioner states that Deputy Klidies arrived on the scene before Deputy Riley and had training in DUI investigations, but did not make contact with him or begin a DUI investigation.

Respondent contends that the unlawful speeding coupled with the observation of Petitioner stumbling out of his vehicle gave rise to a reasonable suspicion to conduct a DUI investigation. Further, Respondent contends that whether it took Deputy Riley fifteen or thirty minutes to arrive on the scene to conduct the investigation, Petitioner's detention was lawful because it was based on reasonable suspicion.

The Court agrees with Respondent and its analysis regarding this issue. The ultimate consideration here was whether Deputy Borchardt had reasonable suspension to detain Petitioner for further investigation. Based on the evidence, Deputy Borchardt had that reasonable suspension to detain Petitioner. As such, the Court finds that the hearing officer had competent, substantial evidence to sustain the suspension of Petitioner's driver's license.

In light of the foregoing, the Court finds that the essential requirements of the law were observed and the Petitioner was accorded procedural due process. Accordingly, it is

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Telephonic oath—Hearing officer did not depart from essential requirements of law by administering oath over telephone—No merit to argument that licensee was deprived of due process because law enforcement failed to forward copy of his driver's license to Department of Highway Safety and Motor Vehicles—Officer's failure to submit material does not affect department's ability to consider evidence submitted at or prior to hearing—Lawfulness of stop—Stop was lawful where deputy observed licensee weaving outside of his lane and making abrupt lane change

ADDISON JOSHUA DIERICKX, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2020-AP-31, Division AP-A. March 18, 2022. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) Petitioner seeks certiorari review of the Department's ruling and raises two arguments for review: (1) The hearing officer departed from the essential requirements from the law and denied Petitioner his right to due process at the hearing; and (2) The Department failed to comply with the essential requirements of the law and failed to afford Petitioner due process when the hearing officer found the Petitioner was lawfully arrested. On certiorari review of an administrative action, the Court's standard of review is "limited to a determination of whether procedural due process was accorded, whether the essential requirements of the law had been observed, and whether the administrative order was supported by competent, substantial evidence." *Dep't of Highway Safety and Motor Vehicles v. Luttrell,* 983 So. 2d 1215, 1217 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1625a]; *see also Dep't of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

The hearing officer found as follows:

> On March 12, 2020, Deputy M. Thompson of the Saint Johns County Sheriff's Office observed a black Dodge traveling southbound on AIA North, which he observed to be weaving outside of its lane. Deputy Thomas observed the vehicle drift from the fog line to the divider line multiple times. Deputy Thompson also observed the vehicle's right tires cross the fog line and enter into the bicycle lane multiple times. As the vehicle approached the intersection of AIA North and Ocean Place, Deputy Thompson observed the vehicle abruptly change lanes from the far right lane to the left turn lane; the vehicle did not slow down as it made the quick lane change. Deputy Thompson activated his emergency lights to conduct a traffic stop on the vehicle due to his concerns that the driver may be ill, tired, or impaired.
>
> After Deputy Thompson activated his emergency lights, the vehicle traveled for approximately another 100 feet before parking in a parking spot at an apartment complex. Deputy Thompson observed that the vehicle was parked at an angle in the parking spot. Deputy Thompson made contact with the driver, subsequently identified a Addison Joshua Dierickx (hereafter referred to as the Petitioner). Upon making contact with the Petitioner, Deputy Thompson detected the strong odor of an alcoholic beverage emitting from the Petitioner's breath. Deputy Thompson also observed that the Petitioner's eyes were watery, bloodshot, and glassy; and his speech was slurred. The Petitioner advised Deputy Thompson that he was driving home [sic] Hoptinger's in Jacksonville Beach, where he worked.
>
> Based on his observations of the Petitioner, Deputy Thompson advised the Petitioner that he was conducting a driving under the influence (DUI) investigation and asked the Petitioner to participate in field sobriety exercises. The Petitioner agreed to participate in the exercises. As the Petitioner exited the vehicle, Deputy Thompson observed that he swayed and appeared unsteady on his feet. During the eye exercises, the Petitioner swayed back and forth and moved his head to follow the stimulus. During the walk-and-turn exercise, the Petitioner could not maintain his balance while in the instructional stage; missed touching heel-to-toe on all steps; stepped off the line;

used his arms for balance; and performed the turn incorrectly. During the one leg stand, the Petitioner swayed; used his arms for balance; hopped; and put his foot down. Additionally, the Petitioner did not count out loud as instructed. During his investigation, Deputy Thompson also observed that the Petitioner's face was flushed and he swayed while standing.

Based on his observations of the Petitioner, Deputy Thompson arrested the Petitioner for DUI. The Petitioner was transported to the county jail. Deputy Thompson read the Petitioner the Implied Consent Warning and requested that he submit to a breath test. The Petitioner refused. Based on the foregoing, I find the Petitioner was lawfully arrested for the offense of DUI.

I

In his first ground for relief, Petitioner argues the hearing officer departed from the essential requirements of the law by administering an oath over the telephone. Petitioner has failed to demonstrate a departure from the essential requirements of the law because Rule 15A-6013 only requires that oral evidence be taken under oath. Next, Petitioner he was deprived of due process when law enforcement failed to forward a copy of his driver's license to the Department. His argument is without merit. Pursuant to section 322.2615(2)(a), Florida Statutes, an officer's failure to submit materials does not affect the Department's ability to consider evidence submitted at or prior to the hearing.

II

In his second ground for relief, Petitioner argues that the initial stop of the Petitioner was unlawful because it was not based on reasonable suspicion or probable cause. Having reviewed the record, the Court finds that the hearing officer's findings were supported by competent, substantial evidence. Accordingly, the Petition is **DENIED**, and the "Motion for Oral Argument" is **DENIED** as **MOOT**. (CHARBULA and SALEM B, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Telephonic oath—Hearing officer did not depart from essential requirements of law by administering oath over telephone—No merit to argument that hearing officer denied licensee due process by sustaining suspension of 18 months— Department of Highway Safety and Motor Vehicles, not hearing officer, determines length of suspension

JAMES E. HIGGINS, IV, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2020-AP-40, Division AP-A. March 18, 2022. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Susan Z. Cohen, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

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

The hearing officer found as follows:

On March 15, 2020, at approximately 1:16 a.m., Officer M. Morrison of the Jacksonville Beach Police Department was standing at 602 1st Street North when he was flagged down in reference to a crash that had just occurred in the 600 block of 1st Street North. Officer Morrison turned around and observed two individuals standing outside of their vehicles in the idle of the road. Officer Morrison observed one of the individuals, subsequently identified as James Higgins (hereafter referred to as the Petitioner), standing in the driver's side doorway of his vehicle. Officer Morrison walked over and made contact with the parties.

Officer Morrison first spoke to Asif Khan, who identified the Petitioner as the driver of the vehicle that struck him. Mr. Khan pointed at the Petitioner and stated, "he hit my car." Mr. Khan indicated to Officer Morrison that the Petitioner had struck Mr. Khan's rear bumper. Officer Morrison observed paint transfer on the rear bumper of Mr. Khan's vehicle. Officer Morrison asked the Petitioner and Mr. Khan for their driver's licenses, registrations, and proofs of insurance. The Petitioner provided his driver's license, but stated that his insurance information was on his phone. After several minutes, Officer Morrison moved closer to the Petitioner to see if he could assist the Petitioner in finding his insurance information since he still had not produced it. At that time, Officer Morrison detected the strong odor of an alcoholic beverage emitting from the Petitioner. While speaking to the Petitioner, Officer Morrison also observed that the Petitioner's eyes were bloodshot and watery; and, his speech was slurred.

Officer Morrison called for a backup officer to respond to assist him, and he asked the Petitioner to walk to a nearby sidewalk. After the backup officer arrived, Office Morrison asked the Petitioner to walk across the street to the sidewalk on the east side of 1st Street North, which was level and had minimal foot traffic. Officer Morrison observed that the Petitioner swayed as he walked across the street and was unable to walk in a straight line. Officer Morrison advised the Petitioner that the crash investigation was over, and he was beginning a driving under the influence (DUI) investigation. Officer Morrison read the Petitioner his Miranda warnings. The Petitioner acknowledged his understanding of his rights, and invoked. Officer Morrison asked the Petitioner to participate in field sobriety exercises, and the Petitioner agreed to do so.

During the eye exercise, the Petitioner swayed and almost lost his balance. During the instructional stage of the walk-and-turn exercise, the Petitioner could not maintain his balance and attempted to start the exercise prior to being instructed to do so. The Petitioner was unable to stand in the instructional position without losing his balance. After the fourth occurrence of the Petitioner losing his balance, Officer Morrison ended the exercise for the Petitioner's safety. During the one-leg stand, the Petitioner used his arms for balance, swayed, and put his foot down during the 0-10 second mark and the 11-20 second mark of the exercise. Officer Morrison ended the exercise early for the Petitioner's safety after he almost fell. During the Rhomberg balance exercise, the Petitioner did not keep his eyes closed and swayed. Officer Morrison again had to end the exercise early for the Petitioner's safety after the Petitioner almost hit the ground, and Officer Morrison had to catch the Petitioner.

During his investigation, Officer Morrison also observed that the Petitioner's face was flushed; and, his eyelids were droopy. Based on the totality of the circumstances, Officer Morrison arrested the Petitioner for DUI and transported him to the Duval County Jail. Once there, Office Morrison made contact with Officer C. Dinkins of the Jacksonville Sheriff's Office, and requested that Officer Dinkins administer a breath test to the Petitioner. Officer Dinkins made contact with the Petitioner and requested that he submit to a breath test. The Petitioner refused. Officer Dinkins read the Petitioner the Implied Consent Warning, and again requested that the Petitioner submit to a breath test. The Petitioner still refused to submit to the requested test. Officer Morrison then check[ed] (sic) the Petitioner's record through the Driver and Vehicle Information Database (DAVID), and determined that the Petitioner had two prior refusals from February 23, 2013, and August 16, 2013. Officer Morrison then additionally

charged the Petitioner with refusal to submit to a breath, urine, or blood test.

I

In his first ground for relief, Petitioner argues the hearing officer departed from the essential requirements of the law by administering an oath over the telephone. Petitioner has failed to demonstrate a departure from the essential requirements of the law because Rule 15A-6013 only requires that oral evidence be taken under oath.

II

In his second ground for relief, Petitioner argues he was denied procedural due process when the hearing officer sustained a suspension of eighteen months. His argument is without merit because the Department, not the hearing officer, determines the length of the suspension. §322.2615(8), Fla. Stat. (2013). The scope of the hearing officer's review is limited to the following three issues:

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

2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended was told if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year, or in the case of a second or subsequent refusal, for a period of 18 months.

Id. at (7). In this case, the hearing officer's findings were supported by competent, substantial evidence. Accordingly, the "Petition for Writ of Certiorari" is **DENIED**, and the "Motion for Oral Argument" is **DENIED** as **MOOT**. (CHARBULA and SALEM, JJ., concur.)

* * *

Criminal law—Defendants—Competency—Involuntary commitment of defendants found incompetent to proceed—Mandamus petition filed by public defender to compel Department of Children and Families to comply with its statutory duties—Authority—Challenge—Quo warranto—Petition for writ of quo warranto filed by Department challenging authority of public defender to file petitions for writ of mandamus seeking to compel department to comply with its duties regarding timely transport of incompetent prisoners who meet criteria for involuntary hospitalization to state treatment facilities, is denied—Public defender is authorized to file petitions for writ of mandamus where petitions are filed on behalf of defendants charged with felonies, petitions are filed under Florida Constitution and Rules of Appellate Procedure, not Rules of Civil Procedure, and petitions are filed on behalf of defendants whose liberty interests are at stake

STATE OF FLORIDA, DEPARTMENT OF CHILDREN AND FAMILIES, Petitioner, v. CHARLIE COFER, in his Official Capacity as the Public Defender for the Fourth Judicial Circuit, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 2021-AP-13, Division AP-A. March 10, 2022. Counsel: Andrew J. McGinley, General Counsel DCF, and SaVannah J. Reading, Assistant General Counsel DCF, Tallahassee, for Petitioner. Charlie Cofer, Pro se (assisted by Elizabeth H. Webb, Assistant Public Defender, Jacksonville), Respondent.

ORDER DENYING THE PETITION FOR WRIT OF QUO WARRANTO

(MEREDITH CHARBULA, J.) On November 30, 2021, the Department of Children and Families (hereinafter the "Department") filed a petition for writ of quo warranto.[1] In its petition, the Department alleged the elected Public Defender for the Fourth Judicial Circuit, Charlie Cofer, is improperly exercising his power derived from the legislature. Specifically, the Department challenges the Public Defender's authority to bring petitions for writ of mandamus seeking to compel the Department to comply with its duties under Chapter 916, Florida Statutes.

The dispute between the Department and the Public Defender centers around the delay in transporting criminal defendants, deemed incompetent and meeting the criteria for involuntary hospitalization, to a state forensic facility for treatment and competency restoration training. Neither side disputes that there has been extraordinary delay in transporting incompetent defendants from the Duval County Jail to designated state treatment facilities. The Department says it can't and the Public Defender says it can but won't.[2]

A. ***Law generally governing Quo Warranto petitions***

The Florida Constitution authorizes circuit courts to issue writs of quo warranto. *See Article V, §§ 5(b), Fla. Const.* The term "quo warranto" means "by what authority. " A petition for a writ of quo warranto is the proper mechanism for inquiring into whether a state officer or state agency has improperly exercised a power or right derived from the State. *Fla. House of Representatives v. Crist,* 999 So.2d 601, 607 (Fla. 2008) [33 Fla. L. Weekly S437a].

There is no dispute that the Public Defender is a state officer. Nor is there any dispute that the Office of the Public Defender is a state agency. Likewise, there is no dispute the Public Defender has already acted by filing numerous petitions for writs of mandamus seeking to compel the Department to comply with its statutory duty to timely transport and provide treatment for incompetent defendants who require hospitalization to restore them to competency. *See League of Women Voters v. Scott,* 232 So.3d 264 (Fla. 2017) [42 Fla. L. Weekly S965a] (petitions for quo warranto only appropriate after the official has acted).

B. ***The Root of the Problem***

As set forth in the Department's Petition, there have been many criminal defendants in this circuit who have been determined to be both incompetent to proceed and to meet the criteria for involuntary hospitalization. Most of these defendants are represented by the Office of the Public Defender.

When the trial court determines a criminal defendant is incompetent to proceed and meets the criteria for involuntary hospitalization, the procedure is supposed to work as follows:

(1) The trial court enters a written order adjudicating the Defendant incompetent to proceed and committing the Defendant to the Department's custody for treatment and, hopefully, restoration of competency.

(2) A commitment package is prepared by the Clerk of the Court which includes the commitment order, copies of the expert's report(s) filed with the Court, copies of any other mental health reports filed with the court, and copies of the charging instrument along with any supporting affidavits or documents used in the determination of probable cause.[3] *See Rule 3.212(3), Florida Rules of Criminal Procedure.* Additionally, the sending jail facility must provide the Defendant's medical reports to the Department to round out the commitment package. *See s. 916.13(2)(a), Florida Statutes.*

(3) Within 15 days of receiving the completed commitment package, the Department must designate a facility at which the Defendant is to be treated and the Defendant must be transported to the designated facility for "appropriate training and treatment." *See s. 916.107(1), Florida Statutes* (authorizing a jail to be used be used as an emergency facility for up to 15 days after the Department receives a completed commitment package).

But this is not what has been happening. Instead, incompetent defendants are waiting in jail well past the 15 days designation/transportation period because the Department says it does not have the funding, the beds, or the staff to accommodate some 400 inmates, statewide, who are waiting for the Department to designate a treatment facility so that the Sheriff may transport the Defendant to that facility.

One example of this delay is in a case pending before this trial judge in Division CR-C (J.C). On November 16, 2021, J.C. was adjudicated incompetent to proceed and found to meet the criteria for involuntary hospitalization. A written order was entered on November 23, 2021. (2019-CF-12719). As of March 9, 2022, the Department has not designated a treatment facility. As a result, the Defendant has not been transported to a forensic medical facility for treatment and competency restoration training. Rather, he sits in jail in limbo. The criminal case against him cannot proceed because he is incompetent, and he cannot be treated or receive competency restoration training until the Department designates a medical facility to which he can be transported. Many others, like J.C., are in the same boat.[4]

C. ***The Issue before the Court***

The Department challenges the authority of the Public Defender to file the many petitions for writs of mandamus that the Public Defender has already filed. The Department avers the Public Defender cannot file these petitions because they are in civil in nature and, as such, section 27.51, Florida Statutes, specifically prohibits the Public Defender from filing these civil actions.[5]

In particular, the Department points to section 27.51(1)(d), Florida Statutes. This statute prohibits the Public Defender from representing any plaintiff in a civil action brought under the Florida Rules of Civil Procedure, the Federal Rules of Civil Procedure, any federal statute, or in any rule challenge under chapter 120, unless specifically authorized by law. The Department points to the fact that a petition for writ of mandamus may only be filed in state court pursuant to the Florida Rules of Civil Procedure because there is no criminal rule of procedure permitting such a filing.

The Public Defender counters that the statute upon which the Department relies does not apply because he is not filing these mandamus actions under the Rules of Civil Procedure. Rather, he is filing them pursuant to Florida's Rules of Appellate Procedure. The Public Defender also offers that he is authorized to file these actions, in any event, because section. 27. 51(1)(a), Florida Statutes, authorizes him to represent persons charged with a felony and all of the Defendants on whose behalf the Public Defender have filed mandamus petitions for are charged with a felony. And not only that, all of the defendants are incarcerated.

The Public Defender also cites to s. 27.51(1)(d), Florida Statutes. This statute allows the Public Defender to represent an indigent person against whom the State seeks an order involuntarily committing him as a mentally ill person under part I of chapter 394, involuntarily committing him as sexually violent predator under part V of chapter 394, or involuntarily admitting him to residential services as a person with developmental disabilities under chapter 393. *s. 27.51(1)(d), Florida Statutes.* The Public Defender points out that certain incompetent criminal defendants are entitled, by law, to the same rights as persons committed to civil and residential treatment facilities. *See s. 916.017(1)(b). Florida Statutes.*[6] The Public Defender argues that reading these two statutes together, this Court could conclude the Legislature intended to allow the Public Defendant to represent mentally ill incompetent Defendants in all aspects of their case, including the filing of mandamus petitions.

Initially, this Court declines to go beyond the plain language of the statute. This Court will not add language to s. 27.51(1)(d), Florida Statutes, to include a class of indigent persons to the list of those whom the statute plainly and unambiguously authorizes the Public Defender to represent. This is so for two reasons.

First, a trial judge is not at liberty to add language to a statute. That job is delegated to the legislature, not to the courts. *Holly v. Auld,* 450 So.2d 217 (Fla.1984) (noting that courts lack power to construe clear statute to extend, modify, or limit, express terms or reasonable and obvious implications; to do so would be abrogation of legislative power). *See also Limbaugh v. State,* 887 So.2d 387, 395 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2213a] (in construing statutes, judges are not free to add or delete provisions from plain statutory text). And second, even if the Court were inclined to interpret the two statutes together as suggested by the Public Defender, which it isn't, there is no need to do so.

Section 27.51(1)(a), Florida Statutes, is clear and unambiguous. The Public Defender is specifically authorized by law to represent indigent persons charged with a felony. Each of the defendants for whom the Public Defender has sought mandamus has been charged with one or more felonies.

Moreover, the Court rejects the Department's suggestion the Public Defender is necessarily filing these actions pursuant to Florida's Rules of Civil Procedure because there is no parallel rule of criminal procedure authorizing mandamus actions. On the face of the petitions, the Public Defender is not filing these actions under the Rules of Civil Procedure. Rather, the Public Defender has filed his petitions pursuant to Florida's Constitution and Florida's Rules of Appellate Procedure.

Additionally, to the extent the Department claims the Public Defender may only represent Defendants whose liberty interests are at stake, this Court finds that the liberty interests of every waiting and incarcerated defendant are most certainly at stake.[7] Criminal proceedings cannot proceed while a defendant is incompetent. To do so would be a violation of defendant's Due Process rights. It is reasonable to conclude—indeed it is unreasonable to conclude otherwise—that a defendant will not be restored to competency until after he is transported to a forensic medical facility and provided treatment and competency restoration training. As such, extraordinary delay in transporting incompetent criminal defendants to a designated forensic medical facility for treatment and competency restoration training most certainly implicates a defendant's liberty interests in resolving his criminal case fairly and expeditiously. *See Peters v. State,* 984 So.2d 1227, 1233 (Fla. 2008) [33 Fla. L. Weekly S273a] (recognizing the absolute liberty interest a criminal defendant enjoys prior to trial). *See also Crist v. Florida Association of Criminal Def. Lawyers Inc.*, 978 So.2d 134, 140 (Fla. 2008) [33 Fla. L. Weekly S172c] (noting that s.27.51, Florida Statutes, sets forth the duties of the public defender, one of which is to represent indigent persons who face possible loss of liberty).

During the hearing on the Department's petition for writ of quo warranto, this Court was absolutely convinced that counsel for the Department is committed to solving a serious problem that is adversely impacting defendants and trial courts throughout the State of Florida. But counsel also admitted that the reason the Department has brought this action against the Public Defender in this Circuit is because he has become an unyielding thorn in the Department's side. The Department would like this Court to pull that thorn out. The Court respectfully declines to do so.

Having concluded that the Public Defendant is authorized to represent each of their indigent clients in these mandamus proceedings, the Department's petition for writ of quo warranto is **DENIED.**

---

[1]The petition was originally filed in the First District Court of Appeal on November 1, 2021. The 1st DCA remanded the petition to this Court. The Clerk of our Court docketed the petition on November 30, 2021.

[2]This Court, at the request of the Department, held a hearing on the petition in both its appellate capacity and in its role presiding over cases in which an incompetent Defendant is still waiting transport. The positions of the parties set forth in this order is not intended to be a verbatim recitation of their respective arguments. Rather, it is the Court's interpretation of them, in context, considering the pleadings, documents, and oral argument.

[3]Preparation of the commitment package takes generally 1-3 business days.

[4]The Department has also credibly offered that some 100 defendants statewide have

been determined to be competent and are awaiting transport back to their sending circuits. Only two or possibly three of these, however, are from Duval County. Freeing these 100 beds statewide will certainly help with the backlog.

[5]The Public Defender seeks one thing and one thing only, timely designation of a treatment facility and transportation to that facility for treatment and competency restoration. The Public Defender does not seek any kind of other relief typically seen in civil actions (e.g. damages, declaratory relief, injunctive relief, or attorney's fees).

[6]Defendants waiting transportation to forensic facilities are not included in that category.

[7]The Department has pointed to a motion and order from Fort Lauderdale where the same, or similar, issue was before the trial court. Indeed, the Department included these in an Appendix to the Petition for Writ of Quo Warranto. Counsel for a hospital against whom the Public Defender's Office sought an order of contempt argued the Public Defender was prohibited from seeking such an order because it could only represent defendants whose liberty interests are at stake. The circuit judge there agreed and ruled for the Hospital.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Citizen informant—Officer responding to 911 call from employee of fast food restaurant regarding suspected drunk driver in drive-through area had reasonable suspicion to conduct investigatory stop based on tip from citizen informant—Officer had probable cause for arrest based on informant's report; officer's observations of licensee's bloodshot eyes and odor of alcohol; fact that licensee was unsteady on his feet and argumentative and admitted that he was impaired; and results of HGN test

BRETT MYERS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for St. Johns County. Case No. CA22-129, Division 55. April 1, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(HOWARD MASON MALTZ, J.) Petitioner Brett Myers seeks review of the "Findings of Fact, Conclusions of Law and Decision" of the hearing officer of the Bureau of Administrative Review, Florida Department of Highway Safety and Motor Vehicles ("Department") entered on January 14, 2022. The decision of the hearing officer affirmed the suspension of Petitioner's driving privilege. This Court, having considered the briefs of the parties, finds as follows:

Petitioner was arrested by Officer B.R. Camp of the Green Cove Springs Police Department for driving under the influence of alcohol ("DUI") on November 13, 2021. Following his arrest, Petitioner was advised of his Implied Consent warning, including the sanctions for refusing to submit to an approved breath alcohol test. After being so advised, Petitioner refused to submit to a breath test. Petitioner was issued a citation for DUI and his driving privilege was immediately suspended pursuant to Fla. Stat. § 322.2615, for refusing to submit to a breath alcohol test.

As permitted by Fla. Stat. § 322.2615(6), Petitioner requested a formal review of his driver's license suspension. A formal review hearing was held by a hearing officer employed by the Department. The following documents were entered into the record at the formal review hearing:

1. Petitioner's Florida Driver's License
2. Florida DUI Uniform Traffic Citation #AEWR73E
3. Clay County Sheriff's Office Adult Arrest Report
4. Green Cove Springs Police Dept. Alcohol Influence Report
5. Sworn Statement of Joseph Chillingworth
6. Sworn Statement of Sean Chillingworth
7. Clay County Sheriff's Office Intoxilyzer Observation Form
8. Clay County Sheriff's Office Intoxilyzer Observation Notes
9. FDLE Breath Alcohol Test Affidavit
10. Implied Consent Form
11. Affidavit of Refusal to Submit to Breath and/or Urine Test
12. Green Cove Springs Police Dept. Vehicle Inventory/Tow Sheet

At the formal review hearing, Petitioner sought to invalidate the administrative suspension of his driver's license. On January 14, 2022, the hearing officer issued an order affirming the suspension of Petitioner's driving privilege. This Petition for Writ of Certiorari followed.

Jurisdiction

Pursuant to Fla. State. §§ 322.2615(13) and 322.31, Petitioner seeks review of the hearing officer's order affirming the suspension of his driving privilege. This Court has jurisdiction to consider the Petition for Writ of Certiorari, pursuant to Rule 9.030(c)(3), Fla. R. App. P.[1]

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (i) whether procedural due process was accorded; (ii) whether the essential requirements of law were observed; and (iii) whether the administrative findings and judgment are supported by competent, substantial evidence. *Fla. Dep't. of Highway Safety & Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *Id.* The competent, substantial evidence standard requires the Court to defer to the hearing officer's findings of fact, unless there is no competent evidence of any substance, in light of the record as a whole, that supports the findings. *Fla. Dep't. of Highway Safety & Motor Vehicles v. Hirtzel,* 163 So.3d 527, 529 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D1107a]. The Court's certiorari review power does not allow the Court to direct the lower tribunal to take any action, but rather, is limited to the Court quashing the order being reviewed. *See Tynan v. Fla. Dep't. of Highway Safety & Motor Vehicles,* 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a].

Analysis

In the case of a person whose driving privilege is suspended for refusal to submit to a breath alcohol test, the hearing officer's scope of review is limited to:

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

Fla. Stat. § 322.2615(7)(b).

The issue before the hearing officer at the formal review hearing was whether there was probable cause for Petitioner's arrest. A person's driver's license may only be suspended pursuant to the Implied Consent law, if they refused a breath test request made following a lawful arrest. *See* Fla. Stat. § 316.1932(1)(a)1.a; *Fla. Dep't of Highway Safety & Motor Vehicles v. Pelham,* 979 So. 2d 304, 305-06 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D765a] ("a lawful arrest must precede the administration of the breath test"); *Fla. Dep't. of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070, 1075 (Fla. 2011) [36 Fla. L. Weekly S654a]. Thus, the issue before this Court is whether there was competent, substantial evidence to support the hearing officer's Findings of Fact, Conclusions or Law and Decision that determined probable cause existed for the Petitioner's arrest.

The facts adduced at the formal review hearing revealed that

Petitioner was operating his motor vehicle in the drive-through of a McDonald's restaurant on the evening of November 13, 2021. Based on Petitioner's behavior, a McDonald's employee called 911 to report an intoxicated driver in the drive-through. Officer B.R. Camp of the Green Cove Springs Police Department was dispatched to the McDonald's restaurant and arrived soon thereafter. Upon his arrival at the McDonald's restaurant, Officer Camp observed Petitioner's vehicle in the drive-through area, which matched the description provided to police by the caller. Officer Camp parked his police car in a parking spot, which did not block Petitioner's vehicle. Officer Camp walked up to Petitioner's car and waived for Petitioner, who was in the driver's seat, to roll the window down. Officer Camp testified that Petitioner was free to go at this point and didn't need to roll the window down if he desired; however, Petitioner did in fact lower his window. At that point, Petitioner and Officer Camp "exchanged pleasantries." Officer Camp detected a "substantial" odor of an alcoholic beverage emanating from Petitioner, and observed that Petitioner had bloodshot, watery eyes, and slurred speech. Officer Camp then asked Petitioner if he had anything to drink to which Petitioner answered affirmatively. Officer Camp advised Petitioner that he received a report of a drunk driver in the drive-through, and Petitioner replied that was not driving. Officer Camp eventually asked Petitioner to exit the vehicle.

Officer Camp testified that up until the point he requested Petitioner to exit the vehicle, he considered his encounter to be consensual. Police do not need any type of reasonable suspicion in order to conduct a consensual encounter. *See Popple v. State,* 626 So.2d 185, 186 (Fla. 1993). Petitioner takes issue with whether the initial encounter was consensual. This Court need not make a determination of whether the initial interaction was consensual because Officer Camp was entitled to conduct an investigatory stop and detain Petitioner from the outset of their contact. The facts of the instant case are nearly identical to those in *State v. Evans,* 692 So.2d 216 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1084b]. In *Evans,* as in the instant case, the Defendant was in a drive-through at a McDonald's restaurant when the manager, believing the Defendant was intoxicated, phoned 911 to report a suspected drunk driver. As was the case here, the caller in *Evans,* likewise provided her name, and a description of the vehicle. The responding police officer arrived at the McDonald's restaurant, observed a vehicle matching the description and initiated a traffic stop. After stopping the vehicle, the officer observed signs of impairment similar to that present in the instant case—odor of an alcoholic beverage and mumbled speech. After having the Defendant perform field sobriety exercises, the officer arrested the Defendant. The Court reversed the trial court's granting of a motion to suppress. The Court explained that the McDonald's manager, under the circumstances, was a "citizen informant" reporting the suspected drunk driver. As such, the Court concluded that the responding officer had reasonable suspicion to conduct an investigatory stop. Similarly, in the instant case, based on the totality of the circumstances presented, Officer Camp had reasonable suspicion to conduct an investigatory stop and detention of Petitioner. The fact Officer Camp called it a consensual encounter is of no moment.

While Petitioner was still seated in his car, Officer Camp asked Petitioner if he was willing to perform field sobriety exercises. Petitioner indicated that he would not perform field sobriety exercises. Officer Camp advised Petitioner that the refusal to perform the field sobriety exercises could be used against him, and if he persisted in his refusal, Officer Camp would have to make the determination of whether to arrest Petitioner based only on their interaction up to that point. Petitioner again refused Officer Camp's offer to perform field sobriety exercises. Officer Camp then asked Petitioner to exit his vehicle. Petitioner initially refused to get of his car; however, after several minutes he eventually exited the vehicle, at which time Officer Camp noted Petitioner was unsteady on his feet. Upon exiting the vehicle, Officer Camp advised Petitioner he was under arrest, handcuffed him, and advised him of his *Miranda* warnings.[2]

At that point, Petitioner inquired of Officer Camp why he was being detained. Officer Camp advised Petitioner that he felt Petitioner was too impaired to drive. Petitioner responded by acknowledging he was impaired but not drunk. Petitioner advised Officer Camp that he was willing to perform the field sobriety exercises. Officer Camp performed the Horizontal Gaze Nystagmus ("HGN") test, upon which Petitioner showed signs of impairment. Based on Petitioner's argumentativeness, Officer Camp decided to not perform any further field sobriety exercises. Officer Camp then transported Petitioner to the Clay County Jail where Petitioner subsequently refused to provide a breath alcohol sample.

After Petitioner was lawfully detained based on reasonable suspicion, as discussed above, Officer Camp developed probable cause to arrest Petitioner for DUI. Considering the totality of the circumstances, including the report from the McDonald's employee of an intoxicated driver in the drive-through, Petitioner's blood shot eyes, the odor of an alcoholic beverage on his breath, his argumentative nature, the initial refusal to refusal to perform field sobriety exercises, unsteadiness on his feet, an admission that he was impaired, and indicia of impairment on the HGN test, Officer Camp clearly had probable cause to arrest Petitioner. *See Stone v. State,* 856 So.2d 1109, 1111 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2415a] (Probable cause exists "where the facts and circumstances within the officer's knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in belief that an offense has been committed"); *State v. Riehl,* 504 So.2d 798, 800 (Fla. 2d DCA 1987)("All an officer needs in order to make an arrest is probable cause to believe the suspect is committing or has committed a crime . . . evaluated from the viewpoint of a prudent cautious police officer on the scene at the time of the arrest"); *Fla. Dep't. of Highway Safety & Motor Vehicles v. Possati,* 866 So.2d 737, 740 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a] ("Probable cause for a DUI arrest must arise from the facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system.")

Petitioner seeks to have this Court weigh the credibility of Officer Camp's testimony. For example, Petitioner challenges Officer Camp's testimony that he had slurred speech, because the McDonald's employee testified he could understand Petitioner over the drive-through speaker, or whether Officer Camp could see Petitioner's eyes when he first made contact with him. It is not this Court's function on first-tier certiorari review to weigh the credibility of witnesses—such is the job of the hearing officer. *Hirtzel,* 163 So.3d at 531 (it is not the job of the circuit court on first-tier certiorari review to reweigh the evidence before the hearing officer) *citing Fla. Dep 't. of Highway. Safety & Motor Vehicles v. Favino,* 667 So.2d 305 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D2222a]. It is only this Court's function to determine whether competent, substantial evidence exists to support the hearing officer's findings. *Id.* Thus, the arguments made by Petitioner to this Court challenging Officer Camp's credibility before the hearing officer are without merit.

There was competent, substantial evidence before the hearing officer to support the conclusion Petitioner had been lawfully arrested. Thus, Petitioner was properly requested to provide a breath alcohol sample, and his refusal to do so properly resulted in suspension of his driving privilege. Accordingly, the hearing officer's Findings of Fact, Conclusions of Law and Decision is supported by competent, substantial evidence.

Therefore, it is ORDERED AND ADJUDGED that:

The Petitioner for Writ of Certiorari is hereby DENIED.

[1]Fla. Stat. § 322.2615(13) permits this Petition for Writ of Certiorari to be filed in the county where Petitioner resides. The record conclusively establishes Petitioner resides in St. Johns County.

[2]*Miranda v. Arizona,* 384 U.S. 436 (1966).

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of stop—Erratic driving pattern—Officer's observation of licensee's vehicle weaving within lane and touching lane dividers for distance of several blocks provided valid basis for traffic stop—No merit to argument that, in absence of traffic infraction, stopping officer must articulate suspicion that driver is ill, tired, or impaired to effect lawful stop

DAVID COFFEE, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-4479, Division I. March 8, 2022. Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Petitioner. Roberto R. Castillo, Former Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

AMENDED ORDER DENYING PETITION FOR WRIT OF CERTIORARI[1]

(PAUL L. HUEY, J.) This matter is before the Court on Petition for Writ of Certiorari filed May 28, 2021. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat.; Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for his refusal to submit to a breath test to determine his breath-alcohol level. Petitioner contends that the Department lacked the competent, substantial evidence necessary to find that Petitioner was lawfully arrested because the hearing officer relied solely upon the arrest report, which did not articulate the arresting officer's subjective purpose in initiating the traffic stop that gave rise to Petitioner's arrest. Upon review of the petition, response, reply, appendices, and relevant case law, the Court finds that where law enforcement documented a consistent account of their observations leading up to the traffic stop, the hearing officer did not err in relying on that documentation as competent, substantial evidence of a lawful traffic stop.

JURISDICTION AND STANDARD OF REVIEW

A decision by the Department to uphold or invalidate a suspension may be reviewed by a petition for writ of certiorari to the circuit court in the county in which formal or informal review was conducted. §§ 322.31; 322.2615(13), Fla. Stat. This Court, therefore, has jurisdiction to review the Department's decision in this case. This review is not de novo. §322.2615(13), Fla. Stat. Rather, the Court reviews the administrative decision to determine whether Petitioner received procedural due process, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The Court may not reweigh the evidence contained in the record. *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a].

FACTS AND PROCEDURAL HISTORY

On March 19, 2021, Officer Baar of the Tampa Police Department observed Petitioner's vehicle weaving within its lane, touching the lines that divide the lanes, and continuing to do so for a distance of several blocks. He initiated a traffic stop and asked Petitioner the reason for the vehicle's weaving. During the encounter, Officer Baar observed several indicators of alcohol consumption, including watery and bloodshot eyes, slurred speech, a strong odor of alcohol, and an unsteady walk. Officer Baar then requested that Petitioner participate in Field Sobriety Exercises (FSEs). Petitioner complied but performed them poorly. Petitioner was arrested and transported to Central Breath Testing where he was asked to submit to a breath test to determine his blood alcohol level. He refused. As a result of his refusal, Petitioner's driving privilege was administratively suspended.

A formal review hearing of the administrative suspension was held April 22, 2021. When reviewing a suspension that is the result of a driver's refusal to submit to testing, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, whether Petitioner refused to submit to any such test after being requested to do so by law enforcement, and whether Petitioner was told that if he refused to submit to such test his privilege to drive a vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. §322.2615(7)(b), Fla. Stat. In addition, the Department may not suspend a driver's license for refusal to submit to a breath test if the refusal is not incident to a lawful arrest. *Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1080 (Fla. 2011) [36 Fla. L. Weekly S243a]; *Arenas v. Dep't of Highway Safety & Motor Vehicles*, 90 So. 3d 828, 832 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1024a].

DISCUSSION

Petitioner contends that no competent, substantial evidence supports the Department's finding that Petitioner was lawfully stopped by law enforcement, relying primarily upon *Dobrin v. Dep't of Highway Safety & Motor Vehicles*, 874 So. 2d 1171 (Fla. 2004) [29 Fla. L. Weekly S275a]. Specifically, Petitioner argues that, when there is no allegation of a traffic infraction, law enforcement is required to articulate a belief or suspicion that Petitioner was ill, tired, or impaired in order to effect a lawful traffic stop.

Dobrin is distinguishable. In *Dobrin,* the driver was stopped and ticketed for failure to maintain a single lane, but there was no evidence of his car actually going beyond one lane. *Dobrin*, 874 So. 2d at 1172. The Department in *Dobrin* argued before the circuit court that the officer *would have been* justified in stopping the petitioner for speeding, or alternatively to determine the petitioner's state of wellbeing, because the officer observed the vehicle driving above the speed limit and weaving within the lane, despite the fact that neither speeding nor the petitioner's wellbeing were given as reasons for the stop in the arrest report. *Id.* The circuit court rejected these alternative arguments because failure to maintain a single lane was the only reason for stopping Dobrin's vehicle given in the arrest report. *Id.* at 1174. The Florida Supreme Court reinstated the circuit court's decision to quash the suspension, because where there was no evidence that the car went beyond its lane of travel, no facts provided an objective basis to stop the vehicle for failure to maintain a single lane. That rendered the stop unlawful. *Id.* at 1172, 1175.

In contrast, here, the articulated basis for the stop was that Petitioner was weaving within the travel lane and that Petitioner's vehicle was "touching the lane dividers" for a distance of several blocks. Erratic driving can form the basis for a valid traffic stop where law enforcement seeks to determine the cause of the vehicle's unusual operation. *Bailey v. State*, 319 So. 2d 22, 26 (Fla. 1975); *Dep't of Highway Safety & Motor Vehicles v. DeShong*, 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (citing *State v. Carrillo*, 506 So. 2d 495 (Fla. 5th DCA 1987) (where driver was weaving within the lane)). It need not rise to the level of a traffic violation. *DeShong,* 603 So. 2d at 1352. The facts articulated for the stop here provide specific support for the conclusion that Petitioner's vehicle was weaving, and the hearing officer could properly rely on them. *Dobrin* does not require law enforcement to articulate a suspicion that the driver was ill, tired, or impaired to effect a lawful traffic stop in the absence of an infraction.

Dobrin, 874 So. 2d at 1174. It simply requires that objective evidence support the articulated basis for the stop. *Id.*; *see also Patel v. Dep't of Highway Safety & Motor Vehicles*, 12 Fla. L. Weekly Supp. 997a (Fla. 3d Jud. Cir., Aug 18, 2005).

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

---

[1]This order is amended to correct a scrivener's error. The result is unchanged and does not extend the time to seek review.

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Lawfulness of breath test—The arrest preceding a breath test need not be an arrest for DUI where probable cause for DUI arrest existed—Finding that licensee was observed for twenty minutes prior to breath test was supported by competent substantial evidence, including testimony and documents—Hearings—Failure of witness to bring subpoenaed documents—Statute requiring Department of Highway Safety and Motor Vehicles to invalidate suspension in some cases if breath test operator fails to appear for hearing does not require invalidation where operator appears without subpoenaed documents—Further, licensee's failure to enforce subpoena and his rejection of opportunity to subpoena operator to appear at subsequent hearing waived his entitlement to relief for any due process violation

GONZALO NOVOA, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-3080, Division B. April 5, 2022. Counsel: Keeley R. Karatinos, Mander Law Group, Dade City, for Petitioner. Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING
PETITION FOR WRIT OF CERTIORARI

(MARK WOLFE, J.) This matter is before the Court on Amended Petition for Writ of Certiorari filed April 21, 2021 (Doc. 9). The petition, originally filed April 9, 2021 is timely, and this court has jurisdiction. §322.31, Fla. Stat.; Rules 9.100(c)(2), and 9.030(c)(3), Fla. R. App. P. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for his unlawful breath-alcohol level. Petitioner contends that: 1. the Department departed from the essential requirements of the law in upholding the suspension because Petitioner's breath samples were requested after Petitioner was arrested for Resisting Arrest Without Violence; 2. the Department lacked competent, substantial evidence to find that the breath tests were administered properly, and; 3. the Department violated Petitioner's right to due process and departed from the essential requirements of the law when it denied Petitioner's motion to invalidate because the breath test operator provided testimony telephonically and failed to provide subpoenaed documents. Upon review of the petition, response, appendices, and relevant case law, the Court finds that: 1. the Department did not depart from the essential requirements of the law because the arrest preceding a breath test is not required to be for DUI where there is cause for a DUI arrest; 2. the Department relied on competent, substantial evidence in the form of testimony and self-authenticating documents demonstrating substantial compliance with the rules for administering breath tests, and; 3. the Department did not violate Petitioner's right to due process when it denied Petitioner's motion to invalidate because the invalidation requirement for failure to appear by the breath test operator does not apply to the duces tecum portion of a subpoena.

STANDARD OF REVIEW

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

FACTS AND PROCEDURAL HISTORY

On December 27, 2020, Officer Raines of the Lake Wales Police Department responded to a restaurant parking lot in response to a report about a possible drunk driver. Upon making contact with Petitioner, Officer Raines observed Petitioner sitting in the driver's seat of his vehicle with the keys in the ignition. Officer Raines also observed that Petitioner displayed multiple indicators of intoxication, including slurred speech, an odor of alcohol, and failure to maintain his balance after exiting the vehicle. Petitioner attempted to get back into his vehicle multiple times after being told that he could not reenter the vehicle. Petitioner also placed his hands in his pockets several times after being instructed to keep his hands out and that he would be handcuffed if he made another attempt. After Petitioner's last attempt to put his hands in his pockets, Officer Raines began to place Petitioner in handcuffs and Petitioner resisted. Petitioner was placed under arrest for resisting without violence and taken to the Lake Wales Police Department to perform Field Sobriety Tests (FSTs). Petitioner displayed additional signs of impairment during the FSTs and provided two breath samples with results of 0.135 and 0.133 g/210L. Petitioner was ultimately charged with driving under the influence and resisting without violence.

A formal review hearing of the administrative suspension was held February 4, 2021 and March 1, 2021. When reviewing a suspension that is the result of a driver's unlawful breath-alcohol level, the hearing officer is to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, and whether Petitioner had a breath alcohol level of 0.08 or higher. § 322.2615(7)(a), Fla. Stat. The hearing officer determined that law enforcement had probable cause, Petitioner was placed under lawful arrest for DUI, and Petitioner's breath-alcohol level was above 0.08.

The breath test operator, Deputy Martinez, appeared pursuant to a subpoena duces tecum and gave testimony at the February 4 hearing, but did not provide all of the duces tecum documents prior to the hearing. Deputy Martinez testified that the documents at issue were not in her possession and that she would need to obtain them from the agency inspector. At the conclusion of the hearing, the hearing officer stated that he would allow another subpoena if Petitioner still wished to obtain the documents.

DISCUSSION

Petitioner first contends that the Department departed from the essential requirements of law in finding that Petitioner's breath sample was incidental to a lawful arrest. Specifically, Petitioner argues that because Petitioner was no longer in control of a motor vehicle when he was arrested for resisting without violence, the samples were not taken in accordance with § 316.1932(1)(a)(1)(a), Fla. Stat.

Section 316.1932(1)(a)(1)(a) states in pertinent part that the "breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages." Although Petitioner was initially arrested for resisting without violence and later charged with DUI, the hearing

officer determined that where Petitioner was behind the wheel of his vehicle with the keys in the ignition, smelled of alcohol, admitted drinking and feeling intoxicated, failed to follow instructions, and was unsteady on his feet, competent, substantial evidence supported Petitioner was in actual physical control of the vehicle and under the influence of alcohol at the outset of the investigation leading up to the arrest. *Griffin v. State*, 457 So. 2d 1070, 1071 (Fla. 2d DCA 1984) (finding that a person occupying the driver's seat of a vehicle with the keys in the ignition has actual physical control of the vehicle).

The hearing officer applied the correct law after considering Petitioner's argument and thus did not depart from the essential requirements of the law with regard to Petitioner's arrest and breath samples. *DHSMV v. Whitley*, 846 So.2d 1163, 1167 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] (finding that the statute requires that a lawful arrest precede a breath test, but that the arrest need not be for DUI if there was cause for a DUI arrest at the time).

Petitioner next contends that the Department lacked competent, substantial evidence that Petitioner was observed for 20 minutes prior to providing breath samples because Petitioner was not observed by the breath test operator. The breath test operator testified that the arresting officer ordinarily performs the observation. The observation requirement is in place to ensure that an arrestee does not take anything orally or regurgitate and does not hinge on the identity or position of the law enforcement officer who conducts the observation. *Kaiser v. State*, 609 So. 2d 768, 770 (Fla. 2d DCA 1992) (finding that a breath test is valid when the test was conducted in substantial compliance with the governing regulations). The hearing officer relied on testimony and documentation sufficient to support the conclusion that Petitioner had been observed for at least 20 minutes prior to providing breath samples, in compliance with Rule 11D-8.007, Fla. Admin. Code.

Finally, Petitioner contends that the Department violated his right to due process when it failed to invalidate his suspension because the breath test operator failed to provide documents in accordance with the subpoena duces tecum. §322.2615(11), Fla. Stat. The breath test operator appeared telephonically and gave testimony at the hearing on February 4, 2021. When asked about the documents, the breath test operator testified that she was not in possession of the documents and that they would need to be obtained from the agency inspector. Before concluding her testimony, the breath test operator offered to get the inspection date before work that day and "have [her] stuff re-sent to see if it will show up on the computers," and Petitioner's counsel responded that it would not be necessary. After the testimony was concluded, the hearing officer stated that he would allow Petitioner to subpoena the breath test officer again. Petitioner was also authorized to seek enforcement of the subpoena by filing a motion with the circuit court and failed to avail himself of this remedy. § 322.2615(6)(c), Fla. Stat. Although section 322.2615(11) requires the Department to invalidate a suspension in certain cases where the breath test operator fails to appear, it has no such requirement regarding documents pursuant to a duces tecum subpoena. *Cf. DHSMV v. Lankford*, 956 So. 2d 527, 528 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1264a] (stating that § 322.2615 does not contain a provision that authorizes invalidation of a license suspension because a witness did not provide a good reason for failing to bring evidence pursuant to a subpoena duces tecum).

It is well-settled that the appropriate remedy for a due process violation is remand for a new hearing. *See Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So.3d 616, 623 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D507a]; *Lillyman v. Dep't of Highway Safety & Motor Vehicles*, 645 So. 2d 113, 114 (Fla. 5th DCA 1994); *Dep't of Highway Safety & Motor Vehicles v. Icaza*, 37 So. 3d 309, 312 (Fla. 5th DCA 2010) [35 Fla. L. Weekly D850a]; *Tynan v. Dep't of Highway Safety & Motor Vehicles*, 909 So. 2d 991, 995 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D2142a]; *Dep't of Highway Safety and Motor Vehicles v. Chamizo,* 753 So. 2d 749, 752 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D711e]. The hearing officer in this case issued the subpoena as requested, the breath test operator appeared to testify, providing an explanation for the missing documents, and the hearing officer informed Petitioner that he would allow Petitioner to subpoena the breath test operator to appear at the March 1st hearing. Petitioner's failure to enforce the duces tecum portion of the subpoena, and his rejection of the opportunity to subpoena the breath test operator for the March 1st hearing, amount to a waiver of his entitlement to relief. *See generally State v. Silvia*, 235 So.3d 349 (Fla. 2018) [43 Fla. L. Weekly S70a] (finding that criminal defendant's valid waiver of postconviction proceedings precluded him from claiming a right to relief under subsequent case law). *See also Nicole Stevenson v. Dep't of Highway Safety and Motor Vehicles,* 29 Fla. L. Weekly Supp. 568a (Fla. 13th Jud. Cir. [Appellate] 2021) (party may not reject remedy offered at administrative hearing level and later obtain relief on certiorari review).

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

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Where there are material discrepancies in officers' reports as to whether licensee's vehicle crossed over lane dividers and whether stopping officer detected odor of alcohol on her breath, and hearing officer did not resolve conflicts in evidence, finding that licensee's arrest was lawful was not supported by competent substantial evidence

COURTNEY ELISE JONES, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 21-CA-4612, Division K. March 8, 2022. Counsel: Courtney Elise Jones, Pro se, Tampa, Petitioner. Christie S. Utt, General Counsel, and Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(CAROLINE TESCHE ARKIN, J.) This matter is before the Court on Petition for Writ of Certiorari filed June 4, 2021. The petition is timely. Rule 9.100(c)(2), Fla. R. App. P.; Rule 9.030(c)(3), Fla. R. App. P.; §322.31, Fla. Stat. A second amended petition was filed August 24, 2021, and is the applicable version before the Court. Petitioner seeks review of the Department's final order upholding the suspension of her driving privilege for her refusal to submit to a breath test to determine her breath-alcohol level. Petitioner raises myriad issues, including that that the hearing officer lacked competent, substantial evidence for the conclusion that law enforcement had probable cause to arrest. Upon review of the petition, response, reply, appendices, and relevant case law, the Court finds that the Department erred when the hearing officer determined that there was reasonable suspicion to detain Petitioner for a DUI investigation where a material discrepancy in the evidence remains unresolved. Because this issue is dispositive, it is unnecessary to discuss Petitioner's remaining issues.

JURISDICTION AND STANDARD OF REVIEW

A decision by the Department to uphold or invalidate a suspension may be reviewed by a petition for writ of certiorari to the circuit court in the county in which formal or informal review was conducted. §§ 322.31; 322.2615(13), Fla. Stat. This Court, therefore, has jurisdiction to review the Department's decision in this case. This review is not de novo. § 322.2615(13), Fla. Stat. Rather, the Court "must determine whether procedural due process is accorded, whether the essential

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

FACTS AND PROCEDURAL HISTORY

On January 23, 2021, Officer Portman of the Tampa Police Department observed Petitioner's vehicle weaving within its lane, touching the fog line on the right side of the lane. Officer Portman initiated a traffic stop for suspicion of DUI. Officer Portman observed that Petitioner had a flushed face and paint on her fingers, and noted in his report that he smelled alcohol on her breath. Petitioner's statements did not make sense to Officer Portman, though she advised that she did not have anything to drink and that she takes medication. Officer Portman requested assistance from Officer Van Treese to conduct a DUI investigation. Prior to making contact with Petitioner, Officer Van Treese spoke with Officer Portman who advised that he had stopped petitioner for weaving out of her lane and crossing the lane divider, that she appeared lethargic and jittery, and, in contrast to the notes in his report, that he could *not* detect an odor of alcohol on her breath. Officer Van Treese observed that Petitioner had watery, bloodshot eyes, slurred speech, that she was jittery and lethargic, and that she had the distinct odor of alcohol on her breath. Petitioner advised Officer Van Treese that she takes medication in the morning, but that she did not consume any other drugs or alcohol prior to driving. Petitioner told Officer Van Treese that she had been driving home from work. Officer Van Treese requested that Petitioner participate in Field Sobriety Exercises (FSEs), which request Petitioner refused, except for an evaluation of her eyes for nystagmus. Petitioner refused to submit to a breath test (stating that she was willing to submit to a urine test) after being arrested and notified of the consequences of refusal. Petitioner's driving privilege was administratively suspended as a result.

A formal review hearing of the administrative suspension was continued several times to allow Petitioner to subpoena witnesses. The hearing was held April 20, 2021. Because the suspension was the result of Petitioner's refusal to submit to a breath test, the hearing officer was to determine whether law enforcement had probable cause to believe that Petitioner was driving or in actual physical control of a motor vehicle while under the influence of drugs or alcohol, whether Petitioner refused to submit to any such test after being requested to do so by law enforcement, and whether Petitioner was told that if she refused to submit to such test her privilege to drive a vehicle would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months. § 322.2615(7)(b), Fla. Stat. The Department may not suspend a license for refusal to submit to a breath test if the refusal is not incident to a lawful arrest. *Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1080 (Fla. 2011) [36 Fla. L. Weekly S648c].

Here, the hearing officer determined that law enforcement had probable cause to arrest Petitioner for DUI, that Petitioner was driving a motor vehicle, and that she refused to submit to a breath test after being read Implied Consent and notified of the consequences of refusal. The hearing officer rendered a written order on May 10, 2021.

DISCUSSION

The petition raises a number of issues. Only one, that the Department lacked competent substantial evidence to find that Petitioner's arrest was lawful, merits discussion. Petitioner contends that the arresting officers' reports conflict on two key matters: whether her vehicle crossed over the lane dividers and whether Officer Portman detected the odor of alcohol on her breath.

When considering whether the hearing officer relied on competent, substantial evidence, this Court must ensure that it does not improperly reweigh the evidence in the record. But the proscription against reweighing evidence does not require unexamined deference to the hearing officer's conclusion when a conflict arises. "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a] (noting that "sufficiency tests the adequacy and credibility of the evidence, whereas weight refers to the balance of the evidence"). The constitutionality of a traffic stop "is determined by considering whether the officer who stopped the vehicle had an objective basis to do so" based upon his own observations and logical inferences. *Dobrin v. Fla. Dep't of Highway Safety & Motor Vehicles*, 874 So. 2d 1171, 1174 (Fla. 2004) [29 Fla. L. Weekly S275a].

Here, Officer Portman reported that he stopped Petitioner on suspicion of DUI after he observed her tires drifting on and off the fog line on the right side of the road. Officer Van Treese reported that Officer Portman orally conveyed that he observed Petitioner weaving, drifting *out* of her lane, *and* crossing over the divider line, and that after speaking with her believed that she could be impaired. Both sets of facts were cited in separate places in the hearing officer's decision, with no discussion of the discrepancy. Moreover, Officer Portman also wrote in his report that that he detected the odor of alcohol on Petitioner's breath, while Officer Van Treese reported that Officer Portman conveyed the opposite: that Officer Portman could *not* detect an odor of alcohol on Petitioner's breath when he initiated the DUI investigation. The discrepancies in the reports are material because they reflect Officer Portman's objective observations and inferences, and thus go to the heart of determining whether or not Officer Portman had an ongoing reasonable suspicion to effect a traffic stop and initiate an investigation. *Gregg v. Dep't of highway Safety & Motor Vehicles*, 25 Fla. L. Weekly Supp. 688b (Fla. 6th Cir. Aug. 8, 2017) (finding a lack of competent substantial evidence where Petitioner had watery, bloodshot eyes and an odor of alcohol, but there was conflicting paperwork regarding the quality of her speech). The substantial evidence rule is not satisfied by evidence which gives equal support to inconsistent inferences. *Dep't of Highway Safety & Motor Vehicles v. McClung,* 878 So. 2d 480, 480 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1754b], citing *Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. The Department is authorized to proceed without witnesses in a formal review, but "it does so at the risk that the documents might contain irreconcilable, material contradictions." *Dep't of Highway Safety & Motor Vehicles v. Colling*, 178 So. 3d 2, 5 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b].

Because the hearing officer did not resolve the conflicts, competent, substantial evidence does not support the order upholding Petitioner's administrative license suspension. Accordingly, the petition is GRANTED and the order upholding the suspension of Petitioner's driving privilege is QUASHED.

* * *

Municipal corporations—Code enforcement—Fine reduction—Jurisdiction—Special magistrate has authority to reduce code enforcement fines, but does not have authority to reduce or modify subsequent lien stemming from fine after it has been properly recorded—Order on request for reduction of fine is vacated

PALM BEACH POLO, INC., Appellant/Cross-Appellee, v. VILLAGE OF WELLINGTON, Appellee/Cross-Appellant. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2020-CA-002893-XXXX-MB. April 18, 2022. On Appeal/Cross-Appeal from the Village of Wellington Special Magistrate. Counsel: Alexander L. Domb, Village of Wellington, for Appellant/Cross-Appellee. Laurie Stilwell Cohen and Rachel R. Bausch, Village

of Wellington; and Elliot B. Kula and William D. Mueller, Miami, for Appellee/Cross-Appellant.

(PER CURIAM.) Appellant, Palm Beach Polo Inc. ("Polo") filed an appeal challenging an "Order Reducing Penalty/Lien" issued after a hearing before the Village of Wellington Special Magistrate. Appellee, Village of Wellington, Florida ("Wellington") cross-appealed, challenging the Special Magistrate's subject matter jurisdiction to hold a hearing or enter any orders. We write only to address the Special Magistrate's subject matter jurisdiction, holding that the Special Magistrate was divested of jurisdiction to consider a reduction of a fine because the fine at issue was recorded and converted into a lien. § 162.09, Fla. Stat. (2019).

Factual Background

In 2015, Wellington cited Polo for failing to comply with provisions of Wellington's Land Development Regulations concerning a cypress reserve located on Polo's property. After a hearing before a Special Magistrate, Polo was found to have violations of Wellington's Code and was ordered to correct the violations on or before November 19, 2015. Polo failed to comply by the deadline. On April 25, 2016, the Special Magistrate issued an "Order Imposing Penalty/Lien" imposing a daily fine per violation against Polo. Two days later, Wellington properly recorded the "Order Imposing Penalty/Lien" as a lien.[1]

In April 2018, Polo attempted to remedy its violations by filing an action to quiet title to the property at the source of the violations. In December 2019, Polo accepted a quit claim deed that ended the quiet title action, brought Polo into compliance with the Code violations, and stopped daily fines from accruing.

Polo sought a fine reduction, and on February 20, 2020, a hearing was held before the Special Magistrate. The same day, the Special Magistrate entered the "Order Reducing Penalty/Lien" that substantially reduced the amount that Polo owed. Polo subsequently appealed the "Order on Request for Reduction of Fine." Wellington cross-appealed.

Analysis

Jurisdictional challenges generally involve pure questions of law and are reviewable under a *de novo* standard. *See Florida A&M University Bd. of Trustees v. Bruno,* 198 So. 3d 1040, 1043 [(Fla. 1DCA 2016)] [41 Fla. L. Weekly D1886a] (reviewing issue under a *de novo* standard of review "because the question of whether a trial court has subject-matter jurisdiction is a pure question of law").

The plain language of sections 162.09 of the Florida Statutes and 2-199(b) of Wellington's Code of Ordinances indicate that a Special Magistrate has authority to reduce fines, but not a subsequent lien stemming from the fine after it has been properly recorded. Section 162.09 details the process for enforcing administrative fines and liens in code enforcement cases. Section 162.09(3), states, in part:

> **A certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.** Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment by the sheriffs of this state, including execution and levy against the personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes. A fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to this section, whichever occurs first. **A lien arising from a fine imposed pursuant to this section runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien entered pursuant to this section.**

§ 162.09, Fla. Stat. (2019) (emphasis added). It is clear from the plain language of the statute, that a certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land. When recorded, such a lien is enforceable in the same manner as a court judgment, and "runs in favor of the local governing body," giving only the local governing body the ability to "execute a satisfaction or release of the lien." *Id.* Importantly, section 2-199(b) of Wellington's Code of Ordinances mirrors the language of section 162.09(3).

Further, section 162.09(2)(c) states that "[a]n enforcement board may reduce a **fine** imposed pursuant to this section." § 162.09(2)(c), Fla. Stat. (2019) (emphasis added). The plain language of the statute clearly delineates different procedures for reducing *fines*, and for modifying *liens*. Section 162.09(2)(c) grants authority to the Special Magistrate or enforcement board to reduce *fines* by addressing certain statutory factors, while section 162.09(3) states that *liens* created pursuant to this section may be modified by the local governing body. Here, the Special Magistrate was without power to modify a lien, because the statute granted this power expressly to the local governing body. *See Florida Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 99-100 (Fla. 2014) [39 Fla. L. Weekly S569a] (stating, in part, that an agency created by statute does not possess any inherent powers, rather, the agency is limited to the powers that have been granted).

No contrary authority has been presented to suggest a Special Magistrate may reduce or alter a previously recorded lien. Moreover, the Florida Attorney General has previously spoken directly on the issue of whether a code enforcement board is authorized to reduce a fine for noncompliance with an order *after* that order has been recorded pursuant to section 162.09(3). Op. Att'y Gen. Fla. 002-12 (2002).[2] The Attorney General determined that only the governing body may "compromise, satisfy, or release" a lien, and that although section 162.09(2)(c) empowers a special magistrate to reduce a fine, "nothing in the statute appears to extend that authority to reducing the amount of a lien created when a copy of an order imposing a fine has been recorded in the public records." *Id* at 3.

Based on the foregoing, conversion of the fines to a lien divested the Special Magistrate of subject matter jurisdiction because the Special Magistrate only has authority to reduce fines. Here, it is clear that on April 27, 2016, Wellington properly recorded a certified copy of the April 25, 2016 "Order Imposing Penalty/Lien," transforming the Special Magistrate's ordered fines into liens.[3] *See City of Miami Gardens v. US Bank National Association,* 298 So. 3d 1188, 1190 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D257a] (holding that electronically filed code enforcement orders were certified orders that qualified as liens against property). Under the plain language of section 162.09(3), Florida Statutes, and section 2-199 of the Wellington Code, only The Village of Wellington's village council has the authority to compromise liens after they have been recorded.

By attempting to reduce the amount of the lien, the Special Magistrate acted outside the scope of their permissible jurisdiction. *See Lamancusa v. Dep't of Revenue o/b/o Lamancusa*, 250 So. 3d 812, 814 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1504a] (defining subject matter jurisdiction as "a court's authority to hear and decide a case."); § 162.09(3), Fla. Stat. An order entered without subject matter jurisdiction is void. *Garcia v. Stewart*, 906 So. 2d 1117, 1122 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1322a]. If it is determined that a previously entered order is void, the court has no discretion and is obligated to vacate the order. *See State, Dept. of Transp. v. Bailey,* 603 So. 2d 1384, 1387 (Fla. 1st DCA 1992).

Accordingly, we **VACATE** the "Order Reducing Penalty/Lien" because the Special Magistrate lacked subject matter jurisdiction, and the Order is therefore **VOID**. (ROWE, KERNER, and BONAVITA,

JJ., concur.)

---

[1]ORB 28258/p 0182, Public Record of Palm Beach County, Florida.

[2]"Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." *State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993).

[3]A certified copy of the lien was recorded in the Official Records Book 28258, Page 182, Public Records of Palm Beach County, Florida.

* * *

Municipal corporations—Code enforcement—Fine reduction—Jurisdiction—Special magistrate has authority to reduce code enforcement fines, but does not have authority to reduce or modify subsequent lien stemming from fine after it has been properly recorded—Order on request for reduction of fine is vacated

PALM BEACH POLO, INC., Appellant/Cross-Appellee, v. VILLAGE OF WELLINGTON, Appellee/Cross-Appellant. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2020-CA-007447-XXXX-MB. April 18, 2022. On Appeal/Cross-Appeal from the Village of Wellington Special Magistrate. Counsel: Alexander L. Domb, Village of Wellington, for Appellant/Cross-Appellee. Laurie Stilwell Cohen and Rachel R. Bausch, Village of Wellington; and Elliot B. Kula and William D. Mueller, Miami, for Appellee/Cross-Appellant.

(PER CURIAM.) Appellant, Palm Beach Polo Inc. ("Polo") filed an appeal challenging an "Order on Request for Reduction of Fine" issued after a hearing before the Village of Wellington Special Magistrate. Appellee, Village of Wellington, Florida ("Wellington") cross-appealed, challenging the Special Magistrate's subject matter jurisdiction to hold a hearing or enter any orders. We write only to address the Special Magistrate's subject matter jurisdiction, holding that the Special Magistrate was divested of jurisdiction to consider a reduction of a fine because the fine at issue was recorded and converted into a lien. § 162.09, Fla. Stat. (2019).

Factual Background

In 2014, Wellington cited Polo for failing to comply with two provisions of Wellington's Land Development Regulations and Code of Ordinances concerning a cypress reserve located on Polo's property. After a hearing before a Special Magistrate, Polo was ordered to correct the violations or submit to a daily fine per violation. On November 16, 2017, the Special Magistrate entered an Order Imposing Penalty/Lien for failure to comply with the Special Magistrate's previous Order to correct violations. On January 9, 2018, Wellington properly recorded the Order Imposing Penalty/Lien as a lien.[1]

In October 2018, Wellington obtained authorization from the Special Magistrate to foreclose on the lien after Polo failed to correct the violations. Subsequently, Wellington filed a foreclosure action on the lien in The Fifteenth Judicial Circuit.

In March 2020, with the foreclosure action still pending, Polo submitted a Notice of Compliance, indicating it had corrected the violations. About a month later, Polo filed a "Request for Reduction of Fine" before the Special Magistrate. On June 19, 2020, after a hearing, the Special Magistrate entered the "Order on Request for Reduction of Fine" that substantially reduced the amount that Polo owed. Wellington filed a Motion to Vacate based on a lack of subject matter jurisdiction, but the Special Magistrate denied the motion without hearing. Polo subsequently appealed the "Order on Request for Reduction of Fine." Wellington cross-appealed.

Analysis

Jurisdictional challenges generally involve pure questions of law and are reviewable under a *de novo* standard. *See Florida A& M University Bd. of Trustees v. Bruno,* 198 So. 3d 1040, 1043 [(Fla. 1DCA 2016)] [41 Fla. L. Weekly D1886a] (reviewing issue under a *de novo* standard of review "because the question of whether a trial court has subject-matter jurisdiction is a pure question of law").

The plain language of sections 162.09 of the Florida Statutes and 2-199(b) of Wellington's Code of Ordinances indicate that a Special Magistrate has authority to reduce fines, but not a subsequent lien stemming from the fine after it has been properly recorded. Section 162.09 details the process for enforcing administrative fines and liens in code enforcement cases. Section 162.09(3), states, in part:

> **A certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.** Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment by the sheriffs of this state, including execution and levy against the personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes. A fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to this section, whichever occurs first. **A lien arising from a fine imposed pursuant to this section runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien entered pursuant to this section.**

§ 162.09, Fla. Stat. (2019) (emphasis added). It is clear from the plain language of the statute, that a certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the land. When recorded, such a lien is enforceable in the same manner as a court judgment, and "runs in favor of the local governing body," giving only the local governing body the ability to "execute a satisfaction or release of the lien." *Id.* Importantly, section 2-199(b) of Wellington's Code of Ordinances mirrors the language of section 162.09(3).

Further, section 162.09(2)(c) states that "[a]n enforcement board may reduce a **fine** imposed pursuant to this section." § 162.09(2)(c), Fla. Stat. (2019) (emphasis added). The plain language of the statute clearly delineates different procedures for reducing *fines*, and for modifying *liens*. Section 162.09(2)(c) grants authority to the Special Magistrate or enforcement board to reduce *fines* by addressing certain statutory factors, while section 162.09(3) states that *liens* created pursuant to this section may be modified by the local governing body. Here, the Special Magistrate was without power to modify a lien, because the statute gave this power expressly to the local governing body. *See Florida Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 99-100 (Fla. 2014) [39 Fla. L. Weekly S569a] (stating, in part, that an agency created by statute does not possess any inherent powers, rather, the agency is limited to the powers that have been granted).

No contrary authority has been presented to suggest a Special Magistrate may reduce or alter a previously recorded lien. Moreover, the Florida Attorney General has previously spoken directly on the issue of whether a code enforcement board is authorized to reduce a fine for noncompliance with an order *after* that order has been recorded pursuant to section 162.09(3). Op. Att'y Gen. Fla. 002-12 (2002).[2] The Attorney General determined that only the governing body may "compromise, satisfy, or release" a lien, and that although section 162.09(2)(c) empowers a special magistrate to reduce a fine, "nothing in the statute appears to extend that authority to reducing the amount of a lien created when a copy of an order imposing a fine has been recorded in the public records." *Id* at 3.

Based on the foregoing, conversion of the fines to a lien divested the Special Magistrate of subject matter jurisdiction because the Special Magistrate only has authority to reduce fines. Here, it is clear that on January 9, 2018, Wellington properly recorded a certified copy of the November 16, 2017 "Order Imposing Penalty/Lien," thereby transforming the Special Magistrate's ordered fines into liens.[3] *See City of Miami Gardens v. US Bank National Association,* 298 So. 3d

1188, 1190 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D257a] (holding that electronically filed code enforcement orders were certified orders that qualified as liens against property). Under the plain language of section 162.09(3), Florida Statutes, and section 2-199 of the Wellington Code, only The Village of Wellington's village council has the authority to compromise liens after they have been recorded.

By attempting to reduce the amount of the lien, the Special Magistrate acted outside the scope of their permissible jurisdiction. *See Lamancusa v. Dep't of Revenue o/b/o Lamancusa*, 250 So. 3d 812, 814 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1504a] (defining subject matter jurisdiction as "a court's authority to hear and decide a case."); § 162.09(3), Fla. Stat. An order entered without subject matter jurisdiction is void. *Garcia v. Stewart*, 906 So. 2d 1117, 1122 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1322a]. If it is determined that a previously entered order is void, the court has no discretion and is obligated to vacate the order. *See State, Dept. of Transp. v. Bailey,* 603 So. 2d 1384, 1387 (Fla. 1st DCA 1992).

Accordingly, we **VACATE** the "Order on Request for Reduction of Fine" because the Special Magistrate lacked subject matter jurisdiction, and the Order is therefore **VOID**. (ROWE, KERNER, and BONAVITA, JJ., concur.)

---

[1]ORB 29578/p 0819, Public Record of Palm Beach County, Florida.

[2]"Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." *State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993).

[3]A certified copy of the lien was recorded in the Official Records Book 29578, Page 819, Public Records of Palm Beach County, Florida.

* * *

NELSON HENRY, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Division AY. Case No. 50-2021-CA-004131-XXXX-MB. February 17, 2022. Petition for Writ of Certiorari from the Bureau of Administrative Review, Department of Highway Safety and Motor Vehicles. Counsel: Glenn H. Mitchell, West Palm Beach, for Petitioner. Elana J. Jones, DHSMV, Tallahassee, for Respondent.

(PER CURIAM.) The Petition for Writ of Certiorari is DENIED. The Court writes to note that *State Department of Highway Safety and Motor Vehicles v. Clark*, 974 So. 2d 416 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2155b] cited by Petitioner was disapproved by the Florida Supreme Court in *Nader v. Florida Department of Highway Safety & Motor Vehicles*, 87 So. 3d 712 (Fla. 2012) [37 Fla. L. Weekly S130a]. It is further observed that the initial brief cites to a circuit court opinion plainly contradicted by controlling appellate caselaw. Petitioner is cautioned to more carefully consider the accuracy of representations made to the Court. (NUTT, SHULLMAN, and COLLINS, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—In absence of transcript of hearing, appellate court cannot reverse hearing officer's decision—Finding that licensee who gave three invalid "volume not met" breath samples refused breath test was supported by competent substantial evidence where licensee failed to provide any evidence to support claim that he had asthma, licensee was medically cleared to proceed with test, and there was evidence that licensee was blowing into breath test tube incorrectly—Fact that breathalyzer serial number on probable cause affidavit differs from number on breath test affidavit does not require that suspension be invalidated—Incorrect number on probable cause affidavit is scrivener's error, and law does not require that breath test affidavit contain breathalyzer serial number to be admissible—Argument that suspension should be invalidated because breath testing documents were not submitted to Florida Department of Law Enforcement is not supported by evidence or law—No merit to argument that deputy violated regulations by failing to restart 20-minute observation period after licensee regurgitated where there is no evidence that regurgitation occurred

DALLAS ALLEN YATES, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 16th Judicial Circuit (Appellate) in and for Monroe County, Civil Division. Case No. 2021-CA-000085-P. February 22, 2022. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(TIMOTHY J. KOENIG, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari, filed on February 24, 2021. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for refusing to submit to a breath, blood, or urine test under F.S.S. § 322.2615, Florida Statutes.

This case pertains to the arrest of the Petitioner, Dallas Allen Yates ("Yates") for DUI. On September 11, 2020, Yates was stopped at MM 94 for speeding by deputies of the Monroe County Sheriff's Office. Pursuant to observations of the deputies, Yates was placed under arrest for DUI. Yates was then transported to the Plantation Key DUI room where he was given a breath test. While in the breath testing room, Yates provided two invalid samples due to, "volume not met." Yates then contended he had asthma and requested EMS. EMS arrived, evaluated Yates, and cleared him of respiratory issues. Yates then attempted a third breath test sample which again was invalid due to, "volume not met." At this point, law enforcement deemed his failed attempts as "refusal to submit to a breath test."

A circuit court's review of an administrative agency decision is limited to the following three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (citing *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). When exercising certiorari review, the court is not permitted to reweigh the evidence or substitute its judgment for that of the agency. See *Department of Highway Safety and Motor Vehicles v. Trimble,* 821 So.2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a]. While not technically and specifically required by Fl. R. App. P. 9.220, Yates has failed to provide this Court with a transcript of the administrative hearing to enable it to assess the testimony, the evidence presented, as well as the hearing officer's rulings and considerations. This Court cannot overturn factual determinations without a transcript of the lower proceeding. *Rodriguez v. Figueroa,* 958 So. 2d 1041, 1042 (3rd DCA 2007) [32 Fla. L. Weekly D1429a]. As a result, this Court cannot consider the alleged testimony proffered by Yates to determine whether there was competent substantial evidence to support the hearing officer's rulings or even reverse the decision. *Sugrim v. Sugrim,* 649 So. 2d 936, 938 (5th DCA 1995) [20 Fla. L. Weekly D400b].

Petitioner raises two claims in his Petition. First, he alleges that the hearing officer departed from the essential requirements of law in upholding the suspension regarding his refusal and the "volume not met" samples. Second, the Petitioner argues that the hearing officer departed from the essential requirements of law in upholding the suspension because, "evidence relied upon by Law Enforcement was conflicting [sic] had not been submitted to the Florida Department of Law Enforcement as required by law."

Based on a review of the Petition, the DHSMV response and record submitted, the Court finds there was competent substantial evidence to support the hearing officer's findings. As it pertains to the "refusal" and "volume not met" issue, Yates was given several opportunities to

provide an adequate breath sample. Yates contended to law enforcement and at the administrative hearing that he suffered from asthma, which prevented him from giving an adequate sample. Yet in neither venue did Yates provide any evidence of such a condition. The hearing officer relied upon the EMS evaluation which states that Yates, after requesting help for a medical episode, was medically cleared and could continue the testing. There was record evidence that showed Yates only had "asthma" issues in the immediate seconds prior to the breath test and said issues quickly dissipated after the impending test had passed. In addition, there was record evidence that Yates was incorrectly blowing into the breath testing machine tube. Wherefore, based upon the record submitted, the Court finds there was sufficient and competent evidence for the hearing officer to rely upon to reach the conclusion regarding the deemed "refusal" and "volume not met" suspension.

Next, Yates contends that because there was a conflict in the evidence regarding the serial number of the machine(s), documentation regarding the breath test machine(s) that had not been submitted to the Florida Department of Law Enforcement ("FDLE") and there was a "regurgitation" during the testing process that the suspension should be invalidated.

Yates contends that at the administrative hearing, there was evidence presented that the probable cause affidavit indicated that breath testing machine 80-006693 was used. However, the evidence also showed on the breath test affidavit itself, that breath test machine 80-006471 was the one that was used for the breath test of Yates. Here, the correct serial number from the correct machine for all the breath tests was generated from the actual breath testing machine, 80-006471. It would be, and is, entirely reasonable to conclude that the deputy's incorrect serial number in the probable cause affidavit was a scrivener's error. The hearing officer is allowed to rely upon reasonable inferences from competent substantial inferences on the record. *Avalon's Assisted Living, LLC v. Agency for Health Care Admin.,* 80 So. 3d 347, 351 (1st DCA 2011) [36 Fla. L. Weekly D2621f]. In addition, F.S.S. §316.1934 (5) does not require a serial number on a breath testing affidavit to be admissible at a hearing, therefore to this Court, it is irrelevant what the serial number is. Second, Yates contends that because the breath testing documents from the breath testing machine(s) were not submitted to FDLE then the suspension should be invalidated. Yates cites in his pleadings, "as required by the regulations" and "as required by law" however he fails to cite any regulation, administrative code, statute or even case law to support such a contention. In addition, Yates provides no evidence, other than assertions, that any of these deputies were even responsible for "forwarding" documents relating to this machine to the FDLE. Yates provides no evidence, other than assertions, that FDLE did not in fact have the records in some form or another.

Yates goes onto argue that "Deputy Hradecky testified she violated the "regulations" when she administered the examination at 00:32. . ." Yates contends that this was "in violation of the rules" regarding the 20-minute observation period. Assuming this is a correct representation of the testimony, the Petitioner does not cite to, nor reference any rule, code, regulation, statute or case law to support such an assertion. However, it can be gleaned from the petition and response that Yates is arguing that there was a regurgitation at some point and that the deputy failed to restart the 20-minute observation period as mentioned in Florida Administrative Code, Rule 11D-8.007(3). As pointed out in the DHSMV response there is no evidence, other than Yates' assertion, presented to this Court that there was in fact a regurgitation and this rule should apply.

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

* * *

Counties—Code enforcement—Appeals—Due process claim raised for first time in reply brief may not be considered

DANIELA MAYORGA, Appellant, v. BROWARD COUNTY CODE ENFORCEMENT, Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21-011947 (AP). January 27, 2022. Appeal from Broward County Code Enforcement, Hearing Officer. Counsel: Daniela Mayorga, Pro se, Appellant. Joseph K. Jarone, Counsel for Broward County, for Appellee.

OPINION

(PER CURIAM.) Having carefully considered the Petition and Appendix, the Response, and the applicable law, without oral argument, the May 17, 2021, Final Judgment of Hearing Officer Willaim P. Doney is hereby **AFFIRMED**.

An argument may not be raised for the first time in a reply. *Jones v. State,* 966 So.2d 319, 330 (Fla. 2007) [32 Fla. L. Weekly S272a]. The reply brief shall contain an argument in response and rebuttal to the argument presented in the answer brief. Fla. R. App. P. 9.210. If any issue was not raised in the initial petition, the party abandons those issues. *Parker-Cyrus v. Just. Admin. Comm'n,* 160 So. 3d 926, 928 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D582a]. Matters argued for the first time in a reply brief will not be considered by the appellate court. *United Auto. Ins. Co. v. Hollywood Inj. Rehab Ctr.,* 27 So. 3d 743 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D334a].

Here, Appellant did not argue her due process rights were violated in the Amended Petition. Instead, she first presents this argument in the Reply Brief. In the Reply Brief, Appellant argues that she was denied her due process rights due to the insufficient notice in the "Notice of Court Date." The Notice of Court Date did not include the address where the hearing took place. As a result, Appellant went to the wrong address. When she arrived at the correct address, the hearing had already begun and she was denied entry the the courtroom. Without Appellant in attendance, the Hearing Officer rendered judgment against her. Appellant was then informed that in order to remedy this, she would need to file an appeal.

Had Appellant raised this argument in her Amended Petition it would have merit; however, she failed to do so. Since this argument was raised for the first time in the Reply Brief, Appellant abandoned her due process claim, and this Court is unable to consider her argument. Accordingly, the May 17, 2021, Final Judgment is hereby **AFFIRMED**. **(**BOWMAN, FAHNESTOCK, and MOON, JJ., concur.)

* * *

SUNLAND APARTMENTS, INC. NUMBER TWO, Petitioner, v. CITY OF LIGHTHOUSE POINT, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21017083, Division AP. April 14, 2022.

Order Accepting Notice of Voluntary Dismissal of Appeal

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon Appellant's Notice of Voluntary Dismissal of Appeal, dated March 29, 2022. Upon review of the notice and Court file, this Court finds as follows:

Appellant's Notice of Voluntary Dismissal is hereby **ACCEPTED** by this Court. The Broward County Clerk of Courts is **DIRECTED** to assign this case as "disposed" by way of Appellant's Voluntary Dismissal.

* * *

JOSE GILMER LOPEZ, Petitioner, v. CITY OF HALLANDALE BEACH, FLORIDA, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21020842, Division AP. April 14, 2022.

Final Order of Dismissal

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order to Show Cause, dated February 9, 2022, directing Appellant to file an Initial Brief. Appellant was directed that a failure to comply would result in the dismissal of this Appeal. As of the date of this Order, Appellant has failed to comply with this Court's February 9, 2022, Order to Show Cause.

Accordingly, after due consideration and for the above-stated reasons, it is hereby **ORDERED**, as follows:

1. This Appellate proceeding is **DISMISSED**; and
2. The Clerk of Court is **DIRECTED** to close this case.

* * *

SHONATHAN KANE, Petitioner, v. CITY OF TAMARAC, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22000617, Division AP. April 14, 2022.

Final Order of Dismissal

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, upon this Court's Order Directing Pro Se Appellant to File and Initial Brief, dated January 25, 2022, directing Appellant to file an Initial Brief. Appellant was directed that a failure to comply would result in the dismissal of this Appeal. As of the date of this Order, Appellant has failed to comply with this Court's January 25, 2022, Order to Show Cause.

Accordingly, after due consideration and for the above-stated reasons, it is hereby **ORDERED**, as follows:

1. This Appellate proceeding is **DISMISSED**; and
2. The Clerk of Court is **DIRECTED** to close this case.

* * *

CITY OF CORAL SPRINGS, FLORIDA, Petitioner, v. HEF VENTURES, LLC and LEGACY HEALING CENTER MARGATE, LLC, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 21-009275. L.T. Case Nos. RA 20-0001, RA 20-0002. April 14, 2022. Petition for Writ of Certiorari from the City of Coral Springs. Counsel: Laura K. Wendell and Matthew H. Wendell, Weiss Serota Helfman Cole & Bierman, P.L., Fort Lauderdale, for Petitioner. James K. Green, James K. Green, P.A., West Palm Beach, for Respondent. Bruce Rogow, Bruce Rogow, P.A., Cedar Mountain, NC, for Respondent. Jeffery Lynne, Beighley, Myrick, Udell + Lynne, Boca Raton, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(**PER CURIAM.**) Having carefully considered the Petition and its Appendix, the Response, the Reply, and the applicable law, the Petition for Writ of Certiorari is hereby **DENIED**.

* * *

Volume 30, Number 2
June 30, 2022
Cite as 30 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—ORIGINAL

Insurance—Homeowners—Insured's action against insurer—Conditions precedent to suit—Ten-day notice—Retroactive application of statute—Statute requiring that homeowners file ten-day notice of intent to initiate litigation under property insurance policy applies to any suit arising under policy on or after statute's effective date—Complaint is dismissed without prejudice to refiling after appropriate notifications required by new statute

JAMES HUNT, SHANNON HUNT, Plaintiffs, v. UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 1st Judicial Circuit in and for Santa Rosa County. Case No. 2021-CA-000701. February 23, 2022. Darlene F. Dickey, Judge. Counsel: Irina Tarnovsky, Bernstein | Polsky, Boca Raton, for Plaintiffs. Christopher S. Dutton, Dutton Law Group, P.A., Pensacola, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS FOR FAILURE TO COMPLY WITH CONDITIONS PRECEDENT TO SUIT (FLORIDA STATUTE § 627.70152)

THIS CAUSE having come before the Court at a hearing on January 21, 2022, with counsel for the Plaintiff and Defendant present at the hearing, and based upon review of Defendant's Amended Motion to Dismiss for For Failure to Comply with Conditions Precedent to Suit (Florida Statute § 627.70152), and having heard argument of counsel, the Court being otherwise fully advised in the premise, the Court finds as follows:

The issue before the Court involves the analysis of Florida Statute § 627.70152 (Suits arising under a property insurance policy), and in particular, whether a notice of intent to initiate litigation was required to be provided by Plaintiff as a condition precedent to filing suit under § 627.70152(3)(a), Fla. Stat (2021). Florida Statute § 627.70152 went into effect on July 1, 2021, and since that time, trial courts throughout the state of Florida have reached differing conclusions granting and denying Defendants' Motions to Dismiss. At the time of the hearing, there was no binding case law analyzing Florida Statute § 627.70152. The Court, however, finds one Order to be particularly well-reasoned and persuasive, from Judge John J. Parnofiello of Palm Beach County, Florida (case no. 50-2021-CC-008424-XXXX-MB). In that case, the Court entered an Order Granting Defendant's Motion to Dismiss for Failure to Comply with Section 627.71052, Florida Statutes (2021). The Court adopts much of that Order herein finding the facts and circumstances of the instant case distinguishable from *Menendez v. Progressive Exp. Ins. Co., Inc.,* 35 So. 3d 873 (Fla. 2010) [35 Fla. L. Weekly S222b]. The *Menendez* analysis is binding on this court, however; this Court finds that the holding of *Menendez* is limited to the no-fault PIP statutory framework.

As stated by the Court in *Menendez*:

> Because in this case the statute was enacted after the issuance of the insurance policy, the operative inquiry is whether the statute should apply retroactively. In this regard, the Court applies a two-pronged test. First, the Court must ascertain whether the Legislature Intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles.

In applying the *Menendez* test to the instant case, the Court finds that the plain language of § 627.70152(1) *Fla. Stat.* requires application of the pre-suit procedure to all suits arising under a property insurance policy on or after the effective date of the statute and therefore the legislature intended for the statutory pre-suit notice provision to be applied retroactively. The Court further finds that, unlike the specific statutory scheme relating to PIP claims which entitles a policy holderto recovery "without regard to fault [. . .] providing swift and virtually automatic payment[,]" this procedural change in the law does not impair any vested rights, impose any new obligations, or new penalties under the policy in existence as of the date of the loss and does not otherwise violateany constitutional principles. *Menendez,* 35 So. 3d at 877-78.

§ 6277.0152(5) Fla. Stat. requires that a homeowners' property insurance lawsuit be dismissed without prejudice when the pre-suit notice requirement set forth in the statute is not met.

Accordingly, it is:

ORDERED AND ADJUDGED that the Defendant's Amended Motion to Dismiss is **GRANTED**. The Plaintiff's Complaint is hereby dismissed without prejudice to refile after completing the appropriate notifications required in the new statute. The Clerk of Court is directed to close this file.

Defendant also set for hearing a Motion to Stay Discovery Pending Resolution of its Motion to Dismiss, but the Court did not address the motion since the focus of the hearing was on the Motion to Dismiss. However, Discovery is moot without a valid complaint.

* * *

Contracts—Torts—Employment agreements—Motion to dismiss counts alleging negligent misrepresentations and fraudulent inducement to enter into employment agreement and civil conspiracy—Merger/integration clause that does not contain any "non-reliance" stipulation does not protect former employer against claim for fraudulent inducement based on oral misrepresentations—Independent tort—Because each of alleged misrepresentations that induced plaintiff to enter into employment agreement involve compensation, which is a subject expressly dealt with in agreement, claims for fraudulent inducement, negligent misrepresentation, and civil conspiracy are dismissed

ANTHONY RUBEN, Plaintiff, v. DLP CAPITAL PARTNERS, LLC, DLP REAL ESTATE CAPITAL, INC., and DON WENNER, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation. Case No. 2022-1254 CA 01. April 13, 2022. Michael A. Hanzman, Judge. Counsel: Joshua Migdal and Michelle Genet Bernstein, Mark Migdal & Hayden, Miami, for Plaintiff. Andrew Schindler and Ari C. Shapiro, Gordon Rees Scully Mansukhani, LLP, Miami, for Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Presently before the Court is "Defendants' Motion to Dismiss Plaintiff's Complaint" ("MTD") (D. E. 14). The motion raises legal issues that routinely arise when a plaintiff (in this case Anthony Ruben) brings a claim alleging that defendants (in this case DLP Capital Partners, LLC, DLP Real Estate Capital, Inc., and Don Wenner) induced the execution of a contract (in this case an Employment Agreement) through intentional/negligent misrepresentations.[1,2]

At first blush the question of whether such claims should survive a motion to dismiss would appear to present a benign inquiry raising a single issue: has Plaintiff adequately pled the elements of the causes of action. The issue, however, is more complicated here (as it often is in these cases) because: (a) Defendants insist that a merger/integration clause in the Employment Agreement forecloses these claims; and (b) two distinct, yet related, lines of appellate precedent preclude claims for fraud in the inducement of a contract in circumstances Defendants say are present. Because appellate decisions adopt standards that are inherently imprecise, and case law is in conflict, the Court will attempt to discern the current state of the law on these recurring issues, and properly apply that law in adjudicating Defendants' motion.

II. FACTS ALLEGED/PROCEDURAL POSTURE

The facts alleged, which for present purposes must be taken as true, *see, e.g., Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.,* 842 So. 2d 204, 206 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D847a], are straightforward. In or about January 2018, Defendant Wenner "recruited [Plaintiff] to work with" Defendants in acquiring "multi-family real estate assets." Compl., ¶ 15. After preliminary discussions regarding a "revamped investment strategy" recommended by Plaintiff that "would realize hefty profits," Compl., ¶ 17, the parties "began discussing compensation." Compl., ¶ 19. Plaintiff was promised that if he accepted employment he would "share in the profits" of the venture. Compl., ¶ 20. Plaintiff's compensation package was then memorialized in an "Career Success Opportunity memo." Compl., ¶ 21.

Plaintiff was soon promoted, and on December 9, 2020, he and DLP Real Estate Capital, Inc. ("DLP Real Estate") executed an "Employment Agreement" which, as one would expect, addressed the issue of compensation. Compl., ¶¶ 30, 31. Pursuant to Section 1.3 of the contract, Plaintiff received a "base salary of $160,000 with a non-discretionary bonus structure fixed as follows: 2.5% of acquisition fee on deals acquired, with a 5% additional compensation on any deals originated; 2.5% disposition fee on all dispositions managed; 10% of debt placement fee on deals refinanced inclusive of debt placement fees; 10% of origination fee on any bridge debt deals funded that Anthony originated; and 20% of 'DLP Capital Partner's' (an undefined term) promote on deals directly managed, or 5% of DLP Capital Partner's promote on deals of other directors. There also was a potential additional bonus or share of promote or profits on value created. Ex. A §§ 1.3(A), (B)." Compl., ¶ 31.

Within a year, "DLP's portfolio of assets were ripe for disposition." Compl., ¶ 33. The parties then "began discussing the payment of the accrued compensation which was owed and the specific amount which would be owed, both in the form of disposition fees for the disposition of several legacy assets and, more substantially, [Plaintiff's] share of promotes which were paid on an investment-by-investment basis pursuant to the structure of the [DLP]." Compl., ¶ 34. The parties also discussed "the amount of deferred compensation" Plaintiff "was entitled and other promotes" which he "would be entitled to in the imminent future . . . ." Compl., ¶ 36. "Rather than work through the numbers and provide [Plaintiff] his earned share of the profits, on November 18, 2021," Defendants delivered a "Notice of Termination, stating that 'effective immediately,' [Plaintiff's] employment has been terminated for cause." Compl., ¶ 37.

Plaintiff brings this action advancing claims for: (1) Fraudulent Inducement; (2) Negligent Misrepresentation; (3) Breach of Contract; (4) Breach of the Implied Covenant of Good Faith and Fair Dealing; (5) Accounting; (6) Civil Conspiracy; and (7) Declaratory Judgment.

In support of his claims for "Fraudulent Inducement" (Count I) and "Negligent Misrepresentation" (Count II), Plaintiff alleges that Defendant Wenner induced him to work for the DLP enterprise by representing that: (a) he would "share" in profits; (b) he would "earn millions of dollars in short duration"; (c) business would generate fees from which Plaintiff "would receive a percentage"; and (d) that when Wenner got paid, Plaintiff would "get paid." Compl., ¶¶ 40-42.[3] Each of these alleged misrepresentations relate to Plaintiff's anticipated compensation—an issue addressed by the Employment Agreement.

Defendants seek dismissal of all claims. As for the Fraudulent Inducement (Count I) and Negligent Misrepresentation (Count II) claims, Defendants insist that each is barred by: (a) an integration clause contained in the Employment Agreement; (b) authority providing that "[a] party cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract," *Hillcrest Pac. Corp. v. Yamamura,* 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D520a]; and (c) the economic loss rule/independent tort doctrine. MTD, pp. 4-9. Defendants also contend that Plaintiff's claims for Breach of Contract (Count III); Breach of Implied Covenant of Good Faith and Fair Dealing (Count IV); and for Accounting (Count V) are legally insufficient. MTD, p. 14.

As for Plaintiff's Civil Conspiracy Claim (Count VI), Defendants argue that it is precluded by "Florida's intra-corporate conspiracy doctrine." MTD, p. 14. Finally, Defendants maintain that Plaintiff's claim for Declaratory Relief (Count VII) "does not describe a bona fide, actual, present practical need for the declaration and is more appropriately brought as a breach of contract claim seeking remedies in law not equity." MTD, p. 17.

The Court denies the MTD Count III (Breach of Contract), Count IV (Breach of the Implied Covenant of Good Faith and Fair Dealing), Count V (Accounting), and VII (Declaratory Relief), finding that the arguments raised by Defendants are not well taken. For the reasons elaborated upon herein, the MTD is granted as to Count I (Fraudulent Inducement), Count II (Negligent Misrepresentation) and Count VI (Civil Conspiracy).

III. GOVERNING LAW

The elements of a claim for fraudulent/negligent misrepresentation are well settled, and at the motion to dismiss stage a court would typically do no more than ascertain whether each required element is adequately pled.[4] Simple enough. But as the Court said earlier, the analysis can be far more complicated when a plaintiff alleges fraud in the inducement of a written contract.

A. Merger/Integration/Non-Reliance Clauses

Defendants often rely upon merger/integration/non-reliance clauses to cut off fraud in the inducement claims. The Employment Agreement at issue here contains a garden variety merger/integration clause that provides:

> Entire Agreement. This Agreement supersedes any other agreements, oral or written between the parties with respect to the subject matter hereof and contains all of the agreements and understandings between the parties with respect to the employment of Employee by the Employer.

Id. Some contracts go a step further and also incorporate what is referred to as a "non-reliance" or "anti-reliance" provision, expressly stipulating that no party has relied upon any representation other than those contained in the written agreement. *See, e.g., Oceanic Villas, Inc. v. Godson,* 4 So. 2d 689 (Fla. 1941); *Billington v. Ginn-La Pine Island, Ltd, LLLP,* 192 So. 3d 77 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D1204a].

Many would forcefully argue that parties to a contract should be permitted to bargain for the right not to be subjected to fraud claims, and insist that the presence of a merger/integration/non-reliance clause should foreclose fraud in the inducement claims as a matter of law. *See, e.g., 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] ("when a contract plainly provides that any modification must be in writing . . . [t]he parties have dealt with the issue through a provision designed—and intended—to protect them against the risk of 'being enmeshed in and harassed by' protracted litigation based upon alleged oral modifications, and courts should in most cases do no more than enforce the contract as written"). Most courts agree when the contract contains a "non-reliance" clause, as opposed to just a merger/integration clause,[5] although this Court fails to see any meaningful distinction between the two. One disclaims the existence of *any* extrinsic representations at all, while the other disclaims reliance on any extrinsic representations; meaning both negate an element of a fraud in the inducement claim.[6]

Turning to Florida decisions, our Supreme Court, and the Third District adhering to Supreme Court precedent, have held that a standard merger/integration clause does not protect a contracting party against a claim of fraud in the inducement. *See, e.g., Oceanic Villas, Inc, supra; Mejia v. Jurich,* 781 So. 2d 1175 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D975a] ("[t]he existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement"); *Cas-Kay Enterprises, Inc. v. Snapper Creek Trading Ctr., Inc.,* 453 So. 2d 1147 (Fla. 3d DCA 1984) (same).[7]

As for the issue of whether a "non-reliance" clause affords such protection, Florida appellate law is in conflict and a bit unclear. *See, e.g., Billington,* 192 So. 3d at 83 (lamenting on "[t]he difficulty we have in attempting to reconcile the cases . . ."). In *Billington,* the Fifth District held that a "non-reliance" clause "negate[s] a claim for fraud in the inducement because Appellant cannot recant his contractual promises that he did not rely upon extrinsic representations." *Id.* at 84. The Second District recently disagreed, and held that to be an effective antidote against a fraud claim the contract must contain "an explicit waiver of liability for fraudulent representations that might have been made—an acknowledgment of the parties 'that fraud may have been committed' and a 'stipulat[ion] that such fraud, if found to have been committed, should not vitiate the contract.' " *NM Residential,* 2022 WL 880594, at *4 (Fla. 2d DCA Mar. 25, 2022) [47 Fla. L. Weekly D724a] (internal citations omitted). As far as this Court can tell, the Third District has not addressed the impact, if any, a "non-reliance" clause has on a fraudulent inducement claim.

As this Court (as well as others) has said many times before, "[c]ontracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement. That freedom is indeed a constitutionally protected right." *Okeechobee,* 145 So. 3d at 993; *Sky Bell Asset Mgmt., LLC And Sky Bell Select, L.P., vs. National Union Fire Ins. Co. of Pittsburgh, P.A.,* 23 Fla. L. Weekly Supp. 535a (11th Jud. Cir., Dec. 17, 2015); *DePrince v. Starboard,* 23 Fla. L. Weekly Supp. 1022a (11th Jud. Cir., April 7, 2016). When parties bargain for the right not to be subjected to fraud claims and embroiled in time consuming, expensive and disruptive litigation, there is no reason why that bargain should not be enforced. If parties clearly and unambiguously agree that no representations other than those within the contract have been made at all, *or* clearly and unambiguously agree that they have not relied upon any such extrinsic representations, they have assured one another that one (or two) elements of a fraudulent inducement claim are absent, and have acknowledged that such a claim is not viable. That covenant should be no less binding and enforceable than any other.

If this Court were writing on a clean slate, it would hold parties to their contractual undertakings and dispose of fraudulent inducement claims as a matter of law whenever the contract contains either a merger/integration clause or a "non-reliance" clause that clearly and unmistakably acknowledges either that no representations outside the contract have been made at all, or that no "reliance" has been placed on any such extrinsic representations. Parties to contracts should be entitled to bargain for certainty, predictability and freedom from claims based upon oral "representations," "warranties," "promises" and "modifications." *See Okeechobee, supra,* When they strike such a bargain, courts should not rescue them from the consequences of their negotiated agreement by entertaining a claim that they clearly stipulated, in writing, cannot possibly be proven. *See, e.g., One-O-One Enterprises, Inc. v. Caruso,* 848 F.2d 1283, 1287 (D.C. Cir. 1988) (Ginsburg, Ruth Bader.J) ("[w]ere we to permit plaintiffs' use of the defendants' prior representations (and defendants' nondisclosure of negotiations inconsistent with those representations) to defeat the clear words and purpose of the Final Agreement's integration clause, 'contracts would not be worth the paper on which they are written' ") (Internal citation omitted).

Alternatively, this Court would treat these clauses the same way we treat arbitration clauses; permitting a party to avoid them only by demonstrating that they were fraudulently induced to agree to the specific merger/integration/non-reliance clause itself, as opposed to the contract as a whole. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403 (1967) (party seeking to avoid an arbitration clause must allege and prove "fraud in the inducement of the arbitration clause itself," not "fraud in the inducement of the contract generally"); *Medident Const., Inc. v. Chappell,* 632 So. 2d 194 (Fla. 3d DCA 1994) (same). This would ensure that these specific stipulations are enforced unless they—as opposed to the contract as a whole—were alleged to have been procured by fraud.

In any event, this Court is bound by appellate precedent, even though it is free to disagree with it, and express that disagreement. *See State v. Washington,* 114 So. 3d 182, 185 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1535a] ("[w]hile a lower court is free to disagree and to express its disagreement with an appellate court ruling, it is duty-bound to follow it"). Binding precedent holds that a standard merger/integration clause does not protect against a claim for fraudulent inducement based upon alleged oral misrepresentations, and the merger/integration clause embedded in Plaintiff's Employment Agreement lacks any "non-reliance" stipulation. It therefore does not insulate the Defendants from fraud in the inducement/negligent misrepresentation claims, and the Court is compelled to deny Defendants' motion to dismiss based on this provision.

B. Common Law Doctrines Foreclosing Fraud in the Inducement of Contract Claims

The fact that the merger/integration clause does not bar Plaintiff's fraud/negligent misrepresentation claims does not end the inquiry. For 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.

1. Claims Precluded when Contract Adequately Deals with the Subject Matter of, or Expressly Contradicts, the Alleged Misrepresentation(s).

The first line of precedent which cabins a party's ability to bring tort claims arising out of a contractual relationship forecloses an action for fraud in the inducement based upon "alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract." *Hillcrest,* 727 So. 2d at 1056; *B & G Aventura, LLC v. G-Site Ltd. P'ship,* 97 So. 3d 308, 309 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2197a]; *GVK Int'l Bus. Group, Inc. v. Levkovitz,* 307 So. 3d 144, 146 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1777a]. As the Second District explained in *TRG Night Hawk Ltd. v. Registry Dev. Corp.*, 17 So. 3d 782 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1633a], this prevents contracting parties from doing an end-run around their bargain by agreeing to terms and later attempting to "avoid them by simply taking the stand and swearing that they relied on some other statement." *Id.* at 784. When a subject matter is "adequately dealt with" in the agreement, the agreement will control

the issue and foreclose claims based upon alleged pre-contractual oral representations. *Id.*

In an effort to side-step this precedent, Plaintiff insists that it applies only when the alleged oral misrepresentation(s) are "expressly contradicted" by the contract. Some federal trial courts agree that this line of authority precludes fraud in the inducement claims only when the contract, on its face, negates (i.e., expressly contradicts) the alleged oral misrepresentation(s). *See, e.g., 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"). One Florida appellate court also has suggested that this precedent is implicated only when "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].

This Court does not agree that fraud in the inducement claims are foreclosed *only* when the parties' contract "expressly contradicts" the claim, as opposed to when the contract addresses/deals with the subject matter of the alleged misrepresentation. More importantly, it is bound by Third District precedent holding that fraudulent inducement claims fail as a matter of law if the subject of the alleged misrepresentation is "adequately covered ***or*** expressly contradicted in a later written contract." *B & GAventura,* 97 So. 3d at 309; *GVK Int'l Bus. Group, Inc. v. Levkovitz,* 307 So. 3d at 146. (Emphasis added). The test employed by the Third District is in the disjunctive—meaning that a fraudulent inducement claim is foreclosed if the subject matter of the alleged fraud is "adequately covered" by the contract. *See Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings,* 686 So. 2d 1349 (Fla. 1997) [22 Fla. L. Weekly S42a] (stating that "or" is disjunctive and explaining the difference between "and" and "or"). Nothing in any of our appellate court's opinions suggests that to foreclose a fraud claim the contract must "expressly contradict" (as opposed to adequately deal with the subject matter of) the alleged misrepresentation(s).[8]

There also is no reason why it should matter whether the agreement "expressly contradicts" the claim, "adequately covers" the subject matter of the alleged fraudulent representation(s), or both. As the Third District pointed out as far back as 1958, this line of authority is based on a recognition that;

> [t]he chief and most satisfactory index to determine the intent of the parties to an agreement as to whether they intended their written contract to be a complete and final statement of the whole transaction is whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element, *Milton v. Burton,* 79 Fla. 266, 84 So. 147 [(1920)]; *Bryan v. St. Andrews Bay Community Hotel Corp.,* 99 Fla. 132, 126 So. 142 [(1930)]; *see* 13 Fla. Jur., Evidence § 394 (1957); Wigmore, Evidence § 2430 (3rd ed. 1940).

Greenwald v. Food Fair Stores Corp., 100 So.2d 200, 202 (Fla. 3d DCA 1958).[9] This rationale applies with equal force regardless of whether the parties' agreement "adequately covers" the subject matter of the alleged fraudulent representation or "expressly contradicts" the claim. In both instances the parties' writing specifically addresses the issue and "presumably the writing was meant to represent all of the transaction on that element." *Id.*

When the parties' later agreement either "adequately deals" with the subject matter of the alleged fraud, or "expressly contradicts" the claimed misrepresentation(s), no action for fraudulent inducement may be maintained as a matter of law. This rule pays deference to the sanctity of contracts, holds contracting parties to their bargain, avoids disruption of the parties' allocation of risk, and prevents those who enter into contracts from taking the stand and swearing that they relied upon an oral representation regarding a subject matter "adequately covered," or "expressly contradicted" by, their agreement. *TRG Night Hawk Ltd. v. Registry Dev. Corp.*, 17 So. 3d 782 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D1633a].

2. The Independent Tort Doctrine

The second common law rule that restricts tort claims arising out of a contractual relationship is the "independent tort doctrine." Assuming a plaintiff claiming fraud in the inducement of a contract alleges a misrepresentation related to a subject matter not adequately dealt with in, or contradicted by, the parties' written agreement, recovery in tort is still foreclosed by this doctrine unless she can "adequately allege and prove both 'a tort independent from the acts that breached] the contract' and non-duplicative damages grounded in tort." *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 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2513a]; *Island Travel & Tours, Ltd., Co. v. MYR Indep., Inc.,* 300 So. 3d 1236 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D704a]; *Peebles v. Puig,* 223 So. 3d 1065 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1080a].

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 performance 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, supra.*[10]

While these two lines of common law precedent are clearly related, they impose distinct burdens on a plaintiff who claims to have been fraudulently induced to enter into a contract. A plaintiff must first allege a "misrepresentation" involving a subject matter not adequately dealt with in, or contradicted by, the parties' written agreement. Assuming that hurdle is cleared, they must then allege and prove conduct separate and apart from a breach of contract, and damages different in type/degree from those sustained by the breach.[11]

IV. ANALYSIS

From the face of Plaintiff's Complaint, it is apparent that each of the alleged misrepresentations that induced him into entering into the Employment Agreement involve a subject matter expressly dealt with in the parties' subsequent contract—compensation. Ruben has not alleged any misrepresentation regarding a subject matter not adequately addressed in the Parties' contract and, for that reason alone, his claims for Fraudulent Inducement (Count I), Negligent Misrepresentation (Count II) and Civil Conspiracy (Count VI) are subject to dismissal. The Court therefore need not address whether Plaintiff has, or can, plead both tortious conduct independent of any contractual breach, and non-duplicative damages.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Counts I, II and VI is **GRANTED**. These claims are dismissed without prejudice and with leave to amend within twenty (20) days of this Order. Defendants' obligation to answer Counts III, IV, V and VII is deferred until twenty (20) days after Plaintiff advises that he will not be attempting to amend Counts I, II and VI, or until twenty (20) days after the Court disposes of any motions directed to an amended

pleading.

[1]DLP is an acronym for Dream Live Prosper. Defendant Wenner is the founder of the entity Defendants that conduct business under this moniker.

[2]The parties dispute which Defendants are parties to the Employment Agreement. For today's purposes it makes no difference.

[3]These allegations also support Plaintiff's civil conspiracy claim (Count VI).

[4]*See, e.g., Lou Bachrodt Chevrolet, Inc. v. Savage,* 570 So. 2d 306 (Fla. 4th DCA 1990) (setting forth the elements of a claim for fraudulent inducement).

[5]*See, e.g., Insitu, Inc. v. Kent,* 388 F.App'x 745 (9th Cir. 2010) (applying Washington law, "no-reliance" clause barred claims for fraud and promissory estoppel as matter of law); *Rissman v. Rissman,* 213 F.3d 381, 383-84 (7th Cir. 2000) ("non-reliance" clause precluded claim for securities fraud); *Bank of the West v. Valley Nat'l Bank of Ariz.,* 41 F.3d 471, 477-78 (9th Cir. 1994) (applying California law, "plain and strong words" of no-reliance clause precluded fraud claim as matter of law); *First Fin. Fed. Sav. & Loan Ass'n v. E.F. Hutton Mortg. Corp.,* 834 F.2d 685, 687 (8th Cir. 1987) (disclaimer of reliance on representation negated claim for fraud); *Landale Enters., Inc. v. Berry,* 676 F.2d 506, 507-08 (11th Cir. 1982) (applying Alabama law, non-reliance clause negated fraud claim); *LeTourneau Techs. Drilling Sys., Inc. v. Nomac Drilling, LLC,* 676 F.Supp.2d 534, 543 (S.D.Tex.2009) (applying Texas law, disclaimer of reliance on prior representations negated claim for fraud); *Abry Partners V, L.P. v. F & W Acquisition, LLC,* 891 A.2d 1032, 1057-58 (Del.Ch.2006) (party could not promise not to rely on prior representations and then "shirk its own bargain" by asserting in lawsuit that it in fact relied); *Weinstock v. Novare Grp., Inc.,* 309 Ga.App. 351, 710 S.E.2d 150, 155-56 (2011) (comprehensive merger clause with no-reliance provisions negated fraud in inducement claim); *Danann Realty Corp. v. Harris,* 157 N.E.2d 597, 598-99 (App. Ct. 1959) (no-reliance clause in lease precluded claim for fraud); *Blumenstock v. Gibson,* 811 A.2d 1029, 1036 (Pa.Super.Ct.2002) (party could not sign contract denying reliance on prior representations then later claim reliance on such representations).

[6]In *Vigortone AG Products, Inc. v. PM AG Products, Inc.,* 316 F.3d 641 (7th Cir. 2002) Judge Posner attempted to explain why courts might draw a distinction between a standard merger/integration clause and a non-reliance provision. Like the court in *Danann Realty Corp*. 157 N.E.2d at 597, he reasoned that a standard merger/integration clause is intended to prevent a party from introducing parol evidence, whereas a "non-reliance" clause is intended to "head off the possibility of a fraud suit" and negates the claim because the parties have agreed that an element (i.e., reliance) is absent. 316 F. 3d at 644. This Court sees it a bit differently. When parties agree that no "representations" other than those contained in the agreement have been made at all, they are also contractually negating an element of a fraud in the inducement claim based on oral misrepresentations; namely, the very first element (i.e., a misrepresentation). In this Court's view, this is no different than a stipulation that the "reliance" element is absent. In both circumstances the clause negates an element of the claim. This Court therefore does not see why a merger/integration clause stipulating that no extrinsic representations have been made at all should be treated differently from, or have a different impact than, a clause stipulating to the absence of "reliance."

[7]But *see, Weiss v. Cherry,* 477 So. 2d 12, 13 (Fla. 3d DCA 1985) (fraud claim "cannot survive the ' integration' clause of the contract, which states that there are 'no promises, inducements, assurances, guarantees, warranties, representations, solicitations, either express or implied, oral or written, except those recited and contained' " in the agreement).

[8]If the alleged misrepresentation is in fact "*affirmed* by and contained in the Contract," *Schwab,* 2007 WL 9707023, at *5, it would be a representation/warranty, the breach of which would be actionable in contract—not in tort. *See* discussion *infra.*

[9]*Greenwald* was cited in, and relied upon by, the *B& G Aventura* court.

[10]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, and that this does not impair the tort claim. *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"). This Court is bound by Third District precedent which clearly 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.

[11]Prior to the Supreme Court's decision in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.,* 685 So. 2d 1238 (Fla. 1996) [21 Fla. L. Weekly S447a], courts also employed the "economic loss rule" to dispose of fraud in the inducement claims involving contracts. In *HTP,* our Supreme Court made clear that ".actions of fraudulent inducement into a contract and breach of that contract are not mutually exclusive" and held that an action "for fraud in the inducement is an independent tort and is not barred by the economic loss rule." *Id.* at 1239-1240. In *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.,* 110 So. 3d 399 (Fla. 2013) [38 Fla. L. Weekly S151a], our Supreme Court limited the "economic loss rule" to cases involving products liability. These decisions, however, did not impact the "independent tort doctrine" or precedent requiring that a plaintiff claiming to have been fraudulently induced into a contract plead and prove a misrepresentation regarding a subject matter not adequately dealt with, or contradicted by, a later contract.

* * *

Insurance—Property—Complaint—Amendment—Denial—Motion to amend complaint to allege new date of loss based on a different wind event is denied where proposed amendment would materially change claim to new claim not based on same conduct, transaction, and occurrence, amendment in matter that has been pending for over 16 months would unduly prejudice insurer, and insurer has not been afforded pre-suit opportunity to investigate and respond to new claim

MARK and MICHELLE DIZ, Plaintiffs, v. HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-015920-CA-01, Section CA07. April 12, 2022. Maria de Jesus Santovenia, Judge. Counsel: Sean Saval, Kovar Law Group, South Pasadena, for Plaintiffs. Ashley Jaye Arends, Heritage Property & Casualty Insurance Company, Sunrise, for Defendant.

ORDER DENYING PLAINTIFFS' AMENDED MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

THIS CAUSE having come before the Court for hearing on Plaintiffs' Amended Motion for Leave to File an Amended Complaint ("Motion"), and the Court having reviewed the Motion and the docket, having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. The complaint alleges an April 8, 2020 date of loss.

2. The Motion seeks leave to file an amended complaint not in an attempt to state a cause of action to survive a motion to dismiss or in order to avoid summary judgment. Instead, the proposed amendment seeks to change the alleged date of loss from April 8, 2020 to April 30, 2020 to allege a cause of action for damage allegedly due to a different cause—a potentially different wind event.

3. The complaint also alleges that "Plaintiffs hired a licensed contractor to perform necessary remediation and repair services" and that "Plaintiffs requested coverage for the remediation and repair services under the policy" for the April 8, 2020 loss.

4. Discovery in this case has proceeded based on the April 8, 2020 date of loss, including the depositions of Defendant's corporate representative, Defendant's field adjuster and Plaintiffs.

5. On October 25, 2021, Defendant filed and served its expert witness discovery requests addressed to Plaintiffs. On the same date, Plaintiffs filed their Motion for Leave to File an Amended Complaint. In the proposed amended complaint, Plaintiffs allege for the first time that "[o]n or about April 30, 2020, the subject property sustained damage due to wind."

6. Plaintiff admits that it was Plaintiff's expert that determined that the date of loss should be April 30, 2020 instead of April 8, 2020.

7. Liberality in granting leave to amend a pleading diminishes as the case progresses to trial. *Marquesa at Pembroke Pines Condominium Ass'n, Inc. v. Powell*, 183 So. 3d 1278, 1280 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D312b]; Rule 1.190(a), Fla. R. Civ. P.

8. The Court finds that granting the Plaintiffs' motion would unduly prejudice Defendant as this matter had been pending for over sixteen months as of the date of hearing on the Motion, the claim was submitted to Defendant and evaluated based on the date of loss alleged in the complaint, fact discovery is nearly complete and expert discovery requests have been submitted based on the April 8, 2020 date of loss alleged in the complaint, a joint case management report was filed representing that the date of loss is April 8, 2020, and the trial readiness deadline for this case is April 15, 2022 pursuant to Eleventh Judicial Circuit Administrative Order 21-09.

9. The date of loss is not simply any date within the range of the

coverage period as Plaintiff argues. Allowing Plaintiffs to change the alleged date of loss on a claim in litigation materially changes the claim, potentially to a new claim with causation allegedly resulting from a different wind event. As such, the new claim is not based on the **same conduct, transaction and occurrence** upon which the original claim was brought.' Contrast *Marquesa*, *supra.*, *Id.* at 1279 ('Leave to amend should be freely given, the more so . . . when the amendment is based on the **same conduct, transaction and occurrence** upon which the original claim was brought.' (emphasis added)

10. Significantly, Defendant has not been afforded a pre-suit opportunity to investigate and respond to the new claim if the amendment were allowed while remaining potentially responsible for attorney's fees in this lawsuit on the new claim relating back to the date of the initial claim.

11. For the foregoing reasons, Plaintiffs' Motion for Leave to Amend is DENIED.

* * *

Estates—Personal representatives—Former wife of decedent, who is beneficiary of estate along with her three sons and the plaintiff in a New York lawsuit to enforce postnuptial contract in which sons, who are joint personal representatives of estate, have been substituted for decedent as defendants, petitions court to discharge her sons as personal representatives due to their alleged dilatoriness in their role as defendants and to appoint administrator ad litem—Comity—Where Florida probate case is substantially similar to NY contract action in material ways, and NY court has already granted summary judgment to former wife and has ample power to enforce that order if defendants are dilatory, it would be inconsistent with comity due NY court for Florida court to intervene—Petitions and related motions in probate case are stayed pending further developments in NY case

IN RE: ESTATE OF BRUNO BICH, Deceased. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2021-3063-CP-02. April 4, 2022. Milton Hirsch, Judge.

ORDER ON PETITION TO APPOINT ADMINISTRATOR *AD LITEM*; AND FOR RELATED RELIEF

Pending before the court are Veronique Bich's *Verified Emergency Petition to Appoint Administrator Ad Litem and Freeze Assets*, DE 6; a *Motion to Dismiss Veronique Bich's Petition for Appointment of Administrator Ad Litem*, DE 30, and a *Motion to Dismiss Veronique Bich's Petition to Freeze Assets*, DE 31, filed by the three adult sons of Veronique and the testator herein, Bruno Bich; Veronique's *Renewed Petition to Appoint Administrator Ad Litem and Direct Transfer of Assets on an Emergent Basis*, DE 80; a *Motion to Dismiss Veronique Bich's Renewed Petition for Appointment of Administrator Ad Litem on an Emergent Basis*, DE 82, filed by the sons; and *Veronique Bich's Memorandum in Response to The Personal Representatives' Motion to Dismiss Renewed Petition for Appointment of an Administrator Ad Litem and Report on Administration of the Estate*, DE 93. Hearings on these various pleadings were had on March 11 and 15, 2022.

I. Facts

Bruno Bich was the chief executive officer and eponym of a company that is based in France, but does business in the United States under the name Bic. That business is identified in the public mind with cigarette lighters, pens, and razors. Although no inventory has yet been filed in this case, it is more than apparent that Bruno Bich's estate is remarkable both for its value and its complexity. That said, no extensive narrative history is necessary for the adjudication of the pending pleadings. For reasons that will become clear, these matters can be resolved on a relatively narrow point of law.

Veronique Bich was Bruno's wife of some four decades, and is the mother of his three sons. Since sometime prior to May of 2008, Veronique and Bruno had a postnuptial contract. *See* Petitioner's Exhibit 6, *First Amended Postnuptial Agreement*.[1] A dozen years later, in May of 2020, Veronique filed an action under that contract in the courts of the State of New York. That action remains pending. The principal points of contention are Vernonique's claim to all-but-exclusive ownership of Grenelle, a Delaware limited liability company; and to nearly 600,000 shares of Bic stock.

Bruno departed this world in May of 2021. He was, at the time, residing on Key Biscayne, so his estate was opened in the 11th Judicial Circuit of Florida. *See* Respondents' Exhibits A-C; DE 40-42. Bruno's will provides at Art. V.A. that his three sons are to act jointly as his personal representatives. DE 56. In that capacity they were, on August 16 of last year, substituted for their father as defendants in the postnuptial contract action. *See* Respondents' Exhibit O, *Stipulation of Substitution of Personal Representatives for Deceased Defendant Bruno Bich*.

Veronique asks the court to discharge her sons as personal representatives and to appoint an administrator *ad litem* in their stead. Their alleged shortcomings as personal representatives are not of the usual sort. Veronique does not allege that they are inattentive to their duties, or unqualified by training and experience to discharge those duties. She does not allege that creditors of the estate generally, or interested persons generally, are in danger of being deprived of the just and competent administration of the estate. She is concerned, not unreasonably, with her own financial interests. Because her hopes and expectations as a beneficiary of the estate are, at least in some general sense, pitted against and opposed to her sons' hopes and expectations, she asserts that her sons cannot discharge their fiduciary duties, or be seen to discharge their fiduciary duties, with that "punctilio of an honor the most sensitive," *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928) (Cardozo, C. J.), that is required of a personal representative. The stock shares in Bic, and the interest in Grenelle, that in her view should long ago have been delivered to her, have not been delivered. This, she insists, is malfeasance on the part of her sons in their office as personal representatives, necessitating their removal from that office.

And perhaps she is right. But for reasons extraneous to the merits of her arguments, the court cannot grant her relief—at least at this time.

II. The Limitations of Comity

"Upon the principle of comity . . . effect is given in one state . . . to the laws of another in a great variety of ways, especially upon questions of contract rights to property." Thomas M. Cooley, *A Treatise on Constitutional Limitations* p. 178 (7th ed. 1908).[2] The doctrine of comity is jurisprudential, not jurisdictional. It is reflective of the need always to maintain the delicately-calibrated balance between states that are, in some sense, sovereign within their own limits; but equals within the larger federal system. "The possibility of inconsistent rulings amongst different courts adjudicating related lawsuits is the primary danger created" when the comity principle is too narrowly applied. *Reliable Restoration, LLC v. Panama Commons, L.P.*, 313 So. 3d 1207, 1209 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D749b]. Litigants are not to be placed between the Scylla of obedience to the courts of one state and the Charybdis of obedience to the courts of another. Apart from that, "The purpose of applying the principle of . . . comity is to prevent 'unnecessary and duplicitous lawsuits' that 'would be oppressive to both parties.' " *In Re Guardianship of Morrison*, 972 So. 2d 905, 908 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2811a] (quoting *Siegel v. Siegel*, 575 So. 2d 1267, 1272 (Fla. 1991) (in turn quoting *Bedingfield v. Bedingfield*, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982))).[3]

Comity, to be applicable, does not require that strict identity of the relief sought, of the cause of action, of the parties to the action, and of the quality of the parties to the action, that is required by the doctrine of *res judicata*, or claim preclusion. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) [29 Fla. L. Weekly S21a]. A properly-asserted claim of *res judicata* results in a bar to further litigation. But comity is a discretionary limitation, not a procedural bar. Thus what is necessary is not complete identity, but substantial similarity, between one lawsuit and another. *Sauder v. Rayman*, 800 So. 2d 355, 358 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D2814b]; *Polaris Pub. Income Funds v. Einhorn*, 625 So. 2d 128, 129 (Fla. 3d DCA 1993). "[I]t is sufficient . . . that resolution of the one case will resolve many"—not necessarily all, but many—"of the issues involved in the subsequently-filed case." *Fla. Crushed Stone Co. v. Travelers Indem. Co.*, 632 So. 2d 217, 220 (Fla. 5th DCA 1994).

To be sure, there are dissimilarities between the New York litigation and the case at bar. The New York case is an action at law, sounding in contract; the present case is a suit in equity. In New York Veronique seeks enforcement of a contract, or money damages if the contract cannot be enforced; here, she seeks the replacement of her sons in their capacity as personal representatives. But she seeks their replacement because she believes they have been dilatory or obfuscatory in their role as substituted defendants in the New York litigation, which she views as inconsistent with their fiduciary obligations as personal representatives of the estate. Equity looks to substance and not to form; and in substance, this lawsuit is substantially similar to its New York counterpart in material ways. Veronique believes that if her sons were replaced as personal representatives by an administrator *ad litem* in this Florida probate matter, the administrator would act according to that standard of duty and impartiality required of fiduciaries, and she would promptly receive the relief she claims in her New York contract action. In law or in equity, in New York or in Florida, Veronique's factual allegations, and her outcome of choice, remain the same.

Reliable Restoration, supra, involved two lawsuits. Reliable Restoration, LLC, filed suit in Georgia in March of 2019 against Panama Commons, L.P.; Panama Commons filed suit in Florida in April of the same year against Reliable. *Reliable Restoration, LLC*, 313 So. 3d at 1208. Reliable had entered into a contract with Panama to provide hurricane restoration work on a property owned by Panama in Florida. In connection with that work, each side accused the other of breach of contract. *Id*. Reliable's Georgia lawsuit alleged that Panama withheld payment for work done, and Panama's Florida lawsuit alleged that Reliable failed adequately to perform the work. Reliable had apparently lodged a mechanic's lien; which Panama, in its lawsuit, alleged to have been a fraudulent filing. *Id*. at 1209. Given that the Georgia action was first filed, Reliable sought a stay in the Florida litigation on grounds of comity. The Florida trial court denied that request. *Id*.

And the appellate court reversed:

> [Panama] argue[s] that the cases are not substantially similar because the remedy they seek in [Florida]—that being, adjudication of the lien issue—is not available in the Georgia case. But the validity of the liens in the [Florida] case—along with any applicable damages based on any claim wrongfully filed—will likely still depend on the same factual issues which will be considered in the Georgia case. Put differently, both lawsuits boil down to the question of who wronged whom during the execution of the contract. There is little question that the progression of the Georgia case will likely resolve the issues raised in the subsequently filed [Florida] case. This renders the cases substantially similar.

Id. at 1210.

Here, too, there can be "little question that the progression of the [New York] case will likely resolve the issues raised in the" case at bar. Indeed it has very nearly done so already. On March 4 of this year, the New York court entered an order granting summary judgment to Veronique, requiring that, not later than May 3, the equity interests in Grenelle and Bic that she seeks be transferred to her. *See* Petitioner's Exhibit 4, *Judgment*. If for some reason that deadline were not to be met, the New York court has ample power to enforce its order. In the interim, it would be unwise in the extreme, and utterly inconsistent with a proper respect for the comity due the court system of a sister state, for this court to intervene in any way.

Where, as here, the doctrine of comity is applicable, the remedy is not dismissal of the present suit but a stay of that suit. *See, e.g., Opko Health, Inc. v. Lipsius*, 279 So. 3d 787 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2275a]; *Norris v. Norris*, 573 So. 2d 1085 (Fla. 4th DCA 1991). Such are the vagaries of litigation that it is not inconceivable that a time may come when it would be appropriate for this court to vacate the stay it now enters, and to adjudicate the motions and petitions referenced at the outset of this order. But that is matter for another day.

III. Conclusion

The various motions and petitions identified at the outset of this order are hereby stayed, pending further developments in the New York litigation.

---

[1]At the hearing of March 11, counsel stipulated to the receipt in evidence of a number of exhibits. The court is grateful to counsel for their collegiality and professionalism in entering into these stipulations.

[2]Judge Cooley's treatise has been described as "probably the best-known legal treatise of its time." Michael J. Pallamary, "Revisiting Cooley," *The American Surveyor* (August 15, 2015).

[3]Comity is also a matter of reciprocity between states. The principles of Florida law discussed herein are, so far as appears, principles of New York law as well. *See, e.g., White Light Prods., Inc. v. On the Scene Prods., Inc*., 231 A.D. 2d 90, 660 N.Y.S. 2d 568 (N.Y. App. 1997).

* * *

Estates—Action by personal representative seeking to have restored to decedent's estate a condominium unit, which was given by respondent to a corporation owned by the decedent's long-time boyfriend pursuant to a purported power of attorney—Power of attorney—Because strict compliance with Florida statutory requirements for execution of power of attorney is required, power of attorney signed by decedent before notary but not signed by two witnesses to decedent's execution of document was never valid—If non-durable power of attorney was valid when created, questions of fact as to decedent's mental capacity at time respondent gave her property to her boyfriend preclude summary judgment—Respondent exceeded scope of his authority under power of attorney by giving condominium to corporation where language of power of attorney cannot be read to authorize respondent to make gifts or to give himself gift of income stream derived from management of condominium—Contention that respondent's use of power of attorney to convey condominium was estate planning device by which decedent sought to bequeath condominium to boyfriend, not gift it to him, is supported only by speculation—No merit to argument that property was conveyance supported by consideration of love and affection that boyfriend had shown to decedent—Summary judgment is granted as to counts for quiet title and declaratory relief—Summary judgment cannot be granted as to claim for ejectment where complaint does not name condominium tenants as respondents and does not assert as matter of uncontroverted fact that there is no tenant in possession

IN RE: ESTATE OF MARIA CECILIA QUADRI, Decedent. MARIA ISABEL QUADRI DE KINGSTON, as personal representative of the ESTATE OF MARIA CECILIA QUADRI, Petitioner, v. RAUL PARISI, OSCAR E. PICCOLO, and OXEN GROUP, LLC, THOMAS J. HESS, individually, and THOMAS J. HESS, P.A., a

Florida corporation, Respondents. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Probate Division. Case No. 2018-180-CP-02. Adv. Case No. 2018-445-CP-02. April 5, 2022. Milton Hirsch, Judge.

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Maria Isabel Quadri de Kingston, the personal representative of the estate of her late sister Maria Cecilia Quadri, moves for summary judgment as to Counts I (quiet title), II (declaratory relief), and VII (ejectment) of her Second Amended Complaint. In truth these counts are simply three different means of seeking the same relief. Maria Isabel alleges that, purporting to act pursuant to a power of attorney signed by Maria Cecilia, Respondent Oscar Piccolo gave[1] Maria Cecilia's valuable Brickell-Avenue condo unit to Respondent Oxen Group, LLC, a corporation wholly owned by Piccolo's friend and sometime business colleague Respondent Raul Parisi. Maria Isabel wants the condominium unit restored to the estate. Whether this is done by quieting the estate's title to the unit, or by declaratory relief, or by ejectment of the respondents, is a matter of indifference to her.

It is Maria Isabel's position that the power of attorney was void *ab initio* and thus incapable of vesting Piccolo with authority to give the condominium unit to Oxen. *See Petitioner's Motion for Partial Summary Judgment* ("MSJ"), DE 582, at pp. 11 *et. seq*. It is further Maria Isabel's position that, even if the power of attorney had been effective when created, its efficacy terminated as a matter of law when Maria Cecilia became incapacitated. *MSJ* at pp. 13 *et. seq*. Finally, it is Maria Isabel's position that even if the power of attorney had been effective when created, and even if its efficacy had not terminated when Maria Cecilia became incapacitated, Piccolo exceeded the scope of the authority vested in him by that power of attorney when he simply gave the condo away. I consider those positions in turn.

I. Was the power of attorney void *ab initio*?

The "Florida Power of Attorney Act" appears at Fla. Stat. § 709.2101 *et. seq*. Section 709.2105(2) provides that, "A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or as otherwise provided in §695.03." Section 695.03(3) deals with the formalizing of a power of attorney when done in a foreign country. Apropos the case at bar, it provides that, "An acknowledgment, an affidavit, an oath, a legalization, an authentication, or a proof taken, administered, or made . . . in a foreign country may be taken, administered, or made . . . before a notary public of such foreign country or a civil-law notary . . . of such foreign country." In other words, the foreign country's version, or equivalent, of a notary can do the notarizing.

Although the power of attorney in this case purports to bear the signatures of two witnesses, all agree that the authors of those signatures were not witnesses to anything. Certainly they did not see Maria Cecilia sign the power of attorney. "At the time the [power of attorney] was executed by [Maria] Cecilia, it was not signed by two subscribing witnesses. This fact is not in dispute." *Response in Opposition to Motion for Summary Judgment* ("Resp"), DE 584 p. 12.[2] The "witness" signatures were procured by Respondent Piccolo long after the fact. As I noted in a prior order, "One such witness was Piccolo's wife, who was not in Argentina when Cecilia signed the power of attorney and thus could not have borne witness. The other was a Daniel Monsalve, whom Piccolo initially claimed not even to know, but whom he now acknowledges knowing. . . . Apparently Piccolo now claims that he was unaware that a witness, to be a witness, actually has to witness something." *Order on Motion to Dismiss Second Amended Complaint*, DE 547 p. 4, n.4.

For their part, Respondents allege that the power of attorney was executed in accordance with those formalities required by Fla. Stat. § 695.03. Three persons were present and saw Maria Cecilia execute the power of attorney: Respondent Parisi, an Argentine notary, and that notary's wife. *Resp* p. 5 ¶7. "On August 25, 2016, Mr. Belzoni[, the Argentine notary], along with his wife, went to [Maria] Cecilia and Mr. Parisi's home for Mr. Belzoni to notarize the [power of attorney] for [Maria] Cecilia. . . . [Maria] Cecilia executed the [power of attorney] at her home in Argentina and in the presence of Mr. Belzoni who notarized" it. The power of attorney was then apostilled. *Resp* p. 12. Although Mr. Belzoni signed the power of attorney as a notary, he did not sign as a witness; and no one else present signed at all.

Maria Isabel's position is straightforward: Section 709.2105(2) requires that to be effective, a power of attorney must be (1) signed by the principal; and (2) signed by two subscribing witnesses; and (3) acknowledged by the principal, either before a notary or, if done in a foreign jurisdiction, before a titulary analogous to a notary. Here, the power of attorney was indeed signed by Maria Cecilia (thus satisfying the first prong of the test). It was indeed acknowledged before a notary, or the Argentine version of a notary (thus satisfying the third prong of the test). But it was not signed by two, or for that matter any, subscribing witnesses. True, there were two people present, Mr. Parisi and Mrs. Belzoni, who might have signed as witnesses; but they did not. True, two people later signed as witnesses; but they never witnessed anything. The second prong of the test is therefore unsatisfied. The formalities of execution are not fully complied with. In Maria Isabel's view, strict compliance is required, and here, strict compliance is wanting. It follows that the power of attorney was never of any force or effect.

Respondents offer a number of arguments in rebuttal, but only one merits extended discussion. They insist that it was Maria Cecilia's intent to execute the power of attorney, and to execute it in such a way as to make it entirely efficacious. She troubled herself to obtain the services of a notary, and to have him witness and attest to her signature. Her failure to solicit the signatures of Mr. Parisi and Mrs. Bolzoni as witnesses were, in Respondents' view, inadvertent and a mere reflection of her unfamiliarity with the niceties of Fla. Stat. § 709.2105(2). Her compliance with the requirements of that statute was, if not strict, certainly substantial. In the circumstances, argue Respondents, that is, or at least should be, enough. To require more would be to frustrate, rather than give effect to, Maria Cecilia's intent.

The issue is clearly presented. If strict compliance is required, it is not made out. If substantial compliance is sufficient, it is made out. As the parties acknowledge, the issue is one of first impression. The "court may construe . . . a power of attorney," Fla. Stat. § 709.2116(1); and on the present facts, the court must do so.

The opinion of the Florida Supreme Court in *Allen v. Dalk*, 826 So. 2d 245 (Fla. 2002) [27 Fla. L. Weekly S708d], although not controlling, is instructive. In *Allen*, a Ms. McPeak directed her attorney to prepare a will, a durable power of attorney, and a living will and designation of health care surrogate. *Allen*, 826 So. 2d at 246. In a flurry of signing, she executed four copies of the living will and designation of health care surrogate, and three of the durable power of attorney; but somehow omitted to sign the will itself. *Id*. at 246-47. When Ms. McPeak died, her niece, Petitioner Allen, sought the admission of the will to probate. *Id*. at 247. The probate judge determined the will to be admissible and, in the alternative, imposed a constructive trust on estate assets for the benefit of the beneficiary named in the will. *Id*.

The district court of appeal, although it "acknowledged that the decedent probably intended to sign the will," reversed the probate judge. *Id*. In the view of the appellate court, a will not signed by the testator was no will at all. Nor could the problem be outflanked by imposing a constructive trust. *Id*. The court of appeal certified to the Florida Supreme Court the following question of great public

importance:

> May a constructive trust be imposed over the assets of an estate in favor of a beneficiary named in an invalidly executed will, where the invalidity is the result of a mistake in its execution, and the invalid will expresses the clear intention of the decedent to dispose of her assets in the manner expressed there?

Id. at 246. The Supreme Court answered the question in the negative, affirming the intermediate appellate court. *Id*.

As a threshold matter, the court in *Allen* was obliged to distinguish its earlier decision in *In Re Estate of Tolin*, 622 So. 2d 988 (Fla. 1993). Tolin signed a will leaving the residue of his estate to a friend, one Creaig. *Id.* at 989. Some years later he executed a codicil, changing the residuary beneficiary to a public charity. Later still, Tolin reconsidered, and sought to restore Creaig as his residuary beneficiary. He did so by tearing up what he thought was the original codicil. After Tolin's death, however, it appeared that the document he destroyed was a copy—a very convincing and exact copy—rather than the original codicil, which remained in the custody of his lawyer. *Id*. The certified question of great public importance that came before the Florida Supreme Court was:

> May a codicil to a will be revoked by destroying a photographic copy if the testator believed that by such act he was destroying the original and the testator intended to revoke the codicil?

Id. at 989.

The Supreme Court determined that the revocation was not effective. Where the creation or, in *Tolin*, revocation of a will or codicil is concerned, "it is well settled that strict compliance with the will statutes is required." *Id*. at 990. Here, that strict compliance was lacking. Tolin intended to revoke his codicil by destroying it, and he destroyed what he thought was his codicil. But the requirement that the intent to destroy be conjoined with the actual destruction of the codicil itself—not some look-alike document, but the original codicil—was not satisfied.

But the *Tolin* Court went further. It then considered "whether a constructive trust should properly be imposed when a testator fails to effectively revoke a codicil because of a mistake of fact." *Id*. at 990. That Tolin intended to revoke his codicil was uncontroverted. His intent was frustrated "by the high quality of the copy, which made it indistinguishable from the original." *Id*. at 991.[3] In the circumstances, equity would impose a constructive trust as the means of giving effect to the testator's intent.

The *Allen* court "decline[d] the invitation to extend *Tolin* beyond its facts." *Allen*, 826 So. 2d at 248. It was undisputed in *Tolin* that the testator intended, and attempted, "to comply with the statutory requirements for revocation by physical act." *Id*. There could be no suggestion that Tolin's intent was unclear; he was simply the victim of a mistake of fact that any layman might easily have made. "By contrast, [in *Allen*] the major requirement for a validly executed will," the requirement of the testator's signature, was not met. In *Allen*, "the decedent failed to sign or direct someone to sign her will. While it is probable that the decedent read the will and intended to sign her name, this Court has no way of knowing why she did not do so, nor do we know that the will properly reflects her testamentary intent." *Id*. at 248. Although the *Allen* Court did not speak in the language of strict versus substantial compliance, the implication of the opinion is that the requirement that a testator sign her original will is so fundamental that where that requirement is not satisfied, there is a failure of even substantial compliance—no matter how many other formalities are satisfied. In a separate concurring opinion, Chief Justice Anstead noted, "[E]ven proponents of the substantial compliance doctrine to cure the results of defective execution have not suggested that the more 'fundamental' formalities for valid execution of a will, such as signature, are dispensable."[4] *Allen* at 249 (Anstead, C. J., concurring).

In the solemnizing of wills, the signatures of attesting witnesses are second in importance only to the signature of the testator. "[T]he testator must sign or acknowledge his signature on the will in the presence of two witnesses and . . . the attesting witnesses must sign the will in the presence of the testator and in the presence of each other. . . . An improperly attested will may not be admitted to probate." *Jordan v. Fehr*, 902 So. 2d 198, 201 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D950b]; *see also Price v. Abate*, 9 So. 3d 37, 38 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D502c] ("An improperly attested will cannot be admitted to probate"). These strict requirements are intended "to assure not only that the signature on the will is that of the testator, but to provide reasonable assurance of the circumstances under which the signature was affixed to the document." *Jordan*, 902 So. 2d at 201 (citing *Manson v. Hayes*, 539 So. 2d 27, 28 n. 2 (Fla. 3d DCA 1989)). "Thus, to satisfy the requirements [of law], it is essential for the witnesses to sign both in the testator's presence and in the presence of each other." *Jordan*, 902 So. 2d at 201 (citing *Simpson v. Williams*, 611 So. 2d 544 (Fla. 5th DCA 1992)). The same rule of strict compliance applies to the testamentary aspects of a revocable trust. *Kelly v. Lindenau*, 223 So. 2d 1074, 1076-77 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D1133a] ("[A] trust—or an amendment thereto—must be signed by the settlor in the presence of two attesting witnesses and those witnesses must also sign the trust or any amendments in the presence of the settlor and of each other. These requirement are strictly construed.").

All well and good; but the issue at bar does not involve a will or a trust. It involves a power of attorney. As with wills and trusts, the law of Florida provides detailed and specific formalities that must be complied with if a power of attorney is to be binding and effective. Does it therefore follow that, as is generally the case with wills and trusts, compliance with those formalities must be strict and not merely substantial?

This would be an easier case if the missing signature were that of Maria Cecilia. As with the signature of a testator to a will, so with the signature of a principal to a power of attorney: no aspect of compliance with statutory requirements could be more fundamental, more essential. If it were Maria Cecilia, and not those who were in her presence when the power of attorney was executed, who omitted to sign, no amount of extrinsic evidence of her intent to sign would persuade me to enforce the power. Maria Cecilia, principal in the present case, would be situated similarly to Ms. McPeak, testator in the *Allen* case; and the rule in that case would rightly control.

What is missing here, however, is not the signature of the principal, but the signatures of the witnesses. As noted *supra*, Respondents take the position that there was compliance in substance. A notary, his wife, and Respondent Parisi, are all alleged to have been present when Maria Cecilia signed the power. They did not bother to sign as witnesses because, in Respondents' view, they did not know they were obliged to do so. They acted—again, in Respondents' view—in conformity with Argentine law, and assumed that would be adequate for their purposes. Their assumption was not wholly unreasonable. There are circumstances in which a notary's stamp and signature are entirely sufficient to authenticate and formalize documents in Florida, and elsewhere in the United States.

But they are not sufficient to authenticate and formalize a power of attorney in Florida. To the extent that powers of attorney are *ejusdem generis* with wills and trusts—other writings commonly associated with the personal disposition of important items of property—powers of attorney must be executed with the same strict compliance required in connection with wills and trusts. Equity was called into being to ameliorate the harsh and rigid application of law; and it may seem ironic at best that equity insists on the harsh and rigid application of

formalities in situations such as this one. Such strict application may, it is true, seem unfair and seem to frustrate the intent of a testator, settlor, or principal in some cases. Perhaps this is such a case. But in the larger sense, the rule of strict compliance is intended to promote fair outcomes by limiting fraud and mistake. Once open the gates to a less than strict compliance, and the construction of a simple will, trust, or power of attorney may become a carnival of claims, contrived claims, and false claims, all of them impossible to assess and adjudicate. That is not equity, in any sense of the word. *See also* Fla. Stat. § 709.2301 (principles of equity applicable to statutes governing powers of attorney).

In any event, Respondents here can hardly assert that they are being treated unfairly. Messrs. Parisi and Piccolo have an extensive history of business dealings in Miami, and even Maria Cecilia was no neophyte. If they wanted a valid power of attorney for use in Florida, it was their responsibility to obtain one, and to obtain one in conformity with all governing legal requirements. If they failed to do so, they will not be heard to grouse that those legal requirements are excessively exacting in their terms, or excessively stringent in their application. Counsel for Respondents, in her very scholarly *Response*, quite properly cautions me that my resolution of this issue, "could directly impact nearly every power of attorney executed in a foreign country." *Resp.* p. 2. Her point is well taken. *Malleiro v. Mori*, 182 So. 3d 5 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2226c] involved an Argentine national who died in Florida. She executed two wills: one in the United States in perfect conformity with Florida law, and one in Argentina in seeming conformity with the law of that nation. Although the particulars of *Malleiro* differ from those of the case at bar in important ways, Judge Logue, at the conclusion of his opinion in that case, offered an admonition akin to the one offered by Respondents' counsel here: "Florida is already a global community and global marketplace. The people of Florida benefit from the way many citizens of distant states and countries visit, invest, and often stay . . . in Florida. . . . We owe it to them to ensure that their testamentary intentions are strictly honored regarding the disposition of their Florida property." *Malleiro*, 182 So. 3d at 10-11. To that wise thought I would add only this: that we owe it to all litigants, the home-born and the foreign-born, to apply a uniform rule of law in the courts of Florida—even when that rule may seem petty in its rigidity. Yes, the consequences of probate rules rigidly applied are not always good. But the consequences of probate rules loosely and unpredictably applied are almost always bad. Respondents' counsel rightly expresses her concern that my resolution of this issue "could directly impact nearly every power of attorney executed in a foreign country" for use in Florida. By demanding strict compliance, I send a clear message to anyone in a foreign country seeking to execute a power of attorney for use in Florida: conform to all legal requirements or take the consequences.[5]

I recognize that there are areas of Florida law in which substantial compliance is as effective as strict compliance. A party's adherence to contractual conditions precedent, for example, is evaluated for substantial compliance. *See, e.g., Alvarez v. Rendon*, 953 So. 2d 702 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D902a]; *Grover v. Jacksonville Golfair, Inc.*, 914 So. 2d 995 (Fla. 1st DCA 2005) [30 Fla. L. Weekly D2422b]; *Community Design Corp. v. Antonell*, 459 So. 2d 343 (Fla. 3d DCA 1984). In the contracts context, substantial compliance simply means that any contractual breach is immaterial. *AJH Prop. Inv. Ltd. v. SunTrust Bank*, 89 So. 3d 948 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D840a]; *Legacy Place Apartment Homes v. PGA Gateway, Ltd.*, 65 So. 2d 644 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1605a]. Perhaps Respondents would argue that their non-compliance—their failure to secure the signatures of persons whom they claim were present, witnessed Maria Cecilia's execution of the power of attorney, and could have signed as witnesses—was immaterial. But the law of wills and trusts provides a better analogy, and the law of contracts a worse one, for the power of attorney in this case. Respondents themselves concede as much. They assert adamantly that Mr. Piccolo's gift of the condo to Oxen was a feature of Maria Cecilia's estate planning; and was ordered by her *causa mortis* at a time when, for her, the night was growing dark; the candle was flickering; and black oblivion loomed. *See Resp* pp. 40 *et. seq.*, citing, *inter alia*, *De Bueno v. Castro*, 543 So. 2d 393 (Fla. 4th DCA 1989).

If, as I conclude, the power of attorney at issue here was never, from the outset, of any force and effect, then the transactions in which respondents engaged vis-a-vis the demised condominium unit were likewise of no force and effect,[6] and Maria Isabel is entitled to her summary judgment without more. For my better correction by the court of appeal, however, I consider the other arguments raised by the parties in their *Motion* and *Response*.

II. Assuming the power of attorney was valid when created, did it terminate as a matter of law when Maria Cecilia became incapacitated?

All agree that Maria Cecilia executed the power of attorney on August 25, 2016. *See, e.g., Resp.* p. 5, ¶6. Respondents concede that at that time Maria Cecilia's "health was truly starting to deteriorate." *Resp*. p. 11.

But Maria Isabel goes further. She asserts that:

> It is undisputed that the decedent lacked the ability to take those actions necessary to obtain, administer, and dispose of real and personal property on November 4, 2016, when Piccolo signed the [quitclaim deed], because per Parisi's testimony, as of November 2, 2016, the decedent "wasn't waking up. She was giving signs of understanding, but we were not able to understand her because she was babbling."

MSJ p. 14 (some quotation marks omitted). Counsel for Maria Isabel directs my attention to Fla. Stat. § 709.2109(1)(b), which provides that a "power of attorney terminates when . . .[t]he principal becomes incapacitated, if the power of attorney is not durable;" and to Fla. Stat. § 709.2104, which provides that a power of attorney is not durable unless it includes language expressly "show[ing] the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity." Because the power of attorney in the case at bar includes no such language, it became invalid—in Petitioner's view—on or about November 2, 2016, *i.e.*, before Mr. Piccolo gave the condo unit to Oxen. In other words, Piccolo was entirely without authority to give the condo to Oxen.

The parties debate at some length the meaning of "incapacity" for these purposes, and Respondents argue that Maria Isabel is barred from pleading incapacity at summary judgment because she never raised it in any prior submission. But I need neither enter into the debate as to the definition of "incapacity," nor consider Respondents' allegation of procedural bar, to address this issue.

The sole evidence of Maria Cecilia's alleged loss of cognitive function is the testimony, captioned above, of Mr. Parisi. To be sure, a lay witness can express his impression that someone with whom he interacted appeared to be lucid and in possession of her mental faculties, or appeared otherwise, Fla. Stat. § 90.701, *see, e.g., Florida Bar v. Clement*, 662 So. 2d 690, 697 (Fla. 1995) [20 Fla. L. Weekly S553a]; *Cruse v. State*, 588 So. 2d 983, 990 (Fla. 1991); but such an impression is not necessarily entitled to great weight. And in any event, here it is controverted. Respondents, including Mr. Parisi, now take the position that Maria "Cecilia was provided medication to prevent pain but was, up until the date of her death, was [*sic*] in full use of her faculties." *Resp.* p. 6, ¶12, purporting to cite a letter from Maria Cecilia's treating physician, a Dr. Fiorani, a copy of which is ap-

pended to the *Response* as Exhibit H.

Unfortunately, that is not what the letter says. Dr. Fiorani represents that "until October 31, 2016, the patient retained full use of her mental faculties, being lucid, oriented times three," but that subsequent to that date she began to experience increasing drowsiness accompanied by the inability to rest and by poor pain control, for which reason she was then sedated. Dr. Fiorani does not describe the extent to which Maria Cecilia was sedated, the effect of that sedation on her cognitive function, or the lucidity of her mind at times relevant to this issue. Dr. Fiorani's chart note does not, certainly does not, give Maria Cecilia that clean bill of mental health, that assurance of "full use of her faculties" till the moment of death, that counsel for Respondents claims.

Still, I cannot say for purposes of summary judgment that there exists no material issue of fact whether, at the time Mr. Piccolo gave away her condominium unit, Maria Cecilia was capacitated or incapacitated. The power of attorney was not durable. If Maria Cecilia was, at the time Piccolo gave her property to Oxen, bereft of that relatively minimal level of cognition needed to meet the threshold of intellectual capacity, the power of attorney was a nullity and so was the gift. But that is a question that would require further development of the factual record.

III. Did Piccolo exceed the scope of the authority vested in him by the power of attorney when he simply gave the condo away?

One to whom power of attorney is given "is a fiduciary." Fla. Stat. § 709.2114(1). He "[m]ust act only within the scope of authority granted in the power of attorney." Fla. Stat. § 709.2114(1)(a). Like every fiduciary, he must act in good faith, and must not act in a manner contrary to his principal's best interests. Fla. Stat. § 709.2114(1)(a)1, 2. As expressed by a treatise-writer upon whom generations of students of equity have relied:

> Whenever two persons stand in such relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relations had existed.

Fetter, *Handbook of Equity Jurisprudence* pp. 145-46 (1st ed. 1895).[7]

Piccolo was ill-suited for this fiduciary role. As I have noted elsewhere, Piccolo "never expressly disclosed to [Maria] Cecilia that if the condo were sold, he would cease to earn management fees from it, whereas if it were conveyed to Oxen he would continue to profit from its management."[8] *Order on Motion to Dismiss Second Amended Complaint*, DE 547 pp. 3-4. At the time Piccolo handed the condo to Oxen, he "was aware that [Maria Cecilia] had rejected a sales price of $260,000 [for it,] (causing him, in private correspondence, to offer the very-much-less-than-complimentary observation, 'Greed is her god!') because she believed that in due course the property would sell for $300,000." *Id*. at 4.

In short, Mr. Piccolo's conduct was hardly that expected of a fiduciary. And Maria Cecilia's conduct was hardly that expected of someone allegedly willing "To throw away the dearest thing he owned/As 'twere a careless trifle." Wm. Shakespeare, *MacBeth*, Act I sc. 4.

"The established rule is that a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified." *Bloom v. Weiser*, 348 So. 2d 651, 653 (Fla. 3d DCA 1977). As an expression of that "established rule," "an agent cannot make gifts of his principal's property to himself or others unless it is expressly authorized in the power" of attorney. *James v. James*, 843 So. 2d 304, 308 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D655a]. The operative language of the power of attorney in this case does not, and cannot be read to, expressly authorize the making of gifts. Yet in truth Piccolo made a gift of the property not only to Mr. Parisi but also to himself. By giving the condo to Oxen, Parisi's wholly-owned corporation, he made a gift of the ownership of the condo to Parisi. And by assuring that his friend and business associate would continue to hold the unit out for rental, he made a gift to himself of the income stream arising from his own management fees. None of this was specifically provided for in the power of attorney, and none of this was consistent with Piccolo's fiduciary duty. The power of attorney in this case does not expressly authorize the making of gifts, and Piccolo's own course of dealing with Maria Cecilia made clear to him that she viewed the condo as an investment property, to be sold or otherwise utilized for profit, not given away for free. After all, "[g]reed [wa]s her god!"

Respondents offer not one but two fall-back positions. First, they aver that Mr. Piccolo's use of the power of attorney to give Maria Cecilia's condominium unit to Oxen wasn't a gift at all—it was an "estate planning device." *Resp*. p. 40. According to Respondents, Maria Cecilia sought to bequeath the property to Mr. Parisi, her long-time boyfriend. Rather than do so in a conventional and straightforward fashion—as, say, by leaving it to him in a will—she took the roundabout route of conveying a power of attorney to Mr. Piccolo, who then made a gift of the condominium unit to a corporation, which corporation was in turn owned by Parisi. Respondents identify five circumstances which, in their view, provide factual support for their thesis, thus defeating summary judgment. I consider those five circumstances in turn.

Respondents first allege that because the power of attorney "granted Mr. Piccolo authority to convey only the [condo] property, and no other properties," *Resp.* pp. 42-43, it somehow follows that this was all part of an elaborate estate-planning scheme. I freely acknowledge that, at least so far as appears on the present record, the power of attorney extended to one property only, and no other power of attorney conveyed similar authority as to other properties. How it therefore follows that a power of attorney that vested no authority to make gifts, bequests, devises, endowments, or anything of the kind; a power of attorney that was not given, and made no reference, to Mr. Parisi; a power of attorney that did not recite, and was not accompanied by any document that recited, that it was executed as part of an estate plan and with the intent that the demised property be left to Mr. Parisi or his corporation; was an estate-planning device, I confess I do not understand. Counsel for Respondent is to be commended for her advocacy and creative afflatus. But facts, and not imagination, are needed to defeat summary judgment.

The second circumstance to which Respondents direct my attention is, "the fact that [Maria] Cecilia had executed a quit claim deed in Mr. Parisi's favor for the [demised] property back in 2012, evidencing [Maria] Cecilia's intent that Mr. Parisi would ultimately be the sole beneficial owner of the property in the event [Maria] Cecilia died before Mr. Parisi." *Resp.* p. 43. But this undercuts, rather than strengthens, Respondents' position. If Maria Cecilia signed and delivered to Mr. Parisi a quitclaim deed as to the condo in 2012, the condo was his thereafter and her 2016 power of attorney was nothing more than scrap paper. If she did not sign, or signed but did not deliver, a quitclaim deed in 2012, that would evidence her intent that the property *not* go to Mr. Parisi. On either version of affairs, the power of attorney was no part of any estate-planning program.

Respondents then purport to note, "the fact that Mr. Piccolo was [Maria] Cecilia's trusted manager of the property for years." *Resp*. p. 43. Overlooking for purposes of the analysis the irony in characterizing Mr. Piccolo as Maria Cecilia's "trusted" property manager, the

uncontroverted facts reveal a property owner who had evidenced her desire to profit from her property by its sale or other commercial use, conveying to a property manager a power of attorney that vested him with authority sufficient to give effect to that desire. How is that a specimen of estate planning? Armed with the power of attorney, Piccolo, at least in theory, could have sold the property to anyone willing to pay fair market value for it, whether Parisi liked it or not. If Maria Cecilia died while such a sale was pending or after it was completed, the proceeds of the sale would have constituted part of her estate. Mr. Parisi would have had no claim to those proceeds, except to the extent he had a claim, if any, against the estate. How is that estate planning? How is that demonstrative of an intent to benefit Parisi?

Fourth on Respondents' list of circumstances is, "the fact that [Maria] Cecilia and Mr. Parisi believed that [Maria] Cecilia would beat her cancer." *Resp*. p. 43. Here again, this works against, and not in favor of, Respondents' conclusion of choice. If Parisi and Maria Cecilia believed with a perfect faith that she would make a complete recovery, no estate planning was necessary; in fact estate planning would be pointless, a waste of time. And that being the case, the power of attorney, whatever it was, was not part of an estate plan. If, on the other hand, Parisi and Maria Cecilia were sensible enough to realize that there is never a guarantee that anyone will beat cancer, and that someone whose cancer is already far along should prepare for the worst, then people as well-versed in business practices as were Mr. Parisi and Maria Cecilia would certainly have engaged in estate planning. Maria Cecilia would have made out a will. If she wanted to convey her Miami property to Parisi, should could have done it by an *inter vivos* gift, or by a testamentary bequest. These are not unfathomable concepts or steps difficult to take. Parisi and Maria Cecilia were well accustomed to transacting business in Miami, and in conforming to U.S. legal requirements. Why, then, would providing a third party—Parisi's business colleague Piccolo—with power of attorney as to Maria Cecilia's Miami condo demonstrate her abiding belief that she would recover from cancer? Put another way, why is Maria Cecilia's belief that she would recover from cancer evidence that the power of attorney employed in this case was actually a tool of estate planning? No reason suggests itself, and Respondents' pleading suggests none.

Finally, Respondents point to, "the fact that [Maria] Cecilia' intent all along was to convey the property to Mr. Parisi in the event she died before Mr. Parisi." *Resp*. p. 43. Even assuming the existence of this "fact"—a very considerable assumption—the questions remain: If that was her intent, why didn't she give the property to Parisi while she was alive, or leave it to him by means of a will when she died? How does the existence of a power of attorney vesting in someone other than Parisi, making no mention of Parisi, unaccompanied by any document expressing a desire to benefit Parisi, constitute an estate-planning tool? And how is Parisi a beneficiary of that estate planning?

Respondents' pleading gets high marks for inventiveness, but offers nothing more than untethered speculation that the power of attorney conveyed by Maria Cecilia to Piccolo was part of a concatenous estate-planning scheme—a pointlessly elaborate and ultimately ineffective estate-planning scheme—and that therefore Piccolo's gift of Maria Cecilia's property to Oxen was not beyond the scope of, not entirely inconsistent with, Piccolo's powers and duties as agent.

As noted *supra*, however, Respondents have a second fall-back position: Piccolo conveyed the property to Oxen, not as a gift, but for good and valuable consideration, the consideration being the "love and affection" that Parisi had shown Maria Cecilia. "In the instant case, it is undisputed that for 14 years, Mr. Parisi and [Maria] Cecilia shared their lives with one another; living as husband and wife" although not actually married. *Resp*. p. 44. *See also Resp*. p. 8, ¶14 ("the property was given by [Maria] Cecilia to Oxen, on behalf of Mr. Parisi, as a gift and in consideration for Mr. Parisi's years of love and affection"); ¶15 (Maria "Cecilia wanted to gift Mr. Parisi the property in exchange for years of love and affection").

Respondents purport to rely upon *Harrod v. Simmons*, 143 So. 2d 717 (Fla. 2d DCA 1962), but that case makes a poor analogy for this one. The decedent in *Harrod* did what Maria Cecilia should have done but didn't: he made out a will. The decedent and his favorite daughter visited a lawyer "for the purpose of engaging him to prepare [the father's] last will and testament." *Harrod*, 143 So. 2d at 718. The father made clear to the lawyer that, although he had many children, he wished to bequeath all his property to the apple of his eye, his daughter Inezze Harrod, because of the "love and affection" that she had shown him. *Id*. On the advice of the lawyer, the father even "executed an affidavit stating that it was his intention to convey his properties to [Inezze] to compensate her for love and affection shown him." *Id*.

Before proceeding further with the facts of *Harrod*, two points bear emphasis: first, *Harrod*, as noted, was a will case. There can be no serious suggestion that a testator, possessed of sound mind, cannot, in providing in his will for the natural objects of his bounty, prefer one or exclude others. He can do so as an expression of "love and affection," or for some other reason, or for no reason at all. *See, e.g., Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d (Fla. 1990). The case at bar is not a will case. Had Maria Cecilia left her Miami property to Parisi in her last will and testament, there would be nothing to litigate here. Had she made an *inter vivos* gift of the property to Parisi in conformity with the law regulating gifts, there would be nothing to litigate here. She did neither. She vested power of attorney in a third party, who then gave the demised property to a corporation, which corporation is owned by Parisi. *Harrod* offers no precedent for that fact pattern, and no support for the notion that Oxen's acquisition of the property was a *quid pro quo* for affection expressed by Parisi to Maria Cecilia.

Second point: the testator in *Harrod* executed an affidavit making clear that he was leaving his properties to Inezze alone, and was doing so because of the love and affection she had shown him. The power of attorney in this case runs from Maria Cecilia to Piccolo. It makes no reference to Parisi. It is unaccompanied by an affidavit, or any document of any kind, expressing a desire on Maria Cecilia's part that the power of attorney be used to benefit Parisi; and that it be so used because of the love and affection he had shown her. Again, *Harrod* is no precedent for the case at bar.

Back to *Harrod*: The lawyer in that case apparently neglected to make reference to a particular piece of the testator's property in the documents he (the lawyer) drafted, as a consequence of which that property, although almost certainly intended by the testator to go, like all others, to Inezze, was divided among all the children. *Id*. at 718. Inezze sought equitable reformation to require that the property go to her. The appellate court declined to grant it. *Id*. at 719. That is the actual holding in *Harrod*. It has no applicability here.[9]

In truth, with or without *Harrod*, discussion of "love and affection" has no relevance to the present case at all. I assume for the sake of the argument that Maria Cecilia and Mr. Parisi loved each other ardently and devotedly. If she had conveyed her Miami condo to him outright, and if that conveyance were later challenged, "love and affection" might well afford sufficient consideration even in the absence of consanguinity or marital affinity. But she did not make a gift to him of her Miami condo—not outright, and not otherwise. She executed a power of attorney as to that condo, appointing Mr. Piccolo as her agent. At some point Piccolo made a gift of the condo to a corporation, and continued to profit from its management. Maria Cecilia received no love or affection from the corporation that received the ownership

interest in the condo, and certainly received none from Piccolo, who benefits financially from the corporation's ownership of the condo.

I am called upon, not to unravel the riddle of a human heart, but to construe a legal document; a document of the sort to which strict and narrow construction is always given. The document is clear on its face. It concerns real property located in Miami. The real property was owned by an Argentine national who was not in a position to see to the day-to-day management of that property, or to personally undertake the sale or rental of that property on advantageous terms. The document deputes to a Miami resident the power to do those things for the absentee owner. Waiting until the owner was helpless to act in her own interests, the agent gave the property to a corporation with which he had a relationship profitable to him. There was no consideration, tangible or intangible, for this conveyance. It was a gift made by someone who had no power to make a gift, and who made that gift in derogation of his fiduciary duty.

IV. To what remedy is Maria Isabel entitled?

In assessing motions for summary judgment, Florida now follows the federal standard. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). That standard recognizes the conceptual similarity between summary judgment and directed verdict. It "permits trial courts to grant summary judgment when one side's version of events is simply implausible." *Scurtis v. Rodriguez*, 29 Fla. L. Weekly Supp. 656b, ___ (Fla. 11th cir. 2021) (Hanzman, J.). "Florida trial courts are no longer required to empanel a jury, and force parties to go through trial, simply because a nonmovant swears to facts belied by the record. Nor may a party avoid summary judgment by showing that 'there is a metaphysical doubt as to the material facts,' *Matsushita Elec. Indus. Co. Ltd.*, 475 U.S. at 586, as summary judgment is now appropriate '[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.' *Id*. at 587." *Scurtis*, 29 Fla. L. Weekly Supp. at ___. As the foregoing discussion makes clear, as to Maria Isabel's allegations that the power of attorney was void for failure of compliance with the formalities required to vivify such documents; and that Oscar Piccolo exceeded the scope of any authority purportedly vested in him by the power of attorney when he chose to donate the condo unit to Oxen; there is no material dispute of fact. Respondents' rejoinders are "simply implausible," "belied by the record," and raise not more than—perhaps not as much as—"a metaphysical doubt."

Respondents argue that Maria Isabel is nonetheless not entitled to relief as to the counts as to which partial summary judgment is sought. I consider those counts in turn.

A. Quiet title

Respondents argue that Maria Isabel is not entitled to summary judgment as to Count I, her claim to quiet title, *Resp*. pp. 45-47, principally because she has not, as Respondents see it, pleaded and shown that Maria Cecilia, from whom the estate takes, had good title to the Miami condo. *Id*. p. 47. This is a curious position for Respondents to take, very much at odds with positions that they have taken throughout the course of this litigation. Not quite a year ago, Respondents's counsel wrote that, "Mr. Parisi encouraged and assisted [Maria] Cecilia with . . . *the purchase of property at issue in this case*: 504 Brickell Key Drive, Unit 203." Maria "Cecilia lived in Argentina at the time that *she purchased the property*." *Respondents' Motion to Dismiss Second Amended Complaint with Prejudice*, DE 436 p. 3 (emphasis added). The pleading is replete with references to the Miami condo, all of which seem to acknowledge it as belonging to Maria Cecilia outright.[10] There is no suggestion in that or any other of Respondents' pleadings that Maria Cecilia's title to the condo was imperfect or incomplete. *See also Respondents' Response to Petitioner's Motion for Sanctions*, DE 555 p. 4.

That being the case, and given that Maria Cecilia died intestate, her Miami real property became an asset of her ancillary estate. Maria Isabel is the personal representative of that estate, and as such is charged with marshaling estate assets, maximizing their value, and distributing them according to law. She would be recreant in her fiduciary duty if she failed to seek to establish clear title on behalf of the estate to the condominium unit.

Maria Cecilia owned the property. Respondents have repeatedly acknowledged as much. The power of attorney she purported to execute as to that property was a nullity, and in any event certainly did not empower Mr. Piccolo to make a gift of the property to a corporation from which he derives income. That being the case, the condo unit was Maria Cecilia's property at the time of her death, and is her estate's property now. Summary judgment is properly granted as to Count I.

B. Declaratory Relief

Respondents quite properly remind me that declaratory actions may be subject to prudential limitations not always applicable to actions at law. The federal courts are particularly cautious about rendering declaratory judgment. That is as it should be. Article III § 2 of the Constitution requires that a "case or controversy" exist in order for a federal court to exercise jurisdiction. For that reason, the federal Declaratory Judgment Act, 18 U.S.C. 2201, begins with the words, "In a case of actual controversy within its jurisdiction . . . ." "Federal courts typically point out that nothing in the Declaratory Judgment Act requires them to hear a request for declaratory relief; indeed, their jurisdiction is entirely discretionary." Robert T. Sherwin, *Shoot First, Litigate Later: Declaratory Judgment Actions, Procedural Fencing, and Itchy Trigger Fingers*, 70 Okla. L. Rev. 793, 797 (2018) (citing *Willton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); *Sherwin-Williams Co. v. Holmes Cty*., 343 F. 3d 383, 390 (5th Cir. 2003)).

By contrast, "Florida's circuit courts are tribunals of plenary jurisdiction . . . . They have authority over any matter not expressly denied them by the constitution or applicable statutes." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (Kogan, J.). That said, Florida's courts are not in the business of resolving hypothetical questions. *See, e.g., Interlachen Lakes Estates v. Brooks*, 341 So. 2d 993 (Fla. 1976). Declaratory judgment "will be rendered in the exercise of the court's discretion when it will serve some practical purpose." Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, XXVIII Yale Law Journal 1, 5 (Nov. 1918). "[T]he exercise of the power to render a declaratory judgment is discretionary with the court." *Id*. at 24.

Section 86.041, Fla. Stat., captioned, "Actions by executors, administrators, trustees, etc.," provides that, "Any person interested as . . . an executor"—*i.e.*, a personal representative—"in the administration of . . . the estate of a decedent . . . may have a declaration of rights . . . to . . . [d]etermine any question relating to the administration of the . . . estate." This entitlement extends to "questions of construction of wills and other writings," the "other writings" presumably including powers of attorney. Maria Isabel, as personal representative, seeks a declaration that the power of attorney given to Piccolo as to the Miami real property was a nullity; that acts taken in reliance on the purported authority of that power of attorney are therefore likewise nullities; that, specifically, the purported gift of the property by Piccolo to Oxen is of no force and effect; that Respondents do not have, and have never had, any interest in the property; and that, from and after the death of Maria Cecilia, the property has been an asset of her estate. All of this falls squarely within the ambit of § 86.041, which is to be liberally construed to do equity. *Wells v. Wells*, 24 So.

3d 579, 583 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D1897b] (citing *Dent v. Belin*, 483 So. 2d 61, 62 (Fla. 1st DCA 1986)); *Backus v. Howard W. Backus Towing, Inc*., 391 So. 2d 378, 380 (Fla. 3d DCA 1980) (citing *Lambert v. Justus*, 335 So. 2d 818 (Fla. 1976)).

Yes, I have discretionary authority to refrain from entering declaratory judgment. But I see no reason to refrain here. The personal representative seeks a determination of legal questions relating directly, centrally, to the administration of the estate. So far as appears from the record, the Miami condominium was a, perhaps the, principal asset in Maria Cecilia's portfolio. If, as I find to be the case, that condominium unit is, and has been since Maria Cecilia's death, an estate asset, her personal representative has the fiduciary duty to establish the estate's title to the asset, to preserve the value of the asset, and to make such use of the asset as will best benefit Maria Cecilia's heirs. "A personal representative may invoke the jurisdiction of the court to resolve judicial questions about an estate or its administration . . . and may maintain an action to determine title to or record possession of property." *Wolf Sanitary Wiping Cloth, Inc. v. Wolf*, 526 So. 2d 702 (Fla. 3d DCA 1988). Count II is properly brought and properly granted. Maria Isabel is entitled to summary judgment on that count.

C. Ejectment

"A person with a superior right to possession of real property may maintain an action of ejectment to recover possession of the property." Fla. Stat. § 66.021. Maria Isabel claims, on behalf of the estate of Maria Cecilia, a right superior to that of the respondents to possession of the Miami condominium property. Indeed she claims not only that her right is superior, but also that Respondents have no right to the property at all, having obtained the property by breach of fiduciary duty.

"When . . . a defendant in an action of ejectment is in possession as a tenant and . . . his or her landlord is not a party, the landlord must be made a party before further proceeding." Fla. Stat. § 66.021(4). Here, Respondents assert the converse: that the condo "is currently being rented and at all times during the course of this action, Petitioner and her counsel have been aware that the property was consistently rented." *Resp*. p. 51. It follows, in the respondents' view, that although they have an ownership interest in the condo, it is the tenant or tenants who are in present possession, and from whom ejectment must be sought. Maria Isabel's Complaint does not name any tenant or tenants as respondents, and her *MSJ* does not assert as a matter of uncontroverted fact that there is no tenant in possession; or that, as a matter of law, possession is vested in Respondents.

On the present state of the record, I cannot grant summary judgment as to the claim of ejectment.

V. Conclusion[11]

Petitioner's *Motion for Partial Summary Judgment Regarding Invalidity of Power of Attorney and Property Conveyance*, DE 582, is granted as to Counts I and II, and denied as to Count VII.

---

[1]Although opposing counsel disagree about a great deal, there is one subject about which they are in enthusiastic and repeated agreement: They both consider the word "gift" to be a verb, "gifting" being the participle or gerund form.

There are those who take a very contrary view. *See, e.g,* https://www.theatlantic.com/entertainment/archive/2014/12/gifting-is-not-a-verb/383676/. My copy of *Black's Law Dictionary* (admittedly the 4th edition, vintage 1968) defines "gift" as a noun: "A voluntary transfer of . . . property without consideration." It treats "give" as the verb, defined as, "To transfer ownership or possession without compensation." Without meaning to seem critical in any way of counsels' choice of usage, I will use "gift" and "give" throughout this order as defined by *Black's.*

[2]References to "Respondents" herein, and to the *Response* filed on their behalf, are to Raul Parisi, Oscar Piccolo, and Oxen Group LLC. Expressly not considered herein are the "Hess Respondents," *viz*., Thomas J. Hess individually and Thomas J. Hess, P.A.

[3]The Court was concerned that this problem might arise again, and with increasing frequency. "As technology advances, the determination of whether an instrument is an original or a copy may become more difficult. Thus, it is advisable for attorneys preparing documents, such as wills and codicils, to consider designating which documents are copies." *Id*.

[4]Chief Justice Anstead quoted from John H. Langbein, *Substantial Compliance With the Wills Act*, 88 Harv. L. Rev. 489, 518 (1975): "[S]ignature is still the most fundamental of the Wills Act formalities. . . . The substantial compliance doctrine would virtually always follow present law in holding that an unsigned will is no will; a will with the testator's signature omitted does not comply." *Allen* at 250 (Anstead, C. J., concurring).

[5]Respondents, in their *Response*, direct my attention to Fla. Stat. § 709.2016, which allows for variances in the form of powers of attorneys executed in other states. *See, e.g., Deutsche Bank National Trust Co. v. Prevratil*, ___ So. 3d ___ , ___ n. 3(Fla. 2d DCA May 22, 2013) [38 Fla. L. Weekly D1123a] ("This power of attorney was executed in California and is governed by New York law"). Argentina is not an American state. It is a foreign country. If the drafters of § 709.2016 had wanted to say "or country," they could certainly have done so. They chose not to, and in so doing they chose wisely. Making some allowance for the relatively trivial differences in the form of, and law governing, powers of attorney from one U.S state to another is one thing. Making the same allowance for the far-reaching differences in the form of, and law governing, powers of attorney from one country to another is something else.

[6]Fla. Stat. § 709.2119, captioned, "Acceptance of and reliance upon power of attorney," provides protection to innocent third parties who reasonably engage in transactions with one holding a power of attorney that is later determined to be invalid. There can be no serious suggestion that Respondents here are third parties in this sense. Respondents procured the power of attorney and were instrumental in its use. They did not engage, reasonably or otherwise, in transactions with someone else who used the power of attorney to their unfair disadvantage.

[7]The same author adds, "A person who is an agent for another undertakes a duty in which there is a confidence reposed, and which he is bound to execute to the utmost advantage of the person who employs him. He cannot be allowed to place himself in a situation which, under ordinary circumstances, might tempt him not to do that which is the best for his principal." *Id*. pp. 147-48.

[8]*NB* that "Oxen's address is Oscar Piccolo's address." *Transcript of Hearing of July 19, 2021*, at 103.

[9]Respondents also place reliance on *Chase Federal Savings & Loan v. Schreiber*, 479 So. 2d 90 (Fla. 1985). Yes, *Chase Federal* does teach that, "the case law of Florida does not support the proposition that the historical equitable requirement of valuable or good consideration to support enforcement of the deed of bargain and sale or of covenant to stand seised, respectively, is part of the law of Florida now applicable to deeds generally." *Chase Federal*, 479 So. 2d at 100. But the issue in *Chase* was the certified question of great public importance, "What is the proper scope of review for district courts of appeal in granting rehearings en banc?" *Id*. at 91. This case is very far removed from that question.

[10]To the extent one ever owns a condo unit outright. *See* Fla. Stat. § 718.106 and annotations thereunder.

[11]Respondents seek to defeat summary judgment by interposing two affirmative defenses, advice of counsel and standing. On November 30 of last year I entered an order, DE 581, staying Respondents' cross-claim against the Hess Respondents, effectively severing that cross-claim from the litigation of the underlying conflict between Maria Isabel and Respondents. The advice of counsel defense travels with that severance. Respondents will raise it if and when they litigate their cross-claim against the Hess Respondents. It does not bear upon the determination of the summary judgment claims now before me. Respondents, by asserting the defense of advice of counsel, are surely not suggesting that if the Hess Respondents rendered less-than-competent advice, Respondents' remedy is to retain a piece of property to which they appear to have no right, and to divest the rightful holders—who had no dealings with the Hess Respondents—of that property. Respondents' assertion of a defense of advice of counsel is, in effect, a claim of legal malpractice against the third-party respondents.

With all due respect to counsel for Respondents, the affirmative defense of standing is without merit. Maria Isabel has been determined to be the personal representative of her sister's estate. The Miami condo has (by the present order) been determined to be an asset of that estate. Maria Isabel has standing, and a fiduciary duty, to pursue her claims herein.

* * *

Jurisdiction—Service of process—Limited liability companies—Defects—Service of order continuing writ of garnishment on registered agent of limited liability company at her residence address is valid service

IN RE: THE FORMER MARRIAGE OF MICHELLE A. SHLIMBAUM, Petitioner/Former Wife, v. JASON M. SHLIMBAUM, Respondent/Former Husband and JMS CONSTRUCTION SERVICES, INC., a Florida corporation. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. FMCE 18-008923 (44) (93). March 4, 2022. Mariya Weekes, Judge. Counsel: Christopher Link, Christopher N. Link, P.A., Plantation, for Michelle A. Shlimbaum, Petitioner. Steven Pesso, Steven M. Pesso, P.A., Boca Raton, for Jason M. Shlimbaum, Respondent. Renee Safier Harris, Law Offices of Renee Safier Harris, PLLC, Boca Raton, for Garnishee Hurr Homes, LLC. Ronald Torres, Torres Law Offices, Weston, for Process Server Walter Butler.

ORDER DENYING MOTIONS TO QUASH SERVICE OF CONTINUING WRIT OF GARNISHMENT

THIS CAUSE having come before the Court on February 15, 2022 and February 18, 2022 for evidentiary hearing on Movant, HUURR HOMES, LLC's *Amended Motion to Quash Service of Process of Order Continuing Writ of Garnishment*, and *Motion to Quash Service of Process of Order Continuing Writ of Garnishment Purportedly Served on January 5, 2022*, and the Court having reviewed the Movant's motions and the relevant portions of the Court file; heard argument of counsel; reviewed relevant legal authorities; and being sufficiently advised in the premises, finds as follows:

1. In separate motions filed by HUURR HOMES, LLC., the Movant challenges two attempts to serve a *Continuing Writ of Garnishment* that was issued by the Court on November 16, 2021: (1) Service on Tanya Bower as the registered agent of HUURR HOMES, LLC; and (2) Service on Jaime M. Shlimbaum as Manager of HUURR HOMES, LLC.

2. The relevant facts are not in dispute. At 8:00 a.m. on November 19, 2021, Tanya Bower, as the registered agent of HUURR HOMES, LLC, was served with an *Order on Continuing Writ of Garnishment* at her residence by process server Walter Butler. At 6:00 p.m. on January 5, 2022, Jaime M. Shlumbaum, as Manager of HUURR HOMES, LLC, was served with an *Order on Continuing Writ of Garnishment* at her residence by process server Walter Butler.

3. Having reviewed the applicable returns of service admitted into evidence, the Court finds that both return of service affidavits are regular on their face. When a return of service is regular on its face, the party challenging the service has the burden of overcoming the presumption of its validity by presenting clear and convincing evidence. *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983).

4. The fundamental purpose of service is to give proper notice to a defendant in a case so that the party is answerable to the claim of the plaintiff, and therefore, to vest jurisdiction in the court entertaining the controversy. *Green Emerald Homes, LLC v. Bank of N.Y. Mellon*, 204 So.3d 512, 515 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1788b] citing *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So.2d 952, 953 (Fla. 2001) [26 Fla. L. Weekly S574a]. Because the relevant facts surrounding service of the *Continuing Writ of Garnishment* are not in dispute, the Court has been presented with the following legal question: As an alternative to service at the office of a limited liability company's registered agent, is service of process on a registered agent at her residence address valid service as a matter of law?

5. The applicable law governing service of process on a limited liability company is Florida Statutes, §48.062(1), which states:

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

6. Prior to the enactment of §48.062, service on a limited liability company was governed by Florida Statutes, §608.463, which stated in pertinent part that a registered agent may be served "at the agent's street address". However, §608.463 was repealed effective January 1, 2015, and replaced with §48.062 which conspicuously omitted the "street address" language. Accordingly, in its present form §48.062 does not expressly require that service on a registered agent occur only at the office of the registered agent. Indeed, none of the statutes applicable to service of process on a limited liability company expressly prohibit service on a registered agent at his/her residence.

7. In this case, process server Walter Butler testified that he made several attempts to serve the Garnishee's registered agent at her office address, but he was advised by the office receptionist on each occasion that Ms. Bower was not in her office. When Mr. Butler attempted to serve the receptionist as an employee of the registered agent, as authorized by §48.062(1), the receptionist refused service of the garnishment writ by insisting that she was not in fact an employee of the registered agent, but was merely an independent contractor. After several unsuccessful attempts to serve the Garnishee's registered agent at her office address, Mr. Butler was able to ascertain Ms. Bower's residence address through a routine search of property appraiser records.

8. While the memoranda of law submitted by the parties in lieu of closing argument did not reveal specific legal authority that addressed the narrow issue of law presented herein, the Court finds persuasive *Green Emerald Homes, LLC v. Bank of N.Y. Mellon*, 204 So.3d 512, 514 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D1788b]. The *Green Emerald Homes* case involved a mortgage foreclosure wherein a bank obtained constructive service on the defendant limited liability company through the Secretary of State. In support of a motion to quash, the defendant's registered agent filed an affidavit which insisted that she was not avoiding service, and that she owned homestead property in Palm Beach County which was listed with the property appraiser. The bank's process server testified that he made no attempt to serve the registered agent anywhere but the corporate address, and that he made no attempt to locate and serve the registered agent at her home. The trial court ruled that the bank was not required to attempt service anywhere but the corporate address, and was not required to search for the whereabouts of the defendant's registered agent. The appellate court reversed, and held that substitute service on the Secretary of State is unauthorized if personal service on a limited liability company's general manager and registered agent at her home address could have been obtained through reasonable diligence.

Accordingly, it is ORDERED AND ADJUDGED as follows:

A. That Movant, HUURR HOMES LLC's *Amended Motion to Quash Service of Process of Order Continuing Writ of Garnishment* is DENIED.

B. That HUUR HOMES, LLC failed to meet its burden of overcoming the presumption of valid service by clear and convincing evidence.

C. That Florida Statutes, §48.062 does not expressly prohibit service of process on a limited liability company's registered agent at his/her residence.

D. That after several unsuccessful attempts to serve the registered agent at her office address, process server Walter Butler used reasonable diligence to ascertain Tanya Bower's residence address, and thereafter effectuate proper service of the *Continuing Writ of Garnishment* on November 19, 2021.

E. The Court having established the validity of the November 19, 2021 service on its registered agent, Movant, HUURR HOMES LLC's *Motion to Quash Service of Process of Order Continuing Writ*

of Garnishment Purportedly Served on January 5, 2022 is DENIED as moot.

F. That HUURR HOMES LLC shall have 10 days from the date of this Order to answer the *Continuing Writ of Garnishment*, dated November 16, 2021. The Garnishee's answer shall relate back to the initial date of service of the *Continuing Writ of Garnishment*, November 19, 2021.

* * *

Volume 30, Number 2
June 30, 2022
Cite as 30 Fla. L. Weekly Supp. ____

COUNTY COURTS

Insurance—Automobile—Rescission of policy—Material misrepresentations on application—Failure to disclose household residents over age 15

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. KWHAJAR CURRY, Defendant. County Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 21-005703-CO. April 6, 2022. Susan Bedinghaus, Judge. Counsel: Dustin J. Sjong, Savage Villoch Law, PLLC, Tampa, for Plaintiff. Kwhajar Curry, Pro se, St. Petersburg, Defendant.

FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before this Court at the Hearing on April 5, 2022, on the Plaintiff, DIRECT GENERAL INSURANCE COMPANY'S ("Plaintiff's"), Motion for Final Summary Judgment against the Defendant, KWHAJAR CURRY ("Defendant"), and the Court, having considered the Motion and record evidence, and heard argument of Counsel and otherwise being advised in the premises, it is hereby,

ORDERED AND ADJUDGED that said Motion is hereby **GRANTED** as follows:

Standard for Summary Judgment

A party moving for summary judgment has the burden of demonstrating to the court that there are no material facts that are genuinely disputed, and that the movant, therefore, is entitled to judgment as a matter of law. But a key question is what standard the court should apply to determine whether the movant has satisfied its burden.

The Supreme Court addressed this question in its 1986 decision in *Celotex Corporation v. Catrett.* That case involved an action charging that the death of plaintiff's husband resulted from exposure to asbestos products manufactured or distributed by defendants. Defendant moved for summary judgment on the grounds that during discovery plaintiff had failed to produce any evidence to support the allegation that the decedent had been exposed to defendant's products—an issue on which plaintiff would bear the burden of proof at trial. Plaintiff then produced three documents, which defendant challenged as inadmissible hearsay. The district court granted summary judgment and a divided panel of the District of Columbia Circuit reversed on the ground that the defendant had failed to meet its Rule 56 burden because it had not supported its motion with any evidence, so that plaintiff therefore had no obligation to respond with evidence. The Supreme Court reversed.

Although the Court issued a five-to-four decision, the majority and dissent both agreed as to how the summary-judgment burden of proof operates, they disagreed as to how the standard was applied to the facts of the case. Justice Rehnquist, writing for the majority, ruled that there was "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. This conclusion was bolstered by the recognition that courts may enter summary judgment *sua sponte*. As Justice Rehnquist noted:

> It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of the petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

The satisfaction of the moving party's summary judgment burden was influenced by the fact that the nonmovant would bear the burden of proof at trial. When that was so, the moving party could make a proper summary judgment motion in reliance on the pleadings and the allegation that the nonmovant had failed to establish an element essential to that party's case. Rule 56 then would require the opposing party to go beyond the pleadings to designate specific facts showing there was a genuine issue for trial. Justice Rehnquist concluded the majority's opinion with the policy justification that supported this conclusion:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

In the dissenting opinion by Justice Brennan, he elaborated more fully on the way in which the burden shifts between the parties to the action, as well as how it can be satisfied. Rule 56 first imposes a burden of production on the moving party to make a *prima facie* showing that it is entitled to summary judgment. That can be satisfied in cases in which the ultimate burden of persuasion at trial rests on the non-moving party, either by submitting affirmative evidence negating an essential element of the non-movant's claim or, as in *Celotex*, by demonstrating that the non-moving party's evidence itself is insufficient to establish an essential element of its claim. As described by Justice Brennan, the moving party may make this showing by deposing the non-moving party's witness, by establishing the inadequacy of documentary evidence or, if there is no evidence, by reviewing for the court what exists to show why that does not support a judgment for the non-moving party. To this extent, the dissent agreed with the majority that the movant need not present affidavits or new evidence of its own to meet its initial burden, but may premise its summary judgment motion on an attack of the opponent's evidence. If it is successful in arguing that the non-movant's evidence is insufficient, the burden shifts to that party to call evidence to the attention of the court to dispute that contention. The dissent argued, however, that in *Celotex* itself, defendant had not met this initial burden because it had ignored supporting evidence clearly contained in the record and thus had not demonstrated that no evidence existed to support plaintiffs claim.

There are numerous ways in which the movant can satisfy its burden on summary judgment to show that there are no genuine issues of fact. Indeed, when Rule 56 was rewritten in 2010, a new subdivision (c) was included that explicitly provides that a movant must support its position that there is no genuine dispute of material facts by citing to materials in the record that demonstrate the absence of a dispute, by showing that those materials do not establish the presence of a genuine dispute, or, as in *Celotex*, by showing that the opposing party cannot produce admissible evidence to support a material fact. In short, the movant may discharge the Rule 56 burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the opposing party. This may occur, for example, if a movant, by means of uncontroverted affidavits or by using any of the other materials specified in Rule 56(c), completely explores and establishes the facts, thereby demonstrating the absence of any genuine dispute as to the facts and securing the entry of summary judgment. If no evidence could be mustered to sustain the non-moving party's position, a trial would be useless, and the movant is entitled to a judgment as a matter of law.

Indeed, applying this principle, even if the movant's own evidentiary material reveals an issue of credibility, summary judgment still may be warranted if it also appears that the party opposing the motion cannot prevail in any event so that the issue or credibility is immaterial.

Situations in which credibility issues are unimportant because the adversary cannot prevail occasionally result in the interplay between the burden of proof on the summary judgment motion and the burden of persuasion at trial. For example, in *Dyer v. MacDougall,* the allegations in a complaint in a slander action were countered by affidavits signed by all of the witnesses to the supposed defamation, each denying that the wrong had occurred. Plaintiff was unable to resist defendant's motion for summary judgment since even if he succeeded in impeaching the credibility of defendant's witnesses at trial, the court concluded that he nevertheless would be unable to discharge his burden of persuasion the issue of slander. Thus, defendant had demonstrated that a trial would be useless and summary judgment appropriate; there would be no competent evidence that could support a verdict for plaintiff, especially since he could not impeach the testimony of the witnesses to the alleged defamation if he called them to testify at trial.

Finally, it is important to note that, as established in *Celotex*, it is not necessary for the movant to introduce any evidence in order to prevail on summary judgment, at least in cases in which the non-moving party will bear the burden of proof al trial. The movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him. On the other hand, the party moving for summary judgment cannot sustain its burden merely by denying the allegations in the opponent's pleadings, or merely by asserting that the nonmovant lacks evidence to support its claim. The movant must show why the opponent's allegations of fact are insufficient to support the claim for relief as a matter of law or why the court should conclude that its opponent lacks sufficient evidence. Remember that in *Celotex* itself, discovery was completed, and the only evidence plaintiff produced was found to be inadmissible hearsay.

In contrast, if the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing. If the movant fails to make that initial showing, the court must deny the motion, even if the opposing party has not introduced contradictory evidence in response.

In meeting its burden, it is important to note that despite the usual rule that all doubts are resolved against the moving party, there is one inference to which the movant is entitled. If the movant presents credible evidence that, if not controverted at trial, would entitle the movant to a Rule 50 judgment as a matter of law, that evidence must be accepted as true on a summary judgment motion when the party opposing the motion does not offer counter-affidavits or other evidentiary material supporting the opposing contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(d) why he is unable to present facts justifying opposition to the motion.

The amendment adopted by the Florida Supreme Court in SC20-1490 largely replaces the text of existing rule 1.510 with the text of Federal rule 56. New Rule 1.510(a) will also include the following sentence: "The summary judgment standard provided for in this rule shall be construed and applied in accordance with the Federal Summary Judgment Standard."

In the December 31, 2020, decision amending rule 1.510, the Court made it clear that adopting the federal summary judgment standard means that Florida will now adhere to the principles established in the *Celotex* trilogy. In the broadest sense, those cases stand for the proposition that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action." *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). More specifically, though, embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our *state. In re Amends. to Fla. Rule of Civ. Pro. 1.510,* 309 So.3d at 192-93.

Those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson,* 477 U.S. at 251 (noting that "the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id*. at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standardf or Summary Judgments,* 76 Fla. Bar J., Feb. 2002, at 26; *see also Anderson,* 477 U.S. at 255.

Those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under *Celotex* and, therefore, the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the non-moving 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 non-moving party lacks the evidence to prove X." *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.,* 915 F.3d 987, 997 (5th Cir. 2019).

Those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a]. In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

The new rule will continue to require adherence to "the federal summary judgment standard," which itself cannot be understood apart from the Celotex trilogy. But the Court removed the textual reference to the cases themselves. The Court recognized that "30 years of practice under the has refined and added to the trilogy." Gensler & Mulligan, supra. And naturally, courts applying the new rule must be guided not only by the Celotex but by the overall body of case law interpreting Federal Rule 56.

In any event, the Court in adopting the text of Federal Rule 56 almost verbatim has made it unnecessary to list specific cases in new rule 1.510. That is because our act of transplanting Federal Rule 56 brings with it the "old soil" of case law interpreting that rule. *See Fla. Hwy. Patrol v. Jackson,* 288 So.3d 1179, 1183 (Fla. 2020)[45 Fla. L. Weekly S32a] ("[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947))).

Factual Background

1. This is a declaratory action stemming from an automobile accident that was reported as occurring on April 7, 2021.

2. As alleged in Direct General's Complaint for Declaratory Relief, Defendant signed an application for automobile insurance ("Application") wherein the Defendant failed to disclose on the Application all resident household members over the age of 15 that lived with her at the time of Policy Inception. Specifically, Defendant failed to disclose that her adult son, Desoul Thomas, lived with her on the Inception Date of the policy.

3. The Defendant provided all of the answers to all questions on the Application and electronically signed the Application.

4. Material considerations in Direct General's underwriting decision and calculation of premiums include, but are not limited to, the disclosure at policy inception of all household members aged 15 years or older.

5. Disclosure on the Application of any resident household members 15 years of age or older is material to Direct General's underwriting decision so that Direct General can accurately determine whether any such risks are acceptable or not.

6. The Defendant's misrepresentation and omission on the Application regarding the unlisted household member factors into the risk exposure for which Direct General must be compensated.

7. The Defendant's misrepresentation and omission on the Application caused Plaintiff to issue the Insurance Contract to Defendant based on her material misrepresentation.

8. Had the Defendant disclosed on the Application all resident household members over the age of 15, the policy premiums would have been materially higher.

9. Due to Defendant's material misrepresentation and omission, Plaintiff rescinded the Insurance Contract and returned the premiums pursuant to the terms, provisions, and conditions of the Insurance Policy.

10. Plaintiff filed this declaratory action pursuant to Chapter 86 of the Florida Statutes to determine its rights under the Insurance Contract.

11. Plaintiff asserts that Defendant, on her Application, made a material misrepresentation or, at minimum, incorrect statement that was material to Plaintiff's underwriting decision which resulted in the issuance of the Insurance Contract that Plaintiff, in good faith, would have issued to Defendant on different terms had the Defendant disclosed the unlisted household member over the age of 15.

12. There is no genuine dispute of material fact that Defendant failed to disclose on the Application that her adult son lived with her on the Inception Date. Defendant admitted to same during an Examination under Oath and by default in failing to file a response to the Plaintiff's Complaint for Declaratory Relief and address the allegations contained within same.

13. Further, as evidenced by the Affidavit of Rose Chrustic attached to Plaintiff's Motion, the Defendant's omission and misrepresentation was *material to Plaintiff's underwriting decision.* Plaintiff claims it is entitled to a summary judgment against the Defendant. Further, any alleged assignments of benefits are without effect because the Insurance Contract is rescinded and void *ab initio.*

14. The Defendant cannot present any evidence in opposition to the Plaintiff's Motion that she made a material misrepresentation or omission on the Application because she has already admitted under oath and by default that her adult son's girlfriend lived with her on the Inception Date.

15. No reasonable jury could find for the non-moving party here. This is true because the record evidence, including the Defendant's own admissions under oath and by default, indisputably evidence the fact that she failed to disclose a household member over the age of 15 on the Application. Further, Rose Chrustic's affidavit verifies the materiality of the Defendant's misrepresentation and omission.

16. This court must interpret an insurance contract according to the plain and unambiguous language to give effect to the policy as written. *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So.3d. 973, 975 (Fla. 2017) [42 Fla. L. Weekly S38a]. The plain language of the contract does not provide coverage for the Defendant, and Plaintiff is entitled to summary judgment as a matter of law.

17. The "Driver and Household Member Information" section of the Application is clear and unambiguous where it requests disclosure of "all persons living in your household who are 15 years of age or older."

18. Additionally, the Florida Supreme Court held that the assignee of a non-negotiable instrument takes it with all the rights of the assignor, and subject to all the equities and defenses of the debtor connected with or growing out of the obligation that the obligor had against the assignor at the time of the assignment." *Law Office of Stern v. Security Nat. Corp.,* 969, So.2d 962 (Fla. 2007) [32 Fla. L. Weekly S396a] and *Shaw v. State Farm Fire & Cas. Co.,* 37 So.3d. 329 (Fla. DCA 2010) [35 Fla. L. Weekly D1020a]. Also, this rule means that the right of the assignee under an insurance contract is no better than its assignor's rights. *Id.* In this case, any assignee's rights under the Insurance Contract were voided *ab initio*, and since it was as though the contract never existed, the assignors take the same.

19. The United States District Court for the Middle District of Florida wrote, when adopting the 3rd DCA's reasoning in *Shreve Land Co. v. J. & D. Fin. Corp.,* 421 So.2d. 722 (Fla. 3d DCA 1983), that it is a well settled Florida contract law principle that "an assignee succeeds to his assignor's rights under the assignment of the contract and takes with it all the burdens to which it is subject in the hands of the assignor."

20. Thus, any assignment of benefits from the Defendant was assigned subject to the Defendant's material misrepresentation on the Application that resulted in the Defendant's policy being, as here, declared void *ab initio* pursuant to the policy language and Florida Statutes Section 627.409, which states:

> Representations in Applications—
>
> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. Except as provided in subsection (3), a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) If the due facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Conclusion

The record is clear that Plaintiff contracted with the Defendant to provide automobile insurance based on a misrepresentation and omission made in the Application by the Defendant. Defendant failed to disclose a resident household member over the age of 15 on the Application—her adult son, specifically. Non-disclosure of resident household members 15 years of age or older is material to Plaintiff's underwriting decision. There is no genuine dispute of material fact that Defendant made a material misrepresentation on the Application because Defendant admitted to said material misrepresentation under

oath and by default. Defendant did not disclose a resident household member over the age of 15 on the Application.

There is no genuine dispute of material fact that Defendant made a material misrepresentation on the Application, and Plaintiff would have issued the Insurance Contract on different terms had it known of the material misrepresentation and omission; the policy premiums would have been materially higher. According to section 627.409, Florida Statutes, a material misrepresentation exists if the insurer in good faith would not have issued the insurance policy on the same terms, if at all, had the true facts been known. *See also United Auto. Ins. Co. v. Salgado,* 22 So.3d. 594, 599 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D1578a] ("Where a misstatement or omission materially affects the insurer's risk, or would have changed the insurer's decision whether to issue the policy and its terms, [section 627.4091 may preclude recovery.") *Accord Certain Underwriters at Lloyd's London v. Jimenez* 197 So.3d. 597, 602 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1431a].

Had Defendant disclosed all requested and required information on the Application, the information would have been material to the Plaintiff's underwriting decision which was made in reliance on Defendant's misrepresentation and omission.

As the Florida Supreme Court held, it is a well settled Florida contract law principle that an assignee succeeds to his assignor's rights under the assignment of a contract and takes with it all the burdens to which it is subject in the hands of the assignor. Thus, any assignments of benefits were taken subject to the Defendant's insurance contract being declared void *ab initio.*

Based upon the foregoing, the Court grants Plaintiff's Motion for Summary Judgment.

* * *

Insurance—Personal injury protection—Evidence—Summary—PIP policy declarations page is part of policy, not summary as contemplated by section 90.956—Motion to strike declarations page is denied

EMERGENCY PHYSICIANS, INC., d/b/a EMERGENCY RESOURCES GROUP, a/a/o Lauryn Frazier, Plaintiff, v. USAA CASUALTY INSURANCE COMPANY, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2019 36932 COCI. March 31, 2022. Wesley Heidt, Judge. Counsel: Robert Bartels, Bradford Cederberg, P.A., for Plaintiff. William Pratt, Roig Lawyers, Orlando, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S DECLARATION PAGE

THIS CAUSE having come to be heard upon Plaintiff's Motion to Strike Defendant's Declaration's Page, and the Court having reviewed the filings, heard argument of counsel, and being otherwise fully advised in the premises, this Court herby rules as follows:

1. Plaintiff filed its Motion to Strike Defendant's Declaration's Page on January 7, 2022.

2. Within its Motion to Strike, Plaintiff argues Defendant Declaration Page is a summary.

3. Further, Plaintiff argues Defendant Declaration Page is inadmissible under Florida Evidence Code § 90.956.

4. Florida Evidence Code § 90.956 states:

> When it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs, a party may present them in the form of a chart, summary, or calculation by calling a qualified witness. The party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place. A judge may order that they be produced in court.

Florida Evidence Code § 90.956.

5. Further, Plaintiff argues, summaries are admissible only if the document upon which they are based are admissible. Plaintiff argues, Defendant does not have a signed "663 Form" and Defendant corporate representative testified she had not personally reviewed a signed form. Therefore, a summary of documents that do not exist is not admissible. Further, Plaintiff argues Defendant will be unable to produce a qualified witness to testify about documents that do not exist. As such, Plaintiff argues the Declaration's Page, which Plaintiff argues is a summary of coverages, is inadmissible, and should be stricken, and Defendant should be precluded from making any reference to the declaration's page.

6. Defendant filed its Motion in Opposition to Plaintiff's Motion to Strike Defendant's Declaration's Page on January 12, 2022.

7. Within its Motion in Opposition to Plaintiff's Motion to Strike Defendant's Declaration's Page Defendant argues Plaintiff application of Florida Evidence Code § 90.956 is misapplied as Defendant is not seeking the Court's acceptance of a "summary" as contemplated by Florida Evidence Code § 90.956.

8. Defendant argues it is not asserting "it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs" as the first sentence of Florida Evidence Code § 90.956 states. In addition, Defendant argues Florida Evidence Code § 90.956 has a triggering mechanism which has not occurred. Florida Evidence Code § 90.956 requires "the party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place" (emphasis added). Defendant has not notified the Plaintiff nor this Court of its intention to use any document as a "summary" as contemplate in Florida Evidence Code § 90.956. Further Defendant argues it is seeking this Court to "examine" the entire policy of insurance which necessarily includes the Declaration of Coverage Page.

9. Defendant argues Plaintiff merely calls the Declaration of Coverage Page a summary without any evidence to support it is a summary as contemplated under Florida Evidence Code § 90.956.

10. Defendant argues Defendant is required by Florida Law to include the information contained in the Declaration of Coverage Page, that fact that is outline the coverages afforded under the policy of insurance does mean it is a "summary" as contemplated by Florida Evidence Code § 90.956.

11. Defendant argues that the Declaration of Coverage Page and Policy of Insurance is not hearsay and is admissible.

12. Defendant argues Defendant is required by Florida Law to issue a "summary" of coverage, conditions, exclusions, and limitations contained in the policy of insurance, but this is not the type of summary contemplated by Florida Evidence Code § 90.956. Florida Statute § 627.421 requires that any insurance company issuing any automobile liability or physical damage policy that the policy "shall contain on the front page a summary of major coverages, conditions, exclusions, and limitations contained in that policy."

13. Section 627.413(1) governs the contents of insurance policies, stating in relevant part:

> (1) Every policy shall specify:
>
> (a) The names of the parties to the contract.
>
> (b) The subject of the insurance.
>
> (c) The risks insured against.
>
> (d) The time when the insurance thereunder takes effect and the period during which the insurance is to continue.
>
> (e) The premium.

(f) The conditions pertaining to the insurance.

(g) The form numbers and edition dates or numeric code indicating edition dates, when such code has been supplied to the office, of all endorsements attached to a policy. This requirement applies to life insurance policies and health insurance policies only at the time of original issue.

§ 627.413(1), Fla. Stat. (2012).

14. Section 627.421, in turn, governs delivery of an insurance policy. Subsection (3) states in pertinent part:

(3) Any automobile liability or physical damage policy shall contain on the front page a summary of major coverages, conditions, exclusions, and limitations contained in that policy. Any such summary shall state that the issued policy should be referred to for the actual contractual governing provisions. The company may, in lieu of the summary, provide a readable policy.

§ 627.421(3), Fla. Stat. (2012).

15. Defendant argues an insurance policy is a contract, the Declaration of Coverage page is a portion of the policy.

16. Defendant filed with this Court a Certified Copy of the entire Policy of Insurance, which includes the Declaration of Coverage Page and Defendant has not asked this Court to accept the Declaration of Coverage Page as a "summary" as contemplated by Florida Evidence Code § 90.956, rather it has asked this Court to accept the entire policy of insurance which lawfully includes the Declaration of Coverage Page.

17. Defendant argues a Declaration of Coverage Page is not as summary as contemplated by Florida Evidence Code § 90.95.

18. Within Defendant's Motion in Opposition to Plaintiff Motion to Strike Defendant and during argument Defendant presented to this Court for consideration the 2016 Florida 5th DCA case of *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b]. In this case, the Florida Fifth District Court of Appeals was asked to answer whether party seeking to admit promissory note into evidence at trial must establish that the note is a business record under the business record exception to the hearsay rule. The Fifth District Court held that the promissory note is not hearsay.

19. As the Court in *Deutsche Bank Nat. Trust Co. v. Alaqua Property* indicated, there are many Florida Courts which have concluded that a promissory note is a nonhearsay document, see *Kepner-Tregoe, Inc. v. Leadership Software, Inc.,* 12 F.3d 527, 540 (5th Cir. 1994)(Signed instrument such as wills, contracts, and promissory notes are writing that have independent legal significance, and are nonhearsay." (Emphasis added) Quoting Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (2d ed. 1988). *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662. 665 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b]. "A written contract has independent legal significance. It defines the rights and obligations of the parties thereto, regardless of the truth of any assertion made in the document. Therefore, it is not hearsay." (emphasis added) *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662, 665 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b] (citing 2 Robert P. Mostellar et al., *McCormick on Evidence* § 249 (Kenneth S. Broun ed., 7th ed. 2013). In *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b] the Florida Fifth District Court of Appeals held that a promissory note is not hearsay and is admissible for its independent legal significance—to establish the existence of the contractual relationship and the rights and obligations of the parties to the note, regardless of the truth of any assertion made in the document. *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662, 665 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b].

20. Defendant argues, the Fifth District Court of Appeals in *Deutsche Bank Nat. Trust Co. v. Alaqua Property* found that the Bank was not obligated to establish that the note, i.e. contract, qualified as a business exception to the hearsay rule. *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662, 665 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b].

21. Defendant argues in this case, the contract, i.e. policy of insurance which included the Declaration of Coverage Page, is not hearsay has been properly introduced as evidence and should not be stricken.

22. In addition, Defendant at hearing presented to this Court for consideration the 2020 Florida Supreme Court case of *Jackson v. Household Finance Corporation III,* 298 So. 3d 531 (Fla. 2020) [45 Fla. L. Weekly S205a].

23. In *Jackson,* the Florida Supreme Court ruled the testimony by mortgagee's executive vice president was sufficient to lay foundation to admit documents under business records exception to hearsay, and to lay foundation, a witness is not required to detail the basis for his or her familiarity with the relevant business practices.

IT IS HEREBY ORDERED AND ADJUDGED:

A. Plaintiff's Motion to Strike Defendant's Declaration's Page is hereby DENIED;

B. the Declaration Page is a not a "summary" as contemplated by Florida Evidence Code § 90.956;

C. the Declaration Page is part of the insurance policy.

D. In rendering this ruling, the Court specifically relies upon the 5th DCA ruling in *Deutsche Bank Nat. Trust Co. v. Alaqua Property,* 190 So. 3d 662 (Fla. 5th DCA 2016) [41 Fla. L. Weekly D994b] and the Florida Supreme Court ruling in *Jackson v. Household Finance Corporation III,* 298 So. 3d 531 (Fla. 2020) [45 Fla. L. Weekly S205a].

* * *

Landlord-tenant—Judgment on pleadings—Where tenant admitted liability and amount of damages in his answer, landlord is entitled to judgment on pleadings—Court cannot consider tenant's assertion at motion hearing that he did not mean what he said in his answer, as that assertion is outside of pleadings

TIMOTHY JENURM[1], Plaintiff, v. TYLER WANERKA, Defendant. County Court, 7th Judicial Circuit in and for Flagler County. Case No. 2021 CC 000047, Division 61. September 1, 2021. Andrea K. Totten, Judge. Counsel: Steven C. Fraser, Steven C. Fraser, P.A., Hallandale Beach, for Plaintiff.

ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE came on to be heard before the Court on August 17, 2021, upon Plaintiff's Motion for Judgment on the Pleadings, filed July 6, 2021. The Court, having heard the argument of the parties, having reviewed the court file, and being otherwise advised in the premises, finds as follows:

The Amended Complaint, filed April 24, 2021, and served on June 14, 2021, sought damages in the amount of $3250. On July 1, 2021, Defendant filed an answer which stated, "I, Tyler J Wanerka, am accepting the charges in the amount of $3250 in damages to Timothy Jenurm for unpaid rent and property damages."

On July 6, 2021, Plaintiff filed the instant Motion for Judgment on the Pleadings, asserting that Defendant's answer admitted the allegation of the Amended Complaint, and offered no affirmative defenses.

Notwithstanding the answer filed in this case wherein he admitted liability and damages in the amount sought by Plaintiff, at the hearing on Plaintiff's motion, Defendant strenuously argued that his answer did not mean what it said, and that he actually disputed the amount of damages sought by Plaintiff. As Defendant's argument was antici-

pated neither by Plaintiff's counsel nor this Court, the Court took the matter under advisement and the parties were given until August 27, 2021, to file any additional authority or response as to the effect of Defendant's renunciation of his answer. No additional filings were submitted by Defendant, but Plaintiff filed a memorandum on August 17, 2021, which the Court has considered.

Florida Rule of Civil Procedure 1.140(c) states that after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

> When a plaintiff moves for judgment on the pleadings, the motion tests the legal sufficiency of the answer and all affirmative defenses. *See* Henry P. Trawick, Jr., *Fla. Practice & Procedure,* § 10-9 (2018-19 ed.). In considering the motion, all well-pleaded allegations of the nonmoving party are taken to be true, while the moving party's allegations, which were denied in the defendant's answer, are taken as not proved. *See Whitaker v. Powers,* 424 So. 2d 154, 155 (Fla. 5th DCA 1982). A judgment on the pleadings may be granted only if, on the facts as so admitted, the moving party is clearly entitled to judgment. *Williams v. Howard,* 329 So. 2d 277, 280 (Fla. 1976).

Taylor v. Hanlex Dev., LLC, 274 So. 3d 512, 512-13 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D1447d].

Applying the above referenced authority, Plaintiff is clearly entitled to judgment on the pleadings. The well-pled allegation of the nonmoving party (i.e. Mr. Wanerka), which should be taken as true, is that he owes Plaintiff $3250, as alleged in the amended complaint. The Court is not permitted to consider matters outside of the pleadings, and therefore does not consider Defendant's assertion, made at the hearing on Plaintiff's motion, that what he said in this answer is not what he meant. *Whitaker,* 424 So. 2d at 155.

It is therefore **ORDERED** and **ADJUDGED** that Plaintiff's Motion for Judgment on the Pleadings is **GRANTED**.

Plaintiff is entitled to recover from Defendant the principal amount of **$3250** plus reasonable court costs. The Court reserves jurisdiction to determine Plaintiff's entitlement to attorney's fees. Plaintiff is directed to submit a proposed final judgment along with a supporting affidavit as to court costs. If attorney's fees are sought, Plaintiff is directed to set the matter for hearing, barring a stipulation.

---

[1]Plaintiff's named is spelled "Jenrum" on the Civil Cover Sheet and therefore is reflected as "Jenrum" on the court docket.

* * *

Insurance—Homeowners—Coverage—Emergency services—Engineering report is not covered under "loss settlement" or "reasonable emergency measures" provisions of homeowners policy where assignment of benefits refutes any argument that report was meant to repair, restore, or replace damaged property or that services were provided in urgent or emergency circumstances

THE KIDWELL GROUP LLC, d/b/a AIR QUALITY ASSESSORS OF FLORIDA, a/a/o Christopher Carty, Plaintiff, v. PROGRESSIVE PROPERTY INSURANCE CORP. and AMERICAN STRATEGIC INSURANCE CORP., Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 2021 13638 CODL. March 3, 2022. Angela A. Dempsey, Judge. Counsel: Robert F. Gonzalez, Florida Insurance Law Group, LLC, Miami, for Plaintiff. Lani Gonzales and David W. Molhem, Molhem & Fraley, P.A., Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW

THIS CAUSE having come before the Court during a hearing on January 18, 2022 on Defendant's Motion for Final Summary Judgment and Memorandum of Law, and the Court having reviewed the Motion, heard the arguments of counsel, and being otherwise fully advised of the premises, it is hereby ORDERED AND ADJUDGED:

1. Defendant issued a homeowners policy of insurance to Plaintiff's assignor, Christopher Carty, dated April 24, 2020 through April 24, 2021.

2. A pipe leak at the property occurred on August 16, 2020, and caused a covered loss to the subject property. Plaintiff submitted two separate invoices along with its Assignment of Benefits, to Defendant. The first on October 30, 2020 for an engineering report, and the second on November 2, 2020 for assessment and remediation related to mold/microbial issues. Defendant inspected the property on September 3, 2020 and January 18, 2021.

3. On March 17, 2021 Defendant issued partial payment to Plaintiff for the second invoice in the full invoiced amount of $2,500.00. Defendant did not pay the first invoice, for the preparation of an engineering report, and argues there is no coverage for it contemplated by the policy.

4. Summary judgment is proper when "the pleadings and summary judgment evidence on file 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." Fla. R. Civ. P. 1.510(c). Further, the construction of an insurance policy is a question of law to be determined by the court. *DEC Elec., Inc. v. Raphael Const. Corp.,* 558 So. 2d 427 (Fla. 1990). "Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Washington Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a].

5. Defendant makes multiple arguments why the Court should grant judgment in their favor, the only arguments to which the Court finds any merit are discussed in this Order.

6. Defendant argues there is no coverage for the service of an engineering report provided within the policy of insurance, that regardless of the partial coverage for the mold assessment, the engineering report is not compensable under any provision of the policy.

7. Plaintiff's Assignment of Benefits ("AOB"), before the Court as summary judgment evidence, specifically states:

> "Client and AQA hereby acknowledge that the services to be provided are NOT being provided in an urgent or emergency circumstance." Further stating "I understand the *non-emergency assessment services* to be provided *are in no way meant to protect, repair, restore, or replace damaged property or to mitigate against further damage to the property* as defined by Florida Statutes section 627.7152. . ." (emphasis added).

8. Plaintiff argues that the engineering report is a reasonable cost of repair or replacement, compensable under the "Loss Settlement" provision. However, this argument is refuted by the evidence provided (Plaintiff's AOB), which clearly states their service is in no way meant to ". . .repair, restore, or replace." Furthermore, arguments are made throughout the Plaintiff's responses that are not supported by the evidence. . . specifically, arguments are made that this engineering report can somehow guide the general contractor, service provider or vendor who repairs the damage to the property. In reality, this 5 paragraph "report" concludes nothing more than what the insured initially reported, but in very flowery or technical language i.e., there was a pipe leak above the laminate floor, the floor got wet, and is damaged. There is nothing in the report stating the extent of the damage, whether the damage could be repaired, or whether the flooring needed to be replaced. Had there been such findings, the report may arguably be covered under the "Loss Settlement" provision of the subject policy for those costs "necessarily spent to repair or replace the damaged building." However, there are no such statements or conclusions in this report, as argued in Plaintiff's Responses, that would in any way assist any contractor or provider repairing the damage to the floor.

9. Plaintiff additionally argues coverage under the "Reasonable Emergency Measures" provision, arguing Defendant's failure to specify what services fall within this provision to be to their own detriment, citing *State Farm Mutual Automobile Insurance Co. v. Menendez,* 70 So.3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]. Again, however, the evidence (Plaintiff's AOB) refutes this argument, as the AOB makes clear that the services were not being provided in urgent or emergency circumstances. There is no other evidence that this report was done to provide an emergency assessment, or that this particular report actually did make any findings as to the extent of, or repairability of the damaged areas; or give any recommendations to the homeowner on how they could mitigate further damage.

10. There is no evidence to show that *this* report could have somehow assisted in the repair of the loss, and that therefore Plaintiff's invoice could be compensable as a cost of repair or replacement, or as a reasonable emergency measure, as provided in the policy.

11. The Court finds there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's Motion for Final Summary Judgment and Memorandum of Law is hereby GRANTED.

* * *

Insurance—Property—Coverage—Mold remediation—Exhaustion of policy limits—Insurer erred in reimbursing company that removed particulates from air following water loss at property under mold remediation coverage of policy, thereby exhausting those benefits, where company owner's statement that air cleaning services were necessary due to water loss, not mold damage, is unrebutted—Fact that benefits check issued jointly to plaintiff mold remediation company and air cleaning company was cashed does not effect accord and satisfaction where insurer did not apportion amount of benefits between two companies—Exhaustion of mold remediation benefits does not preclude plaintiff's claim where those benefits are not exhausted once air cleaning services are properly covered under main portion of policy

GLOBAL RESTORATION, LLC, a/a/o Philippe Calderon, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-020187-O, Division 77. March 29, 2022. Brian S. Sandor, Judge. Counsel: Dave T. Sooklal, Anthony-Smith Law, P.A., Orlando, for Plaintiff. Steven Hollis, Traub Lieberman Straus & Shrewsberry, LLP, St. Petersburg, for Defendant.

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

After due notice by or to all parties affected, a hearing was held before the Court with Respect to the matters disposed of by this order.

I. Procedural History

1. Plaintiff filed the instant action on June 21, 2019 alleging Defendant breached a contractual agreement with Plaintiff's assignee.

2. On July 30, 2019, Defendant filed its Answer.

3. The parties entered into an Agreed Order requiring the Defendant to provide a more definite statement in its Answer and Affirmative Defenses.

4. On November 4, 2020 the Defendant filed its Amended Answer and Affirmative Defenses.

5. On October 22, 2021, Defendant filed its Motion for Summary Judgment.

6. Defendant's Motion included Exhibit "A," the subject insurance policy and Exhibit "B," the transcript of Cerese Van Hooven.

7. On February 9, 2022, the Plaintiff filed its Motion for Final Summary Judgment.

8. The Plaintiff also separately filed two affidavits. The first affidavit of is Otis Cooper, owner of Plaintiff's company. The second affidavit is that of Eric Rosario, the owner of ELR Restoration, Inc., (hereinafter ELR) including invoices provided by ELR to Defendant.

II. Summary Judgment Standard

Pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, summary judgment is proper 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. *See* Fla. R. Civ. P. 1.510. The summary judgment standard shall be construed and applied in accordance with the federal summary judgment standard. *Id*.

"[S]ummary 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 judgment as a matter of law.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The test for determining the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

III. Facts Not In Dispute

1. The parties agree the subject policy controlling this case contains a $10,000.00 mold policy limit per occurrence.

2. The parties agree the insured sustained a loss in this case covered by the policy and Defendant extended coverage.

3. Plaintiff provided its invoice to Defendant for its services prior to when ELR provided its invoice.

4. Defendant, upon review of the invoices from Plaintiff and from ELR, issued a single check with both Plaintiff and ELR as named payees for the amount of $10,000.00.

5. Defendant did not delineate the amount apportioned to Plaintiff and to ELR in the check or any other document.

IV. Policy Language at Issue

With respect to the mold section of the insured's insurance policy, the specific language controlling the case was provided by both parties in separate filings. The section pertinent to the Court's findings states as follows:

AMENDATORY MOLD, FUNGUS, WET ROT, DRY ROT, BACTERIA, OR VIRUS ENDORSEMENT
SECTION I—PROPERTY COVERAGES

Additional Coverages

The following Additional Coverage is added:

12. Remediation of "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus" Resulting Directly From Any Covered Loss

We will pay, up to the Basic Policy Limits or Option shown in the Declarations, for the "Remediation" of "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus" resulting directly from any covered loss. "Remediation" means the reasonable and necessary treatment, containment, decontamination, removal or disposal of "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus" as required to complete the repair or replacement of property, covered under Section I of the policy that is damaged by any covered peril insured against, and also consists of the following:

1. The reasonable costs or expense to remove, repair, restore, and replace that property including the costs to tear out and replace any part of the building as needed to gain access to the "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus"; and

2. the reasonable costs or expense for the testing or investigation necessary to detect, evaluate or measure "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus"; and

3. any loss of fair rental value, or reasonable increase in additional living expenses, that is necessary to maintain your normal standard of living, if "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus" resulting directly from any covered loss makes your residence premises uninhabitable.

We will pay no more than the Basic Policy Limits or Option shown in the Declarations for the **"Remediation" of "Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus"** resulting directly from any covered loss during the policy period, regardless of the number of locations under the policy to which this endorsement is attached, the number of persons whose property is damaged, the number of "insureds," or the number of losses or claims made.

V. Analysis

A brief summary of the parties' arguments: Plaintiff argues the services provided by ELR do not constitute services that fall under subsection 12 titled above. If ELR's services do not fall under the mold remediation section, then Defendant has not exhausted the $10,000.00 limit and breached its contract to its insured by failing to remit full payment to the Plaintiff. Plaintiff focuses on the affidavit supplied by the owner of ELR and the deposition of Defendant's corporate representative conceding the check issued in this case was not apportioned to give Plaintiff and ELR specific amounts. Defendant argues the services provided by ELR constituted mold remediation services. Defendant does not provide any additional evidence to support this claim. Instead, Defendant relies on a reasonable interpretation of the affidavit supplied by Plaintiff to reason that although it claims its services were limited to only to water loss, it did in fact either knowingly or unknowingly provide mold remediation services capped by the $10,000.00 as it removed airborne particulates. Additionally, the check was cashed and therefore there is an accord and satisfaction prohibiting litigation.

1. Plaintiff's Motion for Final Summary Judgment

Plaintiff provided four separate documents in support of its motion in this case; (1) the subject insurance policy, (2) the deposition of the Defendant's Corporate Representative, Cerese Von Hooven, (3) an affidavit from Plaintiff's owner, Otis Cooper, and (4) an affidavit from the owner of ELR, Eric Rosario including ELR's line item invoice for services.

The insured contracted with Plaintiff after a water loss event related to an air conditioner leak. Plaintiff provided Defendant an invoice for services related to mold treatment and testing. Defendant does not dispute that Plaintiff's invoice is covered and due under the terms of the policy and its decision to afford coverage. Plaintiff argues a non-party to this suit, ELR, while also providing services was wrongly lumped into the category of mold remediation services thereby limiting both companies to a cap of $10,000.00 of coverage under the mold remediation section of the insurance policy.

To further Plaintiff's argument, Plaintiff provided a sworn affidavit from Eric Rosario, the owner of ELR. The affidavit also includes a Mitigation Services Invoice. The two critical lines within the affidavit are lines 23 and 24.

- Line 23: "Specifically, ELR cleaned the property in order to return the property to its pre-loss condition including but not limited to removing all particulates from the air that were caused by water damage to the property."
- Line 24: "The services rendered by ELR reflected in Exhibit A were necessary and related as a result of water loss to the property—not mold damage to the property."

Plaintiff focuses on line 24 to definitively state Defendant erred in applying ELR's invoice to the mold remediation policy. Who is better to state what services ELR provided than the owner of ELR? To that end, ELR stands nothing to gain by providing an affidavit in this case explaining the services it provided.

It is important to note that Section 12, while commonly referred to by the parties as the "mold services limit" does not actually limit only mold services. The policy states "[r]emediation of 'Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus' resulting directly from any covered loss. Remediation means the reasonable and necessary treatment, containment, decontamination, removal or disposal of 'Mold, Fungus, Wet Rot, Dry Rot, Bacteria, or Virus.' "

To counter the straightforward affidavit provided by Plaintiff, Defendant focuses on line 23 of the affidavit and the definition of remediation contained within its policy. Line 23 states in part "removing all particulates from the air that were caused by water damage to the property." Defendant argues that a reasonable interpretation would lead this court to determine that line 23 admits to mold remediation services provided by ELR. Airborne particulates caused by water damage is juxtaposed to line 24 that plainly states ELR's services were not related to mold damage. Defendant did not provide any affidavits or evidence to rebut ELR's contention that it did not perform mold remediation services.

Defendant did not provide an affidavit from any expert or employee to contradict the affidavit of ELR. Defendant relies solely on an interpretation of line 23 and directs the court to infer mold remediation in line 23 and weigh that heavier than the plain statement in line 24. This court declines to do so. The court agrees with Defendant that the removal of particulates in the air may be an inference to mold remediation but that is not the sole interpretation than can be reached. Particulates means particle matter of *any* kind. Although mold remediation may be one of a few logical conclusions to line 23 not the only available interpretation. Airborne particulates could mean things as simple as particles of dirt or dust associated with the loss. It is a high mountain to climb to reach that interpretation when line 24 is worded so clearly. What may be most important is this record is devoid of any form evidence provided by Defendant to allow the court to reach its desired conclusion.

For the above listed reasons, this court finds the services provided by Plaintiff were related to mold remediation and the services provided by ELR *were not.*

A. Defendant's First Affirmative Defense—Accord & Satisfaction

Defendant argues that it issued one check with both Plaintiff and ELR as payees in the amount of $10,000.00 and that the check was cashed, therefore the parties reached an accord and satisfaction barring suit as the matter resolved pre-suit. "An accord and satisfaction results when: (1) the parties mutually intend to effect a settlement of an existing dispute by entering into a superseding agreement; and (2) there is actual performance in accordance with the new agreement. Compliance with the new agreement discharges the prior obligations." *Martinez v. S. Bayshore Tower, L.L.L.P.,* 979 So.2d 1023, 1024 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D655a] *see also Rudick v. Rudick,* 403 So.2d 1091, 1094 (Fla. 3d DCA 1981).

In some cases the mere cashing of a check issued to a party may satisfy the elements but that is not where the inquiry stops. "An accord and satisfaction results as a matter of law only when the creditor accepts payment tendered on the expressed condition that its receipt is to be deemed to be a complete satisfaction of a disputed issue. In the absence of a dispute and a finding or admission that the parties intended to, and did, reach an accord and agreed to resolve that dispute by payment of an agreed amount, a partial payment of a legal obligation does not act to satisfy and discharge that obligation." *Republic Funding Corp. of Florida v. Juarez,* 563 So.2d 145, 147 (Fla. 5th DCA 1990).

In the case at bar, Defendant issued one singular check and listed two separate parties on the payee line. The check was not produced or attached to any exhibit. The parties confirmed the check was issued to both Plaintiff and ELR in the amount of $10,000.00 and the check was cashed. Defendant argues this action bars the Plaintiff from filing suit as the cashing of the check shows an accord (superseding agreement) and satisfaction (acceptance of payment). In looking at Van Hooven's

deposition testimony, she admits Defendant did not apportion the check to indicate how much Plaintiff would receive and how much ELR would receive. Without a specific amount being disbursed directly to Plaintiff, the critical meeting of the minds could not have taken place. To date, no one knows how much money was afforded to Plaintiff from the check and without such information, there can be no accord. Defendant's first affirmative defense fails.

B. Defendant's Second Affirmative Defense—Exhaustion

Defendant argues all benefits under the mold remediation section of the policy have been and therefore exhausted. Citing to *Sheldon v. United Services Auto Ass'n,* a PIP case holding that if benefits are exhausted pre-suit or even in suit prior to a defendant being served, a Plaintiff is barred from receiving any further payments under the policy. 55 So.3d 593 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a]. Here, unlike PIP, there is more coverage available to the insured outside the mold remediation limit.

Plaintiff's invoice was below the $10,000.00 limit. As the parties stipulated only these two alleged invoices of mold remediation exist, the Defendant paid out $10,000.00 to the two companies. It is only when ELR's invoice is combined with Plaintiff's invoice that Defendant reaches the mold remediation limit. As the court has found ELR's services did not constitute mold remediation, ELR's invoice falls outside of the $10,000.00 limit and is properly covered under the main portion of the policy. Once ELR's invoice is removed from the mold remediation limit as it was specifically for water loss services, the benefits have not been exhausted. Defendant's second affirmative defense fails.

C. Defendant's Third Affirmative Defense—Coverage

Plaintiff attached a copy of the transcript of Defendant's Corporate Representative, Van Hooven. Van Hooven admitted the insured's loss was reported to the Defendant, Defendant sent an adjuster to inspect the home, and after inspection coverage was afforded. Defendant conceded coverage in its argument. Based on the forgoing, Defendant's third affirmative defense fails.

D. Defendant's Fourth Affirmative Defense—Extra-contractual Obligations

Defendant has failed to provide any evidence or argument to the court in extra-contractual obligations the Plaintiff has attempted to impose in this matter. Defendant's fourth affirmative defense fails.

It is therefore ORDERED AND ADJUDGED, Plaintiff's Motion for Final Summary Judgment is hereby **GRANTED**. As Plaintiff is the prevailing party in this action, the Court finds entitlement to fees in this matter pursuant to Fla. Stat. §627.428(1). Plaintiff shall coordinate with defense counsel and file a notice of a preliminary hearing regarding the court's procedure for a fee determination within 60 days of this Order.

2. Defendant's Motion for Final Summary Judgment

As this court has entered summary judgment in favor of the Plaintiff, this court hereby ORDERED AND ADJUDGED, Defendant's Motion for Final Summary Judgment is hereby **DENIED**.

* * *

Insurance—Homeowners—Insured's action against insurer—Conditions precedent to suit—Ten-day notice—Retroactive application—Statute requiring that homeowners file ten-day notice of intent to initiate litigation under property insurance policy applies to any suit arising under policy on or after statute's effective date—Complaint is dismissed without prejudice

RAMIRO ESTEVEZ and RAFAELA LUQUE, Plaintiffs, v. FAMILY SECURITY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Osceola County. Case No. 2022 CC 170 CL. April 11, 2022. Stefania Jancewicz, Judge. Counsel: Gareth D. Getzin, Tampa, for Plaintiffs. Richard R. Phelps, Orlando, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come before this Court on 3/29/22 upon Defendant's Motion to Dismiss Plaintiffs' Complaint, and this court having heard argument of counsel, having reviewed case law provided by the parties and having reviewed the court file, this Court finds as follows:

A. It is undisputed that Defendants issued an insurance policy to Plaintiffs for property located at [Editor's note: address redacted], Kissimmee, Osceola County, FL 34744:

B. The Insureds allege that on or about April 20, 2020, the Insured Property suffered a covered loss and Defendants acknowledge a reported claim thereupon;

C. Defendants assert that after investigation of the claim, the covered damages sustained to the property did not exceed the applicable deduction;

D. On January 14, 2022, Plaintiffs filed a two count Complaint for (1) Breach of Contract and (2) Declaratory Relief:

E. Defendant filed its Motion to Dismiss on 2/17/22;

F. Florida Statute §627.70152(3) **mandates written notice of intent to initiate litigation on a form approved by the department at least 10 business days before filing suit**.

G. Neither party disputes the fact that the Plaintiffs failed to provide the department with a written notice of intent to initiate litigation;

H. The issue presented is whether FS 627.70152, which became effective July 1, 2021, can be applied retroactively to this suit when the subject insurance policy was issued prior to the effective date of the new law. Plaintiffs response relies heavily on *Menendez v. Progressive Exp. Ins. Co.,* 35 So. 2d 494 (Fla. 2010) [35 Fla. L. Weekly S222b] for the position that retroactive application is unconstitutional because retroactive application would adversely affect Plaintiff's "vested rights". *Menendez* was an action relating to PIP benefits. The *Menendez* case is factually and legally distinguishable from the issue presented in this case.

I. Florida Statute §627.70152 was enacted July 1, 2021 and makes the notice requirement applicable to "all suits not brought by an assignee arising under a residential or commercial property insurance policy, including a residential or commercial property insurance policy issued by an eligible surplus lines insurer." The new Statute specifically requires notice of intention to file suit BEFORE filing suit and its language is plain and clear—if a lawsuit was to be filed AFTER July 1, 2021, then compliance with the notice provision is mandatory;

J. Plaintiffs are required to claim that all conditions precedent to filing suit have been met/complied with. Plaintiffs in this action did not do that. Standing behind the "four corners" argument in a Motion to Dismiss will not shield Plaintiffs from fulfilling their pleading requirements.

K. As for Count II, Declaratory Relief, the Complaint fails to cite to any specific provision of the policy which is unclear or ambiguous for which declaratory relief may be sought. Plaintiffs believe they are covered by their policy for the losses they sustained; Defendant has (thusfar) disagreed. Nothing about those opposing positions is ambiguous.

It is therefore ORDERED and ADJUDGED as follows:

1. Defendant's Motion to Dismiss is GRANTED.
2. This matter is hereby dismissed without prejudice.

* * *

Insurance—Personal injury protection—Coverage—Emergency services—Out-of-state policy—Where out-of-state policy provides coverage required under any state's financial responsibility laws when insured vehicle is being operated in that state, insured is entitled to $10,000 in PIP coverage—Summary judgment is granted in favor of medical provider on affirmative defenses alleging that PIP statute does not apply to case and that insured failed to maintain security mandated by PIP statute—Affirmative defense alleging exhaustion of benefits fails, as policy limits are not $2,500, as claimed by insured, but $10,000—Summary judgment is entered in favor of provider where provider has met burden to show that emergency services were reasonable, related, and necessary

FLORIDA HOSPITAL OCALA, INC., d/b/a ADVENTHEALTH OCALA, a/a/o Sandra Thomas, Plaintiff, v. PROGRESSIVE SPECIALTY INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2019-SC-034548-O. March 18, 2022. Brian S. Sandor, Judge. Counsel: Mark A. Cederberg, Bradford Cederberg, P.A., Orlando, for Plaintiff. Rhamen Love-Lane and Neil Andrews, Andrews Biernacki Davis, Orlando, for Defendant.

[Related order at 29 Fla. L. Weekly Supp. 725a]

ORDER ON COMPETING MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before this Court on February 22, 2022 on Plaintiff's Motion for Final Summary Judgment dated April 19, 2021 and Defendant's Motion for Summary Judgment/Disposition dated January 13, 2022 and the Court having heard arguments of counsel, having considered the motions, the motions in opposition, the record, the admissible evidence, applicable case law and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED as follows:

I. Summary of Facts

1. On July 3, 2019, Sandra Thomas ("Thomas") was involved in an automobile accident in the State of Florida and suffered resulting injuries. At the time, the Defendant, Progressive Specialty Insurance Company ("Defendant") insured Thomas under a Maryland automobile insurance policy that carried PIP coverage/benefits (Policy Number 10820784).

2. At the time of the above-referenced automobile accident, Thomas and her insured vehicle had been physically present within the State of Florida for more than ninety (90) days during the preceding three hundred and sixty-five (365) days; accordingly, pursuant to Fla. Stat. §627.733, security was required to be maintained pursuant to Florida's compulsory No-Fault Law contained in ss. 627.730 - 627.7405 (to wit: $10,000 in PIP benefits).

3. The Defendant's policy of insurance issued to Thomas contains an "Out-of-State Coverage" clause.

4. Florida's compulsory No-Fault Law, ss. 627.730-627.7405, requires a minimum of $10,000 in medical and disability benefits and $5,000 in death benefits resulting from bodily injury, sickness, disease or death arising out of the ownership, maintenance or use of a motor vehicle . . ." *See Fla. Stat.* §§*627.733(3)* and *627.736(1).*

5. Following the automobile accident, Thomas sought medical services and care from the Plaintiff, Florida Hospital Ocala, Inc. d/b/a AdventHealth Ocala ("Plaintiff"). Thomas assigned the benefits under her personal injury protection insurance to the Plaintiff. Thomas also completed and signed an "Application for Florida 'No-Fault' Benefits" and completed, signed and notarized a claim "Affidavit" at the Defendant's request.

6. On or about July 10, 2019, the Plaintiff submitted its bill for emergency services and care rendered to Thomas from July 3, 2019 through July 4, 2019 at Plaintiff's reasonable and usual and customary charge of $8,870.71 to the Defendant.

7. On or about July 12, 2019, the Defendant received the Plaintiff's bill for dates of service July 3, 2019 through July 4, 2019 in the amount of $8,870.71.

8. Upon receipt of the Plaintiff's bill, the Defendant paid $2,377.72.

9. Defendant claimed that PIP benefits were limited to only $2,500.00 versus $10,000.00).

10. On or about August 28, 2019, the Plaintiff submitted a pre-suit demand letter to the Defendant pursuant to Fla. Stat. §627.736(10) for the bill at issue that confirmed the billed amount of $8,870.71, the partial payment of $2,377.72 and requested that the Defendant pay the balance due and owing the Plaintiff under Thomas' PIP coverage.

11. On or about September 9, 2019, the Defendant responded to the Plaintiff's pre-suit demand letter advising that Thomas' PIP benefits of $2,500.00 were exhausted. No additional payments were made by the Defendant.

12. On or about October 21, 2019, the Plaintiff filed the instant lawsuit seeking to recover the balance due and owing in PIP benefits from the Defendant for the bill at issue.

13. On November 17, 2021, the Court heard argument on Defendant's Motion for Summary Final Judgment/Motion to Invoke Maryland Law. On December 2, 2021, the Court entered an Order denying Defendant's Motion for Summary Final Judgment/Motion to Invoke Maryland Law and finding that "Florida law applies to the subject PIP claim."

II. Issue for Determination by this Court

14. The issue for determination by this Court is whether the contractual provisions of Thomas' Maryland automobile insurance policy provided the coverage required by Florida's No-Fault financial responsibility law (to wit: $10,000 in PIP benefits).

III. Legal Analysis

15. The Court finds that there are no genuine disputed issues of material fact and that the issue as stated above is an issue to be decided as a matter of law. The construction of an insurance policy is a legal issue appropriate for summary judgment. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000) [25 Fla. L. Weekly S390a] ("[w]here the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment").

A. Out of State Coverage Clause

Fla. Stat. §627.733(2) states as follows: "[e]very nonresident owner or registrant of a motor vehicle which, whether operated or not, has been physically present within this state for more than 90 days during the preceding 365 days shall thereafter maintain security as defined by subsection (3) in effect continuously throughout the period such motor vehicle remains within this state.

Fla. Stat. §627.733(3) states in pertinent part: "[s]uch security shall be provided: (a) [b]y an insurance policy delivered or issued for delivery in this state by an authorized or eligible motor vehicle liability insurer which provides the benefits and exemptions contained in ss. 627.730-627.7405. Any policy of insurance represented or sold as providing the security required hereunder shall be deemed to provide insurance for the payment of the required benefits."

Fla. Stat. §627.736(1) states in pertinent part: "[a]n 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 and $5,000 in death benefits resulting from bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle . . ."

The "Out-Of-State Coverage" clause at issue in this case can be found on pages 6 and 7 of Thomas' automobile policy and states as

follows:

OUT-OF-STATE COVERAGE

If an accident to which this Part I applies occurs in any state, territory or possession of the United States of America or any province or territory of Canada, other than the one in which a covered auto is principally garaged, and the state, province, territory or possession has:

1. a financial responsibility or similar law requiring limits of liability for bodily injury or property damage higher than the limits shown on the declarations page, this policy will provide the higher limits; or

2. a compulsory insurance or similar law requiring a non-resident to maintain insurance whenever the non-resident uses an auto in that state, province, territory or possession, this policy will provide the greater of:

a) the required minimum amounts and types of coverage**;** or

b) the limits of liability under this policy. (Emphasis added).

As referenced above, Fla. Stat. §627.736(1) states in pertinent part: "[a]n 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 and $5,000 in death benefits resulting from bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle . . ." Accordingly, Florida's compulsory No-Fault law requires, at a minimum, $10,000 in PIP/No-Fault benefits. It is undisputed in this case that the Defendant did not provide the required minimum of $10,000 in PIP benefits to Thomas; rather, the Defendant limited PIP benefits to $2,500 in derogation of its own policy language/out-of-state coverage clause referenced above and in derogation of Florida law.

The Fifth District Court of Appeal addressed an almost identical set of facts in *Meyer v. Hutchinson,* 861 So.2d 1185 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D2802c] (*rehearing denied* Jan. 9, 2004)(citing to *Spence v. Hughes,* 500 So.2d 538 (Fla. 1987)("the tort exemption applies not only to those individuals required by statute to provide PIP coverage but to every individual (resident or nonresident) who actually provides PIP coverage conforming to the no fault law. This construction avoids an unconstitutional distinction between residents and nonresidents and is consistent with the purpose of Florida's no-fault statute"). In *Meyer*, the 5th DCA found that a "[n]onresident's Michigan automobile insurance policy specifically provided personal injury protection (PIP) coverage required under Florida's no-fault statute" and that the policy "specifically provided coverage required under any state's financial responsibility laws when the insured vehicle was being operated in that state, and location of insuring language in liability section of policy did not limit the inherent intent of the provision to extend coverage to the insured while in another state in such a manner as to comply with that state's financial responsibility laws."

Meyer's Michigan automobile policy contained very similar language to Thomas' Maryland automobile policy. Under Part I - Liability of Meyer's policy, the following language, in pertinent part, is found under "Out-of-State Coverage:" "[i]f an insured is in another state or Canada and, as a non-resident, becomes subject to its motor vehicle compulsory insurance, financial responsibility, or similar law: (a) this policy will be interpreted to give the coverage required by the law . . ." As noted above, Ms. Thomas' policy language is very similar in location within the policy and very similar in content. Accordingly, based upon the 5th DCA's analysis and ruling in *Meyer* (that the policy was required to provide Florida PIP coverage), in the instant case, Ms. Thomas is entitled to $10,000 in PIP coverage as required under the above-referenced Florida statutes. *See also Jiminez v. Faccone,* 98 So.3d 621 (Fla. 2nd DCA 2012) [37 Fla. L. Weekly D1918a] (the 2nd DCA found that the policy provision in question was virtually identical to the policy provision discussed by the 5th DCA in *Meyer* and, as such, concluded that the language of the provision at issue "incorporates by reference" the laws of Florida without "a voluminous inclusion of the details of laws of all of the other jurisdictions." The provision at issue "simply provides that whatever Florida requires as compulsory insurance or financial responsibility when [Ms. Jiminez] operates, maintains[,] or uses her automobile in Florida, that coverage is provided by the policy." *See also Counts v. Altman Pollock and Daniels, Inc.*, No.: 3:18-cv-1072-J-39JBT, 2020 WL 5534277 (M.D. Fla., Aug. 7, 2020) ("Defendant's policy contains an out-of-state coverage provision that obligates its insurer to increase whatever limits may exist in the Policy to meet the minimum requirements for compulsory insurance or financial responsibility laws of the state in which a covered vehicle is being operated. This broad language in the subject Policy, like that in the *Meyer* and *Jiminez* policies, incorporates by reference §627.736(1) and plainly provides Defendants with Florida's minimum PIP coverage requirements when a covered vehicle is being operated in Florida").

In light of the above, the Defendant's Second Affirmative Defense alleging that "Florida Statute §627.736 does not apply to the subject cause of action" because "[t]he subject policy of insurance was issued in the State of Maryland insuring a vehicle registered in the State of Maryland" misconstrues and misapplies Florida law and fails. Contrary to the Defendant's assertion, in light of the "Out-of-State Coverage" clause in the subject policy, Florida Statute §627.736 does apply to the subject cause of action. The Defendant failed to comply with Florida's compulsory No-Fault law by failing to provide a minimum of $10,000 in PIP benefits to Thomas in this matter. Defendant failed to meet its burden on this alleged affirmative defense and summary judgment should be properly granted in favor of Plaintiff.

Additionally, Defendant's Third Affirmative Defense alleging that Thomas "failed to maintain the required security mandated by Florida Statute §627.733" fails for the same reason. It is the Defendant, not Thomas, who failed to provide the required security mandated by Florida Statute §627.733 when it disregarded its own policy language and Florida law. The Defendant's whole theory relies on an inferences contained in affidavits and no actual facts or testimony.

Lastly, the Defendant's Fourth Affirmative Defense alleging exhaustion fails as the court has determined the benefits available are $10,000 and not $2,500. The Defendant's alleged affirmative defense misconstrues and misapplies Florida law. The Defendant failed to meet its burden on this improper alleged affirmative defense and summary judgment should be properly granted in favor of the Plaintiff.

B. Insurance Contract Construction

In *Meyer*, the 5th District Court of Appeal addressed the carrier's argument that because of the location of the "out-of-state coverage" clause in the policy, PIP coverage should not be provided, as follows: "[w]e conclude that the location of the endorsement and limitation of its applicability to the liability section of the policy does not limit the intent of the provision to extend coverage to the insured while in another state in such a manner as to comply with the state's "motor vehicle compulsory insurance, financial responsibility or similar law . . . The broad language employed by Michigan Farm Bureau incorporates by reference those laws of foreign jurisdictions and eliminates a voluminous inclusion of the details of laws of all of the other jurisdictions. The endorsement simply provides that whatever Florida requires as compulsory insurance or financial responsibility when Meyer operates, maintains or uses her automobile in Florida,

that coverage is provided by the policy. *Id at 1188.* The same analysis applies under the facts of the instant case; Defendant should have provided, at a minimum, $10,000 in compulsory PIP coverage to Thomas.

1. Plaintiff Has Established Treatment Was Related, And Medically Necessary

There is no dispute that the emergency services and care provided to Sandra Thomas from July 3, 2019 through July 4, 2019 by Plaintiff were reasonable, related and medically necessary. *See Affidavit of Amar Dalsania, M.D.* Defendant did not raise this as a defense or in oral arguments before the court. In the affidavit, Dr. Dalsania confirms that he made the affidavit based upon his training, experience, personal knowledge, and his review of Thomas' emergency room records in connection with the medical services and care provided to Thomas in the Emergency Department at AdventHealth Ocala on July 3, 2019. In paragraph 7 of Dr. Dalsania's affidavit, the doctor states based upon his experience as a licensed Medical Doctor, his review of Thomas' emergency room records, the history of the motor vehicle accident occurring just hours prior to the subject emergency room visit and Thomas' presenting complaints and history, it is his opinion that the emergency services and care provided to Ms. Thomas, in the Emergency Department at AdventHealth Ocala, were reasonable, medically necessary and related to the injuries Thomas sustained in the July 3, 2019 motor vehicle accident. This record evidence was not disputed nor rebutted by the Defendant.

2. Plaintiff Has Established Charges Were Reasonable

It was noted disputed that the Plaintiff's charge for the emergency services and care rendered to Sandra Thomas from July 3, 2019 through July 4, 2019 was reasonable. *See Affidavit of James Santana.* In the affidavit, Mr. Santana confirms that he made the affidavit based upon his own personal knowledge. He confirms that he is the Regional Director/Patient Financial Services of Plaintiff, AdventHealth (f/k/a Florida Hospital) and is personally familiar with Plaintiff's billing practices and charges. He further confirms that he is familiar with the hospital's reasonable, usual and customary charges in the community because of the number of years that he has worked in the industry and as a result of his years of employment with AdventHealth. Mr. Santana attests that the amount of $8,870.71 reflects the "usual and customary" charge for Plaintiff for the emergency services and care rendered to Thomas in this case (Level 4 Emergency Dept. visit, CT scan of the neck, CT scan of the head/brain, CT scan of the face, x-rays of the knee and the administration of medication). Mr. Santana further attests that AdventHealth's usual and customary charges are the same for each patient treated regardless of insurance or ability to pay. Mr. Santana also took into consideration the variety of factors that AdventHealth utilizes to determine its reasonable, usual and customary charges. Mr. Santana also confirmed that auto insurance carriers who limit reimbursement to 75% of the hospital's usual and customary charges pursuant to the schedule of maximum charges (fee schedule) in Florida's No-Fault law, do not contest the reasonableness of Plaintiff's charges for services rendered. Lastly, Mr. Santana attests that, based upon all of this information, Plaintiff's charge in the amount of $8,870.71 for the emergency services and care provided to Ms. Thomas from July 3, 2019 through July 4, 2019 was "reasonable, usual and customary" for the hospital. This record evidence was not disputed nor rebutted by the Defendant.

As discussed above, granting a Motion for Final Summary Judgment requires that there be no genuine dispute of material fact conclusively shown from the record. *Albelo v. S. Bell*, 682 So. 2d 1126, 1129 (4th DCA 1996) [21 Fla. L. Weekly D2165a]. When there is no genuine dispute of material fact, the movant is entitled to judgment as a matter of law. *Id.* The movant's burden is to come forward with competent evidence to demonstrate the non-existence of a material issue of fact. *Buitrago v. Rohr*, 672 So. 2d 646, 648 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1048a]. The court finds the Plaintiff has met this burden. Once the Plaintiff meets this burden, the Defendant must come forward with counter-evidence to refute Plaintiff's evidence. Defendant has not come forward with any evidence to refute the reasonableness, relatedness or medical necessity of the emergency medical treatment provided by Plaintiff to Sandra Thomas nor has Defendant come forward with any evidence to refute the reasonableness of Plaintiff's charge for the emergency services and care provided to Ms. Thomas in this matter. Accordingly, Defendant's First Affirmative Defense fails and summary judgment is just and proper in this case as there is no genuine dispute of material fact and judgment must be granted in favor of the Plaintiff.

IV. Conclusion

1. In summary, Plaintiff contends, and this Court agrees, that Thomas's policy specifically provides coverage required under Florida's compulsory No-Fault Law under the facts of this case;

2. Based upon the facts of this case as referenced above, the Defendant failed to provide the minimum compulsory No-Fault insurance coverage ($10,000 in PIP benefits) to Thomas for the subject motor vehicle accident resulting in damages to the Plaintiff in the amount of $2,944.71 plus interest as addressed above and summarized below;

3. The Defendant failed to comply with its contractual obligations to Thomas when it failed to provide the minimum compulsory auto insurance coverage ($10,000 in PIP benefits) to Sandra Thomas for the subject motor vehicle accident;

4. The Defendant failed to comply with Florida's compulsory financial responsibility law ($10,000 in PIP benefits) when it failed or refused to provide coverage in this amount to Thomas for the subject motor vehicle accident;

5. If the subject policy language/out-of-state coverage clause is deemed to be ambiguous, the policy language must be construed against the Defendant and in favor of the Plaintiff (up to $10,000 in PIP benefits) as confirmed by the generally accepted rule of construction and interpretation of insurance contracts; and

6. The Plaintiff has additionally met its burden of proof with regard to reasonableness, medical necessity and relatedness of the emergency medical treatment provided to Thomas as well as the reasonableness of Plaintiff's charge for the emergency medical services at issue in this matter. The Defendant did not meet its burden (nor dispute Plaintiff's record evidence) on these issues.

7. Based on the foregoing, Plaintiff's Motion for Final Summary Judgment filed on April 19, 2021 is hereby **GRANTED** and Defendant's Motion for Summary Judgment/Disposition filed on January 13, 2022 is hereby **DENIED**.

8. It is therefore adjudged that Plaintiff shall recover from the Defendant the sum of $2,944.71 plus pre-judgment interest in the amount of $526.52 for a total sum of $3,471.23 for which let execution issue.*

9.The Court finds that Plaintiff is entitled to its reasonable attorneys' fees and costs and reserves jurisdiction to determine the amount of attorneys' fees and costs to Plaintiff pursuant to Fla. Stat. §§627.736, 627.428 and 57.041.

*Post-judgment interest of 4.25% per annum shall accrue on this judgment pursuant to Fla. Stat. §55.03.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Officer who observed defendant weaving in traffic, speeding, and striking orange cones placed to close off roadway had reasonable suspicion for stop—Observations that defendant had odor of alcohol, watery bloodshot eyes, slurred speech, and unsteady stance combined with defendant's admission to having drunk alcohol, were sufficient to provide reasonable suspicion to detain defendant for field sobriety exercises—Based on poor performance on exercises, officer had probable cause for DUI arrest—Breath test—Voluntariness—Where officer did not read entire implied consent form to defendant, and incorrect partial information regarding consequences of refusal to submit to breath test could have confused defendant about those consequences, state has failed to prove that breath test was given voluntarily—Breath test results are suppressed, but statements of defendant and observations of officer during and after administration of field sobriety exercises are not suppressed

STATE OF FLORIDA, Petitioner, v. JAMES N. PETRARCA, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Traffic Division. Case No. 0548XEX. April 11, 2022. Raul A. Cuervo, Judge.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTIONS TO SUPRESS

This matter came before the court on December 2, 2021 on the Defendant's Omnibus Motion to Suppress and Incorporated Memorandum of Law (the "Omnibus Suppression Motion), and Defendant's Motion to Suppress Breath Test Results Due to Improper Coercion (the BAC Suppression Motion) (together, the Motions to Suppress).[1]

The court heard testimony from Miami Beach police officer Deon Page (Page) and Defendant James Petrarca (Petrarca), viewed the body worn camera (BWC) footage of the stop, the field sobriety roadside exercises and the arrest, and heard argument from the State of Florida and Defense Counsel. Having heard testimony and argument, and being advised in the premises, the Court makes the following findings of fact and conclusions of law.

Testimony regarding the initial stop and roadside exercises

Page Testimony:

Page testified that on October 26, 2019, he observed Petrarca driving erratically, straddling lanes, and exceeding the speed limit on the McArthur Causeway.[2] Tr. at 17. Page testified that he did not initiate a stop until he observed Petrarca exiting the causeway onto Alton Road and he observed Petrarca ignoring and making contact with orange cones that had been placed on the exit, which were intended as a barricade to close the road for a marathon run. Tr. at 20-21.

Page testified he was concerned for workers that were assigned to work the marathon run, and that might still be in the area. Tr. at 20. He testified that he was concerned about Petrarca's safety as well. Tr. at 20. Page initiated a stop by turning on his emergency lights. Tr. at 21. Upon making contact with Petrarca, Page identified himself and the reason for the stop. Tr. at 21. Page testified that he smelled a "noticeable" odor of alcohol from Petrarca's breath and that Petrarca had watery and bloodshot eyes. Tr. at 21. Page asked Petrarca if he had anything alcoholic to drink. Tr. at 21. Page testified that Petrarca admitted to having had "a few" or "a couple" of alcoholic beverages. Tr. at 21-22.

After obtaining the license and registration from Petrarca and running the license plate, Page testified that he asked Petrarca to exit the car and step to the sidewalk. Tr. at 22 He then asked Petrarca to perform several field sobrieties exercises to confirm his suspicion that Petrarca might be impaired. Tr. at 25. The exercises and tests included the horizontal gaze nystagmus (HGN), the Modified Romberg balance test, lack of convergence, walk and turn, and one leg stand. Tr. at 25.

Page testified that Petrarca failed several of the field sobriety exercises and tests, including that heel to toe and balancing test. Tr. at 29-30. Page also testified that the HGN supported a finding that that Petrarca was impaired.[3] Tr. at 27. The body worn camera recording viewed by the court was consistent with Page's testimony about the events of the stop.[4] Page testified that he arrested Petrarca based on the totality of the circumstances, including the smell of alcohol, the admission of drinking and the failure of the field sobriety exercises and tests. Tr. at 31.

On cross-examination Page testified that Petrarca told him that he had a couple drinks, but not too much. Tr. at 55. He also testified that he understood that bloodshot and watery eyes alone were not sufficient indicators of impairment. Tr. at 56. However, he testified that he was not told by his department not to use bloodshot and watery eyes as part of the factors to use in his investigation. Tr. at 93. Page testified that Petrarca was cooperative and followed his directions, Tr. at 51. Petrarca did not fumble with this license and registration. Tr. at 51. He testified that while he was having Petrarca perform the exercises Petrarca was not free to get in his car and leave the scene. Tr. at 52-53.

Page also testified that the HGN test was performed within the time indicated in the time stamp on the BWC timer. Tr. at 63-68. In addition, Page testified on cross examination that Petrarca stumbled as he moved to the sidewalk to perform the exercises. Tr. at 73. Page testified that he asked Petrarca if there was anything that would prevent him from performing the exercises and Petrarca said no. Tr. at 74. Page did not ask Petrarca if he had any specific physical ailments or conditions affecting his ability to perform the exercises. Tr. at 74.

Petrarca Testimony:

Petrarca testified that he pulled over when he saw the lights of Page's police car. Tr. at 108. He did not feel free to drive away. Tr. at 108. He testified that he knew that Page was a police officer and that he was in uniform. Tr. at 109. Petrarca testified that he did not believe he was impaired in any way. Tr. at 109. He testified that the officer did not specifically ask if he wanted to perform the sobriety exercises. 'Tr. at 109. Petrarca testified that he exited the vehicle at the officer's request because he was respecting Page. Tr. at 109. He also testified that Page did not initially tell him he was performing sobriety exercises. Tr. at 110. Petrarca testified that he only performed the exercises because he was obeying officer Page's request. Tr. at 110.

On cross examination Petrarca admitted he saw the cones in the road but did not hit them. Tr. at 126. He admitted that he told Page that he had two drinks but "not too much". Tr. at 126.

Testimony regarding the blood alcohol content test

Page testimony:

Once Page arrested Petrarca, he transported him to the Miami Beach Police Department (MBPD) for further testing. Tr. at 31. Page did not recall any statements from Petrarca during the transport. Tr. at 32-33. When Page took Petrarca into the DUI room, Page turned off his BWC. Tr. at 32. Page testified that it was standard operating procedure to turn off his BWC and radio to prevent interference with the Breathalyzer instrument. Tr. at 32-33.

Page did not read the Implied Consent Advisory Form (ICAF) to Petrarca. Tr. at 33. Page testified that he was not required to read the ICAF unless Petrarca refused to take the BAC test. Tr. at 33. He testified that Petrarca never told him that he did not want to participate in the BAC testing. Tr. at 33.

Page testified that he did not tell Petrarca that he could lose his license for 18 months or that there was a program that Petrarca could qualify for if he blew under the legal limit. Tr. at 34 and 86.

On cross-examination Page testified that he did not read either the

ICAF or the Miranda Warning Form (MWF) to Petrarca. Tr. at 82. Instead, he put an X through both forms. Tr. at 82. Page testified that he told Petrarca to be quiet during the 20-minute observation period. Tr. at 83.

Page did not ask Petrarca at the scene of the original stop to take the BAC test at the station. Tr. at 81 and 86. When he did ask him at the station, it was not recorded because the BWC had been turned off. Tr. at 87.

Page testified that there is implied consent to take the BAC test and he was not required to read the ICAF to Petrarca. Tr. at 87 and 102.

Petrarca testimony:

Petrarca testified that he tried to speak to Page about the BAC test and indicated he did not want to take the test. Tr. at 111. He testified that Page told him that if he did not take the test, he would lose his license for 18 months. Tr. at 112. Petrarca said that Page told him if he blew below the legal limit, he could be released. Tr. at 113.

Petrarca testified that there were two reasons he did not want to take the BAC test. First, he had been stopped for possible DUI in 1994 and had taken a BAC test which he believes was detrimental to his defense. Tr. at 111. Thus, he believed there was nothing to gain by taking the breath test. Tr. at 111. Second, he had been told by lawyers and others in social situations to not submit to BAC testing in the event he would be stopped. Tr. at 119-120.

Petrarca testified that he did not want to submit to the breath test. Tr. at 116. He only agreed to take the test because as a real estate agent he is required to drive long distances to take clients to see properties and losing his license would be very detrimental to his business. Tr. at 116. Page's representation of the ramifications of refusal, and the possibility of being released if he blew below the legal limit enticed him to submit. Tr. at 116.

Petrarca testified that Page told him if he did not "pass", there was a program available where he would not be prosecuted called Back on Track. Tr. at 114.

Findings of Fact and Conclusions of Law

Probable cause for the stop:

It is undisputed that the stop made by Page was made without a warrant. The court found that the Motions to Suppress were not insufficient on their face. The court held a hearing on the Motions to Suppress. It is the court's duty to assess the credibility of the witnesses who testified at the hearing and to weigh the evidence introduced. *State v. Oakley,* 751 So. 2d 1006, 1007 (Fla. 5th DCA 2000) [Editor's note: See *State v. Oakley*, 751 So.2d 172 (Fla. 2DCA 2000 [25 Fla. L. Weekly D357a]). The court is free to disregard any testimony and to weigh all the evidence presented. *Id.*

Based on the evidence presented, the court finds that Page had probable cause to make the initial stop of Petrarca based on his erratic driving pattern.[5] Petrarca argues that Page did not have sufficient reasonable suspicion that Petrarca was impaired to continue his DUI investigation after the initial stop. The court finds that Page did have reasonable suspicion based on several factors. First, Page observed that Petrarca was exceeding the speed limit, and weaving in traffic. In addition, he observed Petrarca ignoring and running over orange cones that had been placed to close a roadway for safety reasons. Page credibly testified that he was concerned for the safety of workers possibly in the area as well as having concern for Petrarca's own safety. The court finds Page's testimony credible and that the facts presented to Page gave him sufficient reasonable suspicion to make the initial stop and investigate a possible DUI. *DHSMV v. Deshong,* 603 So. 2d 1349, 1350 (Fla. 2nd DCA 1992).

When he stopped Petrarca and initially went to the window, Page smelled alcohol and observed that Petrarca had bloodshot and watery eyes.[6] Page testified that Petrarca's speech was slurred. When asked, Petrarca admitted having drunk alcohol[7]. Page sated that when he asked Petrarca to exit the vehicle he appeared unsteady on his feet. The Court finds Page's testimony to be credible and sufficient to provide Page with reasonable suspicion that Petrarca was impaired and to ask Petrarca to perform the field sobriety exercises (FSEs). *Origi v. State,* 912 So. 2d 69 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a].

Petrarca's argument that a mere belief that a driver consumed alcohol is insufficient for probable cause, *State v. Kliphouse,* 771 So. 2d 16 (4th DCA 2000) [25 Fla. L. Weekly D2309f], is correct. However, the facts of this case go well beyond mere suspicion of drinking. Petrarca's erratic and dangerous driving pattern, the appearance of bloodshot and watery eyes, the noticeable smell of alcohol emanating from the vehicle, and the admission of drinking puts this case beyond the level of "mere suspicion." Those facts give rise to the level of reasonable suspicion which is what is required to investigate a possible DUI. *Deshong,* at 1350.

Petrarca argues that he was "seized" and his liberty restrained by Page and citing *Terry v. Ohio,* 392 U.S. 1 (1968), and therefore he was not free to ignore Page's authority. Regardless, the state here has presented specific and articulable facts, and inferences therefrom, that suggest that Page correctly ascertained that criminal activity, namely DUI, had occurred. The Court finds that Page had reasonable suspicion and probable cause to investigate the possibility that Petrarca was driving impaired. *Terry,* 392 U.S. at 21. Requesting that a defendant submit to field sobriety tests based on reasonable suspicion does not violate the defendant's Fourth Amendment rights and is not an illegal seizure. *State v. Taylor,* 648 So. 2d 701, 704-04 (Fla. 1995) [20 Fla. L. Weekly S6b].

The FSE's:

The Court finds that the FSEs were conducted reasonably and safely. The BWC recording reflected, and Page's testimony confirmed that Petrarca was unsteady on his feet and failed several field sobrieties exercises. The Court does not make a finding that Petrarca was impaired. Again, that is for a jury to decide. The court does find that based on the exercises and the totality of the circumstances, Page had probable cause to believe that Petrarca was impaired and thus had probable cause to arrest Petrarca for DUI.[8]

Accordingly, the court denies in part the Motions to Suppress to the extent they seek to suppress statements made by Petrarca, the observations made by Page of Petrarca before, during and after the administration of the field sobriety exercises, or the BWC and the field sobriety exercises themselves.

The BAC:

The Court is troubled by the manner which the BAC testing was handled by Page. The state argues that a person who accepts the privilege of driving a motor vehicle gives consent to submit to a breath test after being placed under lawful arrest. Florida Statute §316.1932. However, a driver has a legal right to withdraw such consent. *Id.* After Petrarca was taken to the DUI testing unit, he was not read his implied consent rights. There is no requirement that the ICAF be read to a defendant, *Howitt v. State,* 266 So. 3d 219 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D406b]. Petrarca points out that it is unusual for Page to have to deviated from the Miami-Beach Standard Operating Procedures for DUI Cases (SOP) and not read the ICAF to a DUI suspect. The question is whether based on the evidence presented at the suppression hearing the court finds that the evidence obtained was voluntarily given. *Brewer v. State,* 386 So. 2d 232, 235 (Fla. 1980). The burden is on the state to establish that the evidence was voluntarily given. *Id.*

Petrarca testified that after he told Page he did not want to submit to the breath test, Page provided him with limited information relating

to the possible effects of a refusal. If Petrarca's testimony is credible, the information given by Page was incomplete, at the very least. Omitting the detailed information that would have been provided by reading the entire ICAF, made the statements made by Page about the consequences of refusal incomplete and incorrect.

The court finds Petrarca's testimony about the interaction with Page about the breath test to be credible. Petrarca testified that he had previously submitted to a breath test years ago as a young man and had decided to not submit to one again. He also testified that in casual conversations with lawyers and other acquaintances, he had been advised to not submit to a breath test.

There is no recorded evidence regarding the conversations between Page and Petrarca because Page turned off his BWC upon entering the testing unit. The ICAF that Page admitted he did not read to Petrarca has a line though the middle, and there is no signature by Petraca. Page admitted that he drew that line. Thus, there is no indication that Petrarca was given the complete information outlined in the ICAF. The court finds that because of the passage of time since the arrest, as well as the fact that the BWC was turned off during the conversation, Page's testimony about the conversations with Petrarca at the station is not entirely credible.

Once Petrarca indicated he did not want to submit to the test, Page should have read Petrarca the ICAF and had him sign it. Moreover, the court believes that if any part of the contents of the ICAF are discussed with a defendant, the entire document should be read, and signed, by the defendant to erase any doubt that the submission to the test is in fact voluntary.

The defendant argues that he was "coerced" into giving the breath test. The court does not find that Page's actions were coercive. Rather, the court finds that the incorrect partial information given about the effects of refusal could have confused Petrarca. Moreover, the court finds that based on the testimony and the weight given that testimony, Page's actions regarding the BAC test did not rise to the standard that a court should require to determine that the BAC was obtained voluntarily.[9] The ICAF has been prepared to give complete information about the consequences of refusal to submit to the breath test. Partial information about those consequences when a defendant indicates they intend to refuse the test does not pass muster. The state has failed to show that the breath test was given voluntarily.

Based on the court's determination about the credibility of the testimony at the hearing, the court finds that the BAC was not voluntarily given by Petrarca. Accordingly, the court grants in part the Motions to Suppress and will suppress the BAC results at trial.

---

[1]Petrarca filed the separate BAC Suppression Motion and Omnibus Suppression Motion. However, the findings of fact and conclusions of law in this order are incorporated and made a part of the ruling on both motions.

[2]Transcript of the hearing on the Motions to Suppress dated December 2, 2021 will be referred to as Tr. at__ .

[3]At this point in the hearing, the BWC recording was viewed and introduced at the hearing.

[4]The court makes no finding as to Petrarca's impairment, which is in the province of the Jury.

[5]Petrarca argues that he was seized and detained by Page. However, if Page had articulable facts based on his knowledge and experience that Petrarca had committed or was about to commit a crime, he had the authority to temporarily detain him to investigate. The court finds that the State has met the burden by clear and convincing evidence that Page had the necessary reasonable suspicion to make the stop. In fact, reasonable suspicion is less than probable cause "and requires a showing considerably less than preponderance of the evidence." *Baptiste v. State,* 995 So, 2d 285, 291 (Fla. 2008) [33 Fla. L. Weekly S662a]

[6]While Petrarca argues that a study funded by the National Highway Traffic Safety Administration (NHTSA) concluded that glassy or bloodshot eyes are not valid indicators of alcohol impairment. Page did not testify that those were the only factors indicating impairment. A noticeable smell of alcohol, along with bloodshot and watery eyes, combined with the high rate of speed and ignoring orange cones designed to control traffic were sufficient to provide Page with reasonable suspicion that a crime was being committed. *State v. Taylor,* 648 So. 2d 701, 703-704 (Fla. 1995) [20 Fla. L. Weekly S6b].

[7]Whether Petrarca stated he had a "couple", a "few", or just "two" drinks is not material. In the circumstances of the stop, what is important is that the noticeable smell of alcohol and the admission of drinking alcohol, along with the other factors in the testimony gave Page the right to further investigate.

[8]Petrarca argues that the HGN test was improperly applied. The court makes no finding regarding that issue. Petrarca has made the argument in seeking to exclude the HGN evidence in his Omnibus Motion *In Limine.* The court will rule on that Motion after hearing argument.

[9]The court will note that turning off the BWC before any discussion of the ICAF or the effects of refusal between an officer administering the test and the defendant who appears reluctant to give a breath sample makes a court's job more difficult. The better practice would be to require that the ICAF be read and signed by any defendant that shows any reluctance to submit to the test.
The court will also note that its ruling in this case is based on the testimony, and its determination of credibility of that testimony. The court is not making a blanket ruling that the ICAF must be read to every defendant. Each case is unique and will greatly depend on the facts of the case and the credibility of the testimony.

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Plaintiff demand letter complied with section 627.736(10)'s requirements by providing an exact amount claimed to be due and attaching the health insurance claims forms as the itemized statement—Statute provides no language requiring that an amount to be sued upon be provided to insurer

ANGELS DIAGNOSTIC GROUP, INC., a/a/o Maria Pow, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-017939-SP-25, Section CG02. April 5, 2022. Elijah A. Levitt, Judge. Counsel: Adriana De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Sam H. Itayim, Kubicki Draper, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S AFFIRMATIVE DEFENSES OF DEFICIENT DEMAND LETTER AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING LEGALLY INSUFFICIENT PRE-SUIT DEMAND LETTER

THIS CAUSE came before the Court on March 23, 2022, for hearing on State Farm Mutual Automobile Insurance Company's ("Defendant") Motion for Summary Judgment as to Angels Diagnostic Group, Inc.'s ("Plaintiff") Legally Insufficient Pre-Suit Demand Letter and Plaintiff's Cross-Motion pertaining to Defendant's Affirmative Defenses as to the same issue. The sole issue before the Court is whether Plaintiff's pre-suit demand letter met the requirements of section 627.736(10), Florida Statutes (2017) ("Section 10"), such that Plaintiff satisfied a condition precedent to maintaining this lawsuit. Having reviewed Section 10, the subject demand letter and other evidence, and the pertinent case law, the Court finds that Plaintiff's pre-suit demand letter complied with Section 10. No genuine dispute of material fact exists as to Plaintiff's compliance with Section 10, and Plaintiff is entitled to judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment is denied, and Plaintiff's Motion for Summary Judgment is granted.

Summary Judgment Standard

Pursuant to Florida Rule of Civil Procedure 1.510(c), summary judgment is to be granted "if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." The test for summary judgment is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Id*. at 250.

Findings of Fact

A. Relevant Procedural History

On September 24, 2020, Plaintiff filed a Complaint against Defendant alleging a breach of contract for non-payment of personal injury protection ("PIP") insurance benefits, in violation of section 627.736, Florida Statutes (2017), for services rendered as a result of an alleged March 27, 2017, motor vehicle accident. [DE 2]. On December 11, 2020, Defendant filed its Answer and Affirmative Defenses setting forth a Second and Third Affirmative Defense claiming that Plaintiff's pre-suit demand letter was deficient and did not satisfy Section 10, and Plaintiff, therefore, failed to comply with a condition precedent to bringing this action. [DE 10]. On December 14, 2021, Defendant filed the subject Motion for Summary Judgment alleging a deficient demand letter under Section 10. [DE 55]. On January 12, 2022, Plaintiff filed its response in opposition to the motion and a cross-Motion for Summary Judgment. [DE 57].

B. Plaintiff's Bill

Plaintiff's demand letter provides that for date of service April 5, 2017, Plaintiff billed $2,175.00 and requested PIP benefits in the amount of $1,740.00, 80% of the total amount billed by the Plaintiff to Defendant. [DE 55, Ex. C]. In Plaintiff's demand letter, Plaintiff did not account for Defendant's prior payments of $550.16. *See id.* Plaintiff's Pre-Suit Demand Letter package also included an assignment of benefits and CMS 1500 Health Insurance Claims Forms ("HICF") for the April 5, 2017, services. *Id.* The HICFs were itemized and specifically state the CPT codes that Plaintiff billed and the amount of each charge. *See id.* Despite the amount of $1,740.00 claimed in the demand letter, Plaintiff's Complaint alleges an amount due of $50.00. [DE 2 at ¶ 18].

Summary of Argment

Defendant argues that Plaintiff's demand letter is deficient. Specifically, Defendant asserts that Plaintiff's demand is ambiguous, fails to account for prior payments made by Defendant, and fails to notice the exact amount claimed to be due and owing in violation of section 627.736(10)(b), Florida Statutes (2017). Plaintiff argues that it fulfilled all conditions precedent under the Florida No-Fault law and section 627.736(10)(b)3 and that Plaintiff is not required to include the exact amount owed or account for prior payments made by the insurer in its Pre-Suit Demand Letter.

Analysis

The Court begins its analysis by interpreting the plain language of Section 10.[1] Section 10 provides, in pertinent part,

> (a) As a condition precedent to filing any action for benefits under [section 627.736], written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. *627.736*" and state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement.

The language is clear. To file a lawsuit, notice must be sent to an insurer containing the described information in subsection (b). Section 10 provides no language that must be used for the intent to initiate litigation, save for the requirements of subsection (b).

Under subsection (b)3, the pre-suit demand letter must contain an "***itemized statement specifying each exact amount***, the date of treatment, service, or accommodation, and the type of benefit claimed to be due."[2] § 627.736(10)(b)3, Fla. Stat. (2017) (emphasis added). The word "exact," as used in this context, means "precise, as opposed to approximate." https://www.dictionary.com/browse/exact. Indeed, the Florida legislature used choice words to describe the obligation imposed on a potential PIP plaintiff, when submitting a pre-suit demand letter to an insurer: "*specificity*," "*itemized*," "*specifying*," "*each*" and "*exact amount*." *See* § 627.736(10), Fla. Stat. (2017).

The Court finds the legislature also used precise language to determine what is required in the itemized statement. Specifically, the Court refers to Section 10's language after the semi-colon, to wit, "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due" must be provided to the insurer. *Id.* To be logical, this phase must be read as a whole and not piecemeal. The language "claimed to be due" applies to the entirety of the phrase. For a coherent reading of the phrase, the sub-parts "each exact amount," "the date of treatment, service, or accommodation," and "the type of benefit" cannot be excised from the words "claimed to be due." A reading of the statute in such a manner would result in an absurd interpretation.[3] For example, when "an itemized statement specifying each exact amount" is interpreted separately, one is unable to determine to what "each exact amount" refers. When read as a whole, as is appropriate, the passage reads, "an itemized statement specifying each exact amount . . . claimed to be due." The latter reading, in the present context, is a coherent and correct one.[4]

Having found that Section 10 must be read as a whole, the Court looks to Plaintiff's demand letter to determine if it comports with the section, *i.e.*, does it provide each exact amount claimed to be due? The letter request payment for $1,740.00 for PIP benefits, 10% statutory penalty of $174.00, applicable interest, and cost of mailing of $6.77. *See* DE 55 at Ex. C. The letter is clear and claims exact amounts due. Further, as itemized in the HICFs attached to the demand letter, the $1,740.00 corresponded to 80% of the combined total billed. *See id.* Indeed, Section 10 permits the use of the HICFs as the itemized statement. *See* § 627.736(10)(b)3, Fla. Stat. (2017) ("A completed form satisfying the requirements of paragraph (5)(d) . . . may be used as the itemized statement.").

After review of the statute, the demand letter, and the exhibits attached thereto, the Court finds that Plaintiff's demand letter complied with Section 10. Section 10 provides no language requiring that an amount to be sued upon be provided to an insurer. The Florida legislature endorsed that the amount to be given to the insurer is the exact, or precise, amount ***claimed to be due***. At the time of the demand letter, the exact amount claimed to be due was $1,740.00. The Court is cognizant of the problems that may arise from the Court's plain reading of the section but is unable to re-write the statute.[5] For example, a medical services provider may claim $9,000.00 as the exact amount due, but the actual amount due may be much lower, such as, $50.00. This problem, however, was created by the Florida legislature through its enactment of the section. The legislature may remedy any problems its legislation causes.

The Court agrees with the Court's analysis in *Rivera v. State Farm Mutual Automobile Insurance Company*, 317 So. 3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]. This Court was the trial court referenced in the appellate decision and is intimately familiar with the

facts of that case. *See id.; Rivera v. State Farm Mut. Auto. Ins. Co.*, No. 2014-12640-sp-25 (Miami-Dade Cty. Ct. Jan 11, 2019). The issue in *Rivera* was a failure to properly provide "the exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The *Rivera* demand letters conflicted and were confusing. In the present case, Plaintiff provided the exact amount, service, and type of benefit claimed to be due as required by Section 10. Accordingly, the *Rivera* holding is properly distinguished from the facts of the present case.

Conclusion

The Florida legislature is free to add to, change, or re-define Section 10's terms; no court may do so. Consequently, this Court must determine if the demand letter complies with Section 10 as written. Based on the plain language of Section 10, the demand letter complies with the section's requirements by providing an exact amount claimed to be due and attaching the HICFs as the itemized statement. Wherefore, Defendant's Motion for Summary Judgment is denied, and Plaintiff's Motion for Summary Judgment is granted.

---

[1]The Court must look to the plain language of a statute and apply its obvious meaning where no ambiguity exists. *See Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1230 (Fla. 2004) [29 Fla. L. Weekly S614a].

[2]The Court focuses on this portion of the subsection as it is undisputed that Plaintiff complied with subsections (b)1 and (b)2.

[3]"The legislature is not presumed to enact statutes that provide for absurd results." *Vrchota Corp. v. Kelly*, 42 So.3d 319 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1834a].

[4]*See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-51 (2012) (explaining in detail how a prepositive or postpositive modifier normally applies to an entire series of nouns unless the context suggests otherwise).

[5]"It is [the Court's] duty to declare the law as it is written. [The Court] cannot undertake by a construction of the statute to add to it or to subtract from it." *Fla. Ry. Co. v. Adams*, 47 So. 921, 923 (Fla. 1908).

* * *

Insurance—Personal injury protection—Demand letter— Sufficiency—Demand letter that specified exact amount, service and type of benefit claimed to be due complied with PIP statute—Statute does not require that amount to be sued upon be given to insurer

MANUEL V. FEIJOO, M.D., P.A., a/a/o Paul Faure, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-005840-SP-25, Section CG02. April 1, 2022. Elijah A. Levitt, Judge. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Ryan McArthy, for Defendant.

ORDER DENYING ALLSTATE'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S DEFICIENT PRE-SUIT DEMAND

THIS CAUSE came before the Court on February 23, 2022, for hearing on Allstate Fire and Casualty Insurance Company's ("Allstate" or "Defendant") Motion for Summary Judgment as to Plaintiff Manuel V. Feijoo, M.D., P.A.'s ("Plaintiff") Pre-Suit Demand Letter and Plaintiff's opposition thereto. The sole issue before the Court is whether Plaintiff's pre-suit demand letter met the requirements of section 627.736(10), Florida Statutes (2019) ("Section 10"), such that Plaintiff satisfied a condition precedent to maintaining this lawsuit. Having reviewed Section 10, the subject demand letter and other evidence, and the pertinent case law, the Court finds that Plaintiff's pre-suit demand letter complied with Section 10. Accordingly, Defendant's Motion for Summary Judgment is denied.

Summary Judgment Standard

Pursuant to Florida Rule of Civil Procedure 1.510(c), summary judgment is to be granted "if the pleadings and summary judgment evidence on file show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." The test for summary judgment is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Id*. at 250.

Findings of Fact

A. Relevant Procedural History

On March 24, 2020, Plaintiff filed a Complaint against Defendant alleging a breach of contract for non-payment of personal injury protection ("PIP") insurance benefits, in violation of section 627.736, Florida Statutes (2019), for services rendered as a result of an alleged October 4, 2019, motor vehicle accident. On January 11, 2021, Defendant filed the subject Motion for Summary Judgment alleging a deficient demand letter under Section 10. [DE 65]. On February 17, 2022, Plaintiff filed it response in opposition to the motion. [DE 140].

B. Plaintiff's Bill

Plaintiff submitted one bill to Allstate, itemizing one unit of CPT code 99204 for an office visit at $475.00 and one unit of CPT code 95851 for range of motion testing at $100.00. *See* Health Insurance Claim Form ("HICF") attached to Plaintiff's pre-suit demand letter, Exhibit F to Amended Affidavit of Lisa Ash [DE 145]. In response to Plaintiff's bill, Allstate paid $289.26 for code 99204, in accordance with the applicable Medicare fee schedule. *See* Explanation of Benefits Forms ("EOBs"), Exhibit B to Amended Affidavit of Lisa Ash [DE 145]; *see* Plaintiff's Better Answers to Interrogatories at 2-4 [DE 92]. Allstate denied payment for CPT code 95851, claiming Plaintiff improperly unbundled code 95851 from code 99204. *See* EOBs, Exhibit B to Amended Affidavit of Lisa Ash [DE 145]. The reasons for the reimbursement and the denial were itemized within the EOB sent to Plaintiff on December 16, 2019. *See id.*

C. Plaintiff's Pre-Suit Demand Letter

Approximately two months later, on February 11, 2020, Plaintiff, through George A. David, P.A., sent a pre-suit demand letter to Allstate. *See* Plaintiff's Pre-Suit Demand Letter, Exhibit F to Amended Affidavit of Lisa Ash [DE 145]. The first sentence of Plaintiff's demand letter states "***this is a demand*** for payment of medical services provided [sic] Paul Faure by the Manuel V. Feijoo M.D., P.A., for dates of service October 9, 2019 ***in the amount of $575***." *See id.* (emphasis added). As reflected in the HICF attached to the demand letter, the $575 corresponded to the combined total billed for all services rendered by the Plaintiff—99204 in the amount of $475 and 95851 in the amount $100. *See id*. Although Plaintiff had already received a $289.26 payment from Allstate for code 99204, Plaintiff's pre-suit demand for $575 did not take this into account. *See id.* On March 26, 2020, Allstate responded to Plaintiff's pre-suit demand, denying any further payment because PIP benefits were exhausted. *See* Allstate's Demand Response Letter, Exhibit G to Amended Affidavit of Lisa Ash [DE 145].

D. Pleadings

While no additional payments were made in response to Plaintiff's pre-suit demand letter, Plaintiff, through the same counsel, filed this lawsuit, alleging damages had decreased to less than $500. Complaint at ¶ 1 [DE 2]. Allstate responded with its Answer and Affirmative Defenses, setting forth a First and Second Affirmative Defense claiming that Plaintiff's pre-suit demand letter was deficient and did not satisfy Section 10, and Plaintiff, therefore, failed to comply with a condition precedent to bringing this action. *See* Answer and Affirmative Defenses [DE 41].

E. Discovery

Plaintiff's Complaint did not specify Plaintiff's theory of recovery or how Plaintiff arrived at the new benefits amount due of less than $500. *See* Complaint [DE 2]. Allstate served discovery asking Plaintiff, *inter alia*, to calculate and quantify its damages. *See* Allstate's Interrogatories [DE 39]. Plaintiff initially responded to Allstate's interrogatories by claiming that "Plaintiff currently does not know the illicit fashion that Defendant failed to properly pay Plaintiff's medical bills and thus at this time Plaintiff cannot state whether Defendant denied Plaintiff's medical bills." *See* Plaintiff's Answers to Interrogatories [DE 83]. Plaintiff also set forth two conflicting amounts purportedly owed by Allstate for CPT code 95851—$35.63 and $324.90. *See id.* at ¶ 4. Allstate moved for better answers, and this Court granted the Motion. *See* Order Requiring Plaintiff to Provide Better Answers to Interrogatories [DE 87]. In Plaintiff's better answers, Plaintiff conceded it was paid and received $289.26 for CPT code 99204. *See* Plaintiff's Better Answers to Interrogatories at 2-4 [DE 92]. Plaintiff also disclosed for the first time that it was not disputing the amount of the payment for CPT code 99204, which was calculated at 80% of 200% of the Medicare Part B Fee Schedule. *See id*. Lastly, Plaintiff conceded that its only lawful claim was for denied CPT code 95851. *See id*. Plaintiff identified the purported amount due as $35.63, calculated at 80% of 200% of the Medicare Part B Fee Schedule for CPT Code 95851. *See id*. Plaintiff presented no evidence to oppose the conclusion that the information necessary to calculate this $35.36 claim was available to Plaintiff before Plaintiff submitted its pre-suit demand letter to Allstate or, at least, before Plaintiff initiated this litigation.

Analysis

The Court begins its analysis by interpreting the plain language of Section 10. Section 10 provides, in pertinent part,

> (a) As a condition precedent to filing any action for benefits under [section 627.736], written notice of an intent to initiate litigation must be provided to the insurer. Such notice may not be sent until the claim is overdue, including any additional time the insurer has to pay the claim pursuant to paragraph (4)(b).
>
> (b) The notice must state that it is a "demand letter under s. *627.736*" and state with specificity:
>
> 1. The name of the insured upon which such benefits are being sought, including a copy of the assignment giving rights to the claimant if the claimant is not the insured.
>
> 2. The claim number or policy number upon which such claim was originally submitted to the insurer.
>
> 3. To the extent applicable, the name of any medical provider who rendered to an insured the treatment, services, accommodations, or supplies that form the basis of such claim; and an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due. A completed form satisfying the requirements of paragraph (5)(d) or the lost-wage statement previously submitted may be used as the itemized statement.

The language is clear. To file a lawsuit, notice must be sent to an insurer containing the described information in subsection (b). Section 10 provides no language that must be used for the intent to initiate litigation, save for the requirements of subsection (b).

Under subsection (b)(3), the pre-suit demand letter must contain an "***itemized statement specifying each exact amount***, the date of treatment, service, or accommodation, and the type of benefit claimed to be due."[1] § 627.736(10)(b)(3), Fla. Stat. (2019) (emphasis added). The word "exact," as used in this context, means "precise, as opposed to approximate." https://www.dictionary.com/browse/exact. Indeed, the Florida legislature used choice words to describe the obligation imposed on a potential PIP plaintiff, when submitting a pre-suit demand letter to an insurer: "*specificity*," "*itemized*," "*specifying*," "*each*" and "*exact amount*." *See* § 627.736(10), Fla. Stat. (2019).

The Court finds the legislature also used precise language to determine what is required in the itemized statement. Specifically, the Court refers to Section 10's language after the semi-colon, to wit, "an itemized statement specifying each exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due" must be provided to the insurer. *Id.* To be logical, this phase must be read as a whole and not piecemeal. The language "claimed to be due" applies to the entirety of the phrase. For a coherent reading of the phrase, the sub-parts "each exact amount," "the date of treatment, service, or accommodation," and "the type of benefit" cannot be excised from the words "claimed to be due." A reading of the statute in such a manner would result in an absurd interpretation.[2] For example, when "an itemized statement specifying each exact amount" is interpreted separately, one is unable to determine to what "each exact amount" refers. When read as a whole, as is appropriate, the passage reads, "an itemized statement specifying each exact amount . . . claimed to be due." The latter reading, in the present context, is a coherent and correct one.[3]

Having found that Section 10 must be read as a whole, the Court looks to Plaintiff's demand letter to determine if it comports with the section, *i.e.*, does it provide each exact amount claimed to be due? The letter provides, "this is a demand for payment of medical services provided [sic] Paul Faure by the Manuel V. Feijoo M.D., P.A., for dates of service October 9, 2019 in the amount of $575." *See* Plaintiff's Pre-Suit Demand Letter, Exhibit F to Amended Affidavit of Lisa Ash [DE 145]. As reflected in the HICF attached to the demand letter, the $575 corresponded to the combined total billed for all services rendered by the Plaintiff: 99204 in the amount of $475 and 95851 in the amount $100. *See id*. Section 10 allowed for the use of the HICF. *See* § 627.736(10)(b)(3), Fla. Stat. (2019) ("A completed form satisfying the requirements of paragraph (5)(d) . . . may be used as the itemized statement.").

After review of the statute and the demand letter, the Court finds that Plaintiff's demand letter complied with Section 10. Section 10 provides no language requiring that an amount to be sued upon be provided to an insurer. The Florida legislature endorsed that the amount to be given to the insurer is the exact, or precise, amount ***claimed to be due***. At the time of the demand letter, the exact amount claimed to be due was $575.00. The Court is cognizant of the problems that may arise from the statute's language but is unable to re-write the statute.[4] For example, a medical services provider may claim $9,000.00 as the exact amount due, but the actual amount due may be much lower, such as, $50.00. This problem, however, was created by the Florida legislature through its enactment of the section. The legislature may remedy any problems it causes.

The Court agrees with the Court's analysis in *Rivera v. State Farm Mutual Automobile Insurance Company*, 317 So. 3d 197 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D447a]. This Court was the trial court referenced in the appellate decision and is intimately familiar with the facts of that case. *See id.; Rivera v. State Farm Mut. Auto. Ins. Co.*, No. 2014-12640-sp-25 (Miami-Dade Cty. Ct. Jan 11, 2019). The issue in *Rivera* was a failure to properly provide "the exact amount, the date of treatment, service, or accommodation, and the type of benefit claimed to be due." The *Rivera* demand letters conflicted and were confusing. In the present case, Plaintiff provided the exact amount, service, and type of benefit claimed to be due as required by Section 10. Accordingly, the *Rivera* holding is properly distinguished from the facts of the present case.

Conclusion

The issue before the Court is whether the demand letter complies with Section 10. The Florida legislature is free to add to, change, or re-define Section 10's terms; no court may do so. Based on the plain

language of Section 10, the demand letter complies with the section's requirements by providing an exact amount claimed to be due. Wherefore, Defendant's Motion for Summary Judgment is denied.

[1]The Court focuses on this portion of the subsection as it is undisputed that Plaintiff complied with subsections (b)1 and (b)2.

[2]"The legislature is not presumed to enact statutes that provide for absurd results." *Vrchota Corp. v. Kelly*, 42 So.3d 319 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D1834a].

[3]*See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147-51 (2012) (explaining in detail how a prepositive or postpositive modifier normally applies to an entire series of nouns unless the context suggests otherwise).

[4]"It is [the Court's] duty to declare the law as it is written. [The Court] cannot undertake by a construction of the statute to add to it or to subtract from it." *Fla. Ry. Co. v. Adams*, 47 So. 921, 923 (Fla. 1908).

* * *

Insurance—Homeowners—Untimely notice of loss—Where policy obligates insured to give insurer "prompt notice" of loss to covered property, insured's actions of fixing roof damage and placing "nylon" over roof did not relieve insured of requirement to report loss to insurer—Insured who became aware of roof damage shortly after hurricane but waited three years to report loss failed to provide prompt notice of loss—Insurer was prejudiced by late notice where insurer was unable to timely investigate and evaluate loss to determine if current damage to property interior was attributable to hurricane and was unable to ensure that roof repair was done correctly so as to protect property from further damage—Insurer properly denied claim

MIRIAM GONZALEZ, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-024910-CC-05, Section CC06. March 31, 2022. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE, having come before the Court for hearing on January 18, 2022, on Defendant's Amended Motion for Final Summary Judgment, and the Court, having heard argument of counsel and having considered all of the evidence filed by the parties in support or opposition to the Motion, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

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

The over-arching issue addressed by this Court is whether Defendant was prejudiced by Plaintiff's reporting of a Hurricane Irma water damage claim nearly three years after the storm. Defendant contends there is a presumption of prejudice which Plaintiff is unable to overcome. Plaintiff argues that the loss was promptly reported as soon as it was discovered. This Court disagrees with Plaintiff's assertion.

Undisputed Facts

The Court makes the following findings of facts:

1. The Plaintiff, Miriam Gonzalez, was insured by a policy of insurance issued by the Defendant, Citizens Property Insurance Corporation.

2. On September, 10, 2017, Plaintiff allegedly sustained damage to her roof as a result of the winds from Hurricane Irma. In her Affidavit, Plaintiff swore that she first observed damage to the interior of the property "on or about July, 2020". *Gonzalez Aff.* ¶ 3. According to Plaintiff's interrogatories, she noticed "smudges on her ceiling" in October of 2017 but did not report the claim to Defendant because she believed the issue was related to the quality of the paint used on the property. *Gonzalez Interrog.* ¶ 2. In July 2020, the problem got "much bigger" when "water entered the home streaming down the walls in the kitchen, bathroom and hallway after light passing rain." *Id.*

3. Nowhere in Plaintiff's affidavit did she address when she first became aware of the damage to the roof. *See Gonzalez Aff.* Plaintiff only discussed when she became aware of the damage to the ceiling.

4. On September 25, 2020, Defendant obtained a recorded statement from Plaintiff. *Holbrook Aff.* ¶ 13. In Plaintiff's recorded statement, she acknowledged that shortly after the hurricane, she noticed that the corner roof of her property had damage and was "destroyed" by Hurricane Irma. *Gonzalez Recorded Statement.* She never reported the roof damage to Defendant because nylon was used. *Id.* Plaintiff also stated that she lost some shingles after the storm but she was able to take care of the damage. *Id*.

5. In July 20, 2020, nearly three years after Hurricane Irma made landfall in South Florida, Plaintiff reported a claim to the interior of her property.

6. Marcos Gonzalez, Defendant's field adjuster inspected the insured property on July 31, 2020. *Gonzalez Aff.* ¶ 6. Based on a review of Mr. Gonzalez's experience as detailed in his affidavit, this Court has determined that Mr. Gonzalez is qualified to render an opinion as to the extent of damages he observed when he inspected the roof. *Id.* ¶ 2, 3, 4. During his inspection Mr. Gonzalez observed water damage and mold on the ceiling but he was unable to determine the cause of the damage. *Id.* ¶ 10, 11, 12. During his inspection Mr. Gonzalez "did not observe any physical damage to the roof of the house". *Id.* ¶ 13. Based on the amount of time that elapsed, between Irma and the date of the inspection, Mr. Gonzalez "was unable to determine the cause of loss" , when the damage to the interior property occurred, and the "extent of the alleged damages." *Id.* ¶ 19.

7. Plaintiff relied on the affidavit of Armando Abreu, a licensed independent loss consultant, to meet its burden. *Abreu Aff.* ¶ 2.

8. On September 15, 2020, Mr. Abreu inspected and photographed the roof and the interior of the property. *Abreu Aff.* ¶ 2. While his affidavit states that photographs were taken, these alleged photographs were never filed for this hearing.

9. In his affidavit, Mr. Abreu found: evidence of "multiple storm-created openings in the composition shingle roof in the form of lifted and cracked shingles and wind impacted underlayment"; evidence of multiple "wind created penetration points in the shingled roof over two of the master bedrooms, office, kitchen, and laundry room, especially where the roofing material was opened by what [he] determined to be the impact of wind driven rain debris that matched the ensuing water damage that [he] personally observed to the ceiling in those rooms, and that, consisted with the homeowners' explanation of what they observed during the recurring windstorms that occurred on or about September 10 2017"; and no "convincing evidence of wear and tear or age related deterioration of the roof." *Abreu Aff.* ¶ 2.

10. The Court takes judicial notice that the affidavit Mr. Abreu submitted in this case is almost identical, in every respect, to an affidavit Mr. Abreu submitted in case number 2020-019380-CC-05, JORGE HERNANDEZ and NANCY OLIVA v. CITIZENS PROPERTY INSURANCE CORPORATION, for which this Court issued an Order finding that "Mr. Abreu would not qualify as an expert to testify as to causation". In addition, this Court finds that in this case, Mr. Abreu's findings are conclusory. Mr. Abreu fails to identify which pictures he allegedly took but never provided depicted lifted or cracked shingles, wind impacted underlayment, and wind created penetration points. Accordingly, his testimony as to causation of the damage to the interior of the property or his conclusion that the roof damage was caused by Hurricane Irma will not be considered by this Court.

11. In its Amended Motion for Final Summary Judgment, Defendant argued that do to the late reporting of the loss, Defendant was prejudiced because it was unable to determine if the "alleged

damage" was attributable to Hurricane Irma. *Defendant's Motion* p. 13. In addition, Defendant argued that Plaintiff's breach of the policy's reporting provision and failure to show damages or preserve evidence, denied Defendant the opportunity to timely investigate and evaluate the extent of the damages to the property immediately after the loss. *Id.* The extended delay also precluded Defendant from mitigating its losses or ensuring repairs were done correctly to prevent additional damage to the property. *Id.*

12. Plaintiff argued that Plaintiff's reporting of the loss nearly three years after Hurricane Irma was timely since Plaintiff did not become aware of the damages until the very month the claim was reported in July 2020. Furthermore, Plaintiff argued that Mr. Abreu's findings provided material conflicting evidence rendering summary judgment improper. *Plaintiff's Response.*

13. Defendant's Policy contains a "Duties After Loss" section that obligates the insured to give Citizens "prompt notice" when there is a "loss to covered property." The Policy states in "Duties After Loss":

> In case of a loss to covered property, we have no duty to provide coverage under this Policy if the failure to comply with the following duties is prejudicial to us . . .
>
> (1) Give prompt notice to us or your insurance agent. . . .
>
> CIT HO-3 07 17 p. 19. The policy also requires that Plaintiff cooperate with Defendant in the investigation of the claim. . . . . *Id*.

Summary Judgment Standard

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

A "party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fla. Rule of Civ. Proc. 1.510(a).* A party asserting that a fact cannot be or is genuinely disputed may support the assertion by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fla. Rule of Civ. Proc. 1.510(a)(c)(1)(B).* "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *Fla. Rule of Civ. Proc. 1.510(a)(c)(2).* In addition, the court can consider other materials in the record even when they are not cited by the parties. *Fla. Rule of Civ. Proc. 1.510(a)(c)(3).* "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Fla. Rule of Civ. Proc. 1.510(a)(c)(4).*

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

A "party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support its conclusory allegations." *Evers v. General Motors,* 770 F.2d 984, 986 (11th Cir. 1985); *see Weigel v. Target Stores,* 122 F.3d 461, 468 (7th Cir. 1997) (holding that the plaintiff failed to create a genuine issue for trial when her expert's affidavit provided "nothing more than a naked conclusion unsupported by any factual foundation"); *Vollmert v. Wisconsin Dep't of Transp.,* 197 F.3d 293, 298 (7th Cir. 1999) (holding that an expert opinion is insufficient "to preclude summary judgment where it offers nothing but naked conclusions."); *Hilburn v. Murata Elec. N. Am., Inc.,* 181 F.3d 1220, 1227-28 (11th Cir. 1999) (holding that a conclusory statement in an expert's affidavit "is insufficient to create a genuine issue of a material fact" when the "affidavit is devoid of any specific facts whatsoever which support the" expert's conclusion).

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

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

Analysis

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

"In construing insurance contracts, 'courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.' " *Pride Clean Restoration, Inc. v. Citizens Prop. Ins. Corp.,* 317 So. 3d 1274, 1274 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1109c] (quoting *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871, 877 (Fla. 2007) [32 Fla. L. Weekly S811a]). Any analysis must begin with the language of the insurance contract. *Homeowners Choice Prop. & Cas. v. Miguel Maspons,* 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D203a]. "Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Washington Nat'l Ins. Corp. v. Ruderman,* 117 So. 3d 943,948 (Fla. 2013) [38 Fla. L. Weekly S511a]; *See State Farm Fire & Cas. Co. v. Castillo,* 829 So.2d 242, 244 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1845a] ("[T]erms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.' ").

When the insurer alleges failure by the insured to follow its post-loss obligations, the trial court must perform a two-step analysis. First, the court must decide "whether the insured complied or substantially complied with the terms of the insurance policy." *Shivdasani v. Universal Prop. & Cas. Ins. Co.,* 306 So. 3d 1156, 1161 n7 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2044a]; *Laquer v. Citizens Prop. Ins. Corp.,* 167 So. 3d 470, 473 (Fla. Dist. Ct. App. 2015) [40 Fla. L. Weekly D1186a]; *1500 Coral Towers Condo. Ass'n v. Citizens Prop. Ins. Corp*., 112 So.3d 541, 543-45 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D731b]; *LoBello v. State Farm Fla. Ins. Co.,* 152 So. 3d 595, 599 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c]. Second, if a determination is made that the insured did not comply with its post-loss policy obligations, the "burden shift wherein prejudice to the insurer is presumed, and the insured then has an opportunity to rebut that presumption and prove that the insurer was not prejudiced." *Shivdasani,* 306 So. 3d at 1161 n7 (quoting *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 916 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D1639a]); *see Nunez v. Universal Prop. & Cas. Ins. Co.,* 325 So. 3d 267, 272 (Fla. 3d DCA Aug. 4, 2021) [46 Fla. L. Weekly D1747b] (when an insurer proves that the insured has materially breached a post-loss obligation, the burden shifts to the insured to "prove that any breach did not prejudice the insurer.").

This two-step analysis begins with a reading of the insurance policy at issue. "Prompt" is undefined in the policy. "It is well settled, however, that 'prompt' and other comparable phrases, like 'immediate' and 'as soon as practicable,' do not require instantaneous notice. *Laquer,* 167 So. 3d 470 at 474; (citing *Cont'l Cas. Co. v. Shoffstall,* 198 So.2d 654, 656 (Fla. 2d DCA 1967). Florida courts have interpreted these phrases to mean that notice should be provided "with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case." *Laquer,* 167 So. 3d 470 at 474 (quoting *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.,* 599 Fed.Appx. 875, 879 (11th Cir. 2015)). "Notice is necessary when there has been an occurrence that should lead a reasonable and prudent [person] to believe that a claim for damages would arise." *Laquer,* 167 So. 3d 470 at 474 (quoting *Ideal Mut. Ins. Co. v. Waldrep,* 400 So.2d 782, 785 (Fla. 3d DCA 1981)).

"The purpose of a notice provision in an insurance policy is to allow an insurer 'to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it.' " *Laquer,* 167 So. 3d 470 at 473 (quoting *LoBello v. State Farm Florida Ins. Co.,* 152 So.3d 595, 598 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D1273c]) "An insured's failure to give timely notice under such a provision is 'a legal basis for the denial of recovery under the policy.' " *Laquer* 167 So. 3d at 473. (quoting *Waldrep,* 400 So.2d at 785).

While the issue of whether an insured provided "prompt" notice generally presents an issue of fact, the factual issue may sometimes be resolved by summary judgment, especially in the context of hurricane damage claims. *Laquer,* 167 So. 3d 470 at 474. If the undisputed evidence will not support a finding that the insured gave notice to the insurer as soon as practicable, then a finding that notice was timely given is unsupportable. *Waldrep,* 400 So.2d at 785; *Midland Nat'l Ins. Co. v. Watson,* 188 So.2d 403, 405 (Fla. 3d DCA 1966).

> Courts have upheld summary judgment on the insured's failure to provide "prompt" notice where the insured was aware of damage to the residence shortly after the hurricane, but, for a variety of reasons, waited until several years passed before notifying the insurance company." *See, e.g., 1500 Coral Towers,* 112 So.3d at 543-44 (upholding summary judgment on the insured's failure to give "prompt" notice of roof damage caused by a hurricane where the insured was aware of roof damage one month after the hurricane, but waited more than four years to report the damages because it was unsure if the damages would exceed the policy deductible); *see also Yacht Club,* 599 Fed.Appx. at 879 (explaining that "prompt" notice is generally a jury question, but "Florida courts have interpreted 'prompt' differently when damage is caused by a known event, such as a hurricane, or when the insured was on-site when readily apparent problems developed").

Laquer, 167 So. 3d 470 at 474.

In Laquer, damage to the unit was not apparent until several years after Hurricane Wilma. *Id.* at 474. During the loss, the Laquer property was occupied by a tenant for three years and neither Laquer, her tenant, the housekeeper, the condominium manager, or his agents who regularly visited Laquer's unit, were able to observe any damage, to the wood flooring or walls of the unit. *Id.* Thus no one was ever put on notice to further inspect for damage.

The facts, for purposes of the summary judgment motion on the issue of notice, are established by reviewing the affidavits and depositions in the light most favorable to the insured, as the non-moving party. *Laquer,* 167 So. 3d 470 at 472. "[A]ctual compliance with *other* policy requirements or conditions is not evidence of substantial compliance with the pertinent policy requirement or condition at issue". *Nunez,* 325 So. 3d 267 at 274 (emphasis not added). Thus, cooperating with an insurer's investigation such as promptly reporting a claim, allowing the insurer to inspect the property, and sending a proof of loss, does not bear on whether the insured "substantially complied with the specific, pertinent policy provision." *Id*.

Defendant's Policy contains a "Duties After Loss" section that obligates the insured to give Plaintiff "prompt notice" when there is a "loss to covered property". A plain reading of the policy requires that notice be provided, when the insured become aware of the loss, not

just simply when the insured decides to file a claim. Thus, fixing the damage yourself or placing a nylon on the roof, after a hurricane, will not relieve the insured of the requirement to report the loss to the insurer. Such a failure constitutes a breach of the insurance policy.

In the current case the Plaintiff was living in the property during Hurricane Irma and she knew that the roof was damaged as a result of the hurricane. During her recorded statement she acknowledged seeing damage on the corner roof of her property and claimed that it was "destroyed" by Hurricane Irma. She also stated that she never reported the roof damage to Defendant because she used a nylon, presumably to protect the roof. Plaintiff also noticed that some shingles came off the roof after the storm but she was able to take care of the damage.

When Plaintiff submitted her affidavit, she conveniently omitted that fact that she knew the roof had been damaged after the hurricane and instead focused on when she first noticed the damage to the interior of the property. However, in her sworn interrogatory she stated that she noticed "smudges on her ceiling" in October of 2017, a month after the hurricane. She did not report the claim to Defendant because she believed the issue was related to the quality of the paint used on the property. She went on to state that the problem got "much bigger" in July 2020, when "water entered the home streaming down the walls in the kitchen, bathroom and hallway after light passing rain."

Based on the evidence submitted by both Defendant and Plaintiff, this Court finds that Plaintiff became aware of the damage to her property shortly after the hurricane and waited almost three years to report the loss. The Court finds that this is not a factual dispute which needs to be submitted to the jury since there was ample evidence, provided for this hearing, of Plaintiff's knowledge of the loss and her failure to report.

Having determined that Plaintiff failed to provide Defendant with prompt notice, prejudice to Defendant is presumed and Plaintiff bears the burden of overcoming that presumption by providing admissible evidence to rebut that presumption. Here again, Plaintiff is unable to meet its burden. In its Motion, Defendant argues that based on the late reporting and Plaintiff's failure to preserve evidence of the loss, Defendant was prejudiced because it was unable to timely investigate and evaluate the loss to determine if the current damage to the interior of the property was directly attributable to Hurricane Irma. Furthermore, Defendant was unable to ascertain the extent of the damages following the storm nor was it able to mitigate its losses. Defendant was also unable to ensure that the repairs were done correctly, thus protecting the property form further damage.

Defendant's inspector did not observe any physical damage to the roof of the property despite the reported roof leak due to Irma. Mr. Gonzalez opined that based on the late reporting he was unable to determine what caused the damage to the interior of the property or when the damage occurred. He was also unable to determine the extent of the damages. Mr. Abreu was unable to rebut that determination since his report was conclusory and his testimony, this Court has found, is unreliable.

Even if Mr. Abreu's testimony as to causation was accepted by this Court, Plaintiff would still be unable to rebut the presumption of prejudice since the current damage to the interior of the property would have been minimized or non-existent if the loss had been promptly reported. Plaintiff's, own testimony corroborates this finding. Plaintiff testified that one month after Irma, she noticed "smudges on her ceiling" but did not report the claim because she believed the issue was related to the quality of the paint used on the property. Based on her own testimony, the damage to the interior of the property was fairly minor in 2017. Rather than report the loss at that time, Plaintiff waited until, in her own words, the problem got "much bigger" in July of 2020 when "water entered the home streaming down the walls in the kitchen, bathroom and hallway after light passing rain." *Id.*

According to the policy, Plaintiff was required to report the claim to Defendant shortly after she became aware of the loss. Plaintiff failed comply with the policy and Defendant was prejudiced in the process. Thus, Plaintiff breached the policy of insurance by falling to abide by her Duties After Loss. Accordingly, Defendant properly denied Plaintiffs' claim for payment.

It is therefore ORDERED and ADJUDGED that:

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

2. This case is DISMISSED.

3. Plaintiff shall take nothing and Defendant shall go hence without day.

4. This Court retains jurisdiction to determine reasonable attorney fees and costs.

* * *

Insurance—Personal injury protection—Attorney's fees—Insurer's post-suit payment of outstanding penalty and postage entitles medical provider to award of attorney's fees and costs

ORLANDO INJURY CENTER, INC., a/a/o Carmen Maldonado, Plaintiff, v. USAA GENERAL INDEMNITY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-036983-SP-25, Section CG03. March 22, 2022. Patricia Marino Pedraza, Judge. Counsel: Adrianna De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Jennifer E. Pelaez, Dutton Law Group, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES AND COSTS PURSUANT TO CONFESSION OF JUDGMENT AND DEFENDANT'S MOTION IN OPPOSITION TO PLAINTIFF'S MOTION TO TAX COSTS AND ATTORNEY'S FEES

THIS CAUSE having come before the Court on March 16, 2022, on Plaintiff's Motion for Entitlement to Attorney's Fees and Costs Pursuant to Confession of Judgment and Defendant's Motion in Opposition to Plaintiff's Motion to Tax Costs and Attorney's Fees, and the Court having heard argument of counsel, as well as having reviewed applicable law, and otherwise being fully advised in the premises, it is hereby **ORDERED** and **ADJUDGED** that Plaintiff's Motion is **GRANTED** and Defendant's Motion is **DENIED** for the reasons set forth herein.

This case arises out of a motor vehicle accident that occurred in Miami-Dade County on March 2, 2021. Prior to the subject loss, the insured purchased a policy from the Defendant, which included Personal Injury Protection (PIP or No-Fault) benefits. Following the covered loss, the insured sought medical treatment from the Plaintiff for injuries sustained therein. On or about the time the services were rendered, Plaintiff obtained an assignment of benefits from the insured under the subject policy and timely submitted the bills for the services at issue in this matter. Plaintiff generated the bills for the services rendered and timely billed same. Defendant received the subject bills and failed to pay the bills pursuant to the subject policy and Florida's No-Fault Law. Following the timeframe set forth under Section 627.736(4)(b), Fla. Stat., Plaintiff submitted a valid Pre-Suit Demand Letter requesting complete payment for medical benefits including statutory interest, and penalty and postage pursuant to Section 627.736(10), Fla. Stat. Defendant responded to Plaintiff's Pre-Suit Demand Letter and sent additional payment for the medical benefits, interest, as well as penalty and postage. Defendant issued payment for the outstanding medical benefits as well as statutory interest but did not pay the penalty and postage pursuant to Section

627.736(10), Fla. Stat. Plaintiff then filed the instant suit on December 30, 2021, for the outstanding penalty and postage.

After Plaintiff filed its lawsuit, Defendant filed a Confession of Judgment and issued payment for the outstanding penalty and postage on February 10, 2022, in the amount of $71.79. Defendant's payment, post-suit, and its subsequent filing of a Confession of Judgment was an effective concession that it owed more than what it had paid prior to the filing of this suit. However, despite confessing judgment, Defendant nonetheless disputes Plaintiff's entitlement to attorney's fees and costs.

It is well-settled law in Florida that a payment made by an insurer after an action has been filed, but prior to judgment, constitutes a confession of judgment against the insurer and in favor of the insured, thereby entitling the insured to an award of reasonable attorney's fees and costs. *See Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217 (Fla. 1983); and *Lopez v. State Farm Mut. Auto Ins. Co.*, 139 So. 3d 402, 404 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D1058a]. The question then is whether the post-suit payment of outstanding penalty and postage issued by the Defendant entitles Plaintiff to attorney's fees and costs. In order to answer the question at issue, this Court first looks at Florida's No-Fault Law.

Section 627.736(10)(d), Fla. Stat., states:

> **[i]f within 30 days after receipt of notice** by the insurer, **the overdue claim specified in the notice is paid** by the insurer **together with applicable interest and a penalty** of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, **no action may be brought against the insurer**.

Fla. Stat. §627.736(10)(d) (emphasis added).

This Court must also analyze the text of Section 627.736(8), Fla. Stat., which states:

> With respect to **any** dispute under the provisions of ss. 627.730-627.7405 between the insured and the insurer, or between an assignee of an insured's rights and the insurer, **the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15)** . . . .

Fla. Stat. §627.736(8), Fla. Stat. (emphasis added).

"A court's purpose in construing a statute is to give effect to the legislative intent, which is the polestar that guides the court in statutory construction." *Mendenhall v. State*, 48 So.3d 740 (Fla. 2010) [35 Fla. L. Weekly S631a]. Courts must "give full effect to all statutory provisions and construe related provisions in harmony with one another." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992). *See also School Bd. of Palm Beach Cty. v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1223 (Fla. 2009) [34 Fla. L. Weekly S251a]. In order to interpret the legislative intent of a statute, this Court must look to the plain and obvious meaning of the statute where no ambiguity exists. *See Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1230 (Fla. 2004) [29 Fla. L. Weekly S614a]. If the language of the statute is clear and unambiguous, the legislative intent must be derived from the words used, as interpreting beyond the plain meaning would be contrary to the legislature's intent. *See Nationwide Mutual Fire Ins. Co. v. Southeast Diagnostics, Inc.*, 766 So.2d 229 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D316a].

The purpose of Florida's No-Fault is to "provide swift and virtually automatic payment so that the injured insured may get on with his life without undue financial interruption." *Gov't Employees Ins. Co. v. Gonzalez*, 512 So. 2d 269, 271 (Fla. 3d DCA 1987) (citing *Comeau v. Safeco Ins. Co.*, 356 So. 2d 790 (Fla. 1978)). The purpose of "swift and virtually automatic payment" is further assured by mandating insurers pay statutory interest on outstanding benefits not paid within 30 days of receipt. *See* Fla. Stat. §627.736(4)(b). In the case an insurer fails to issue complete payment, an insured and/or their assignee may submit a demand letter pursuant to Section 627.736(10), Fla. Stat. This is a condition precedent prior to filing suit against the insurer. In order for the insurer to avoid liability, the statute is clear—there is no cause of action against the insurer if the insurer pays, within thirty (30) days, the outstanding claim "**together with** applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250." Fla. Stat. §627.736(10)(d).

Moreover, despite the fact that Florida's No-Fault Law has been amended several times since the Florida Legislature first instituted a demand letter as a condition precedent in 2001, the language in subsection (d) has remained unchanged as to how an insurer can avoid a suit against it—by paying the overdue claim "together with applicable interest and a penalty . . . ." Although the legislature has extended the time for the insurer to respond to the demand letter from the initial seven (7) days to the present thirty (30) days from receipt, the pertinent language regarding how to avoid a suit for breach of contract has remained unchanged.

It is further presumed the Legislature knows the existing law, as well as the judicial construction of former laws, when it enacts a statute or when it amends some parts of a statute but not others. *See King v. Ellison*, 648 So. 2d 666 (Fla. 1994). *See also Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975). This tenet of statutory interpretation applies to all Florida laws, including Florida's No-Fault Law.

In the instant case, this Court finds Section 627.736(10)(d), Fla. Stat., is clear and unambiguous and therefore it is bound by the language of the statute. As such, this Court does not have the authority to add words into the statute or omit any words from the statute. *See generally Nationwide Mutual*, *supra*.

Defendant agreed as it conceded it owed more to the Plaintiff when it filed a Confession of Judgment for outstanding penalty and postage and issued a draft for same less than two (2) months following the filing of this suit. It is important to reiterate the facts of what transpired in this case—**Defendant did not issue complete payment within thirty (30) days after initially receiving bills for the services at issue and did not pay pursuant to the subject policy and Florida law until after it received Plaintiff's demand letter**. Defendant—a sophisticated carrier who sells PIP policies throughout Florida—knew or should have known it additionally owed penalty and postage when it responded to Plaintiff's demand letter with payment for benefits and statutory interest. Defendant knew or should have known that in order to avoid liability, the statute was clear that it would have to pay the overdue claim **together with** statutory interest as well as the penalty and postage as a result of its failure to timely pay the bills before receipt of a demand letter. This is further compounded by the fact that Defendant waited until **after** Plaintiff filed the subject suit for which Plaintiff was left to incur attorney's fees and costs, to issue payment for the outstanding penalty and postage.

In determining whether Defendant's post-suit payment of outstanding penalty and postage entitles Plaintiff to reasonable attorney's fees and costs, this Court must additionally interpret the plain and obvious meaning of the statutory language found in Section 627.736(8), Fla. Stat.

As previously referenced, Section 627.736(8), Fla. Stat., states:

> With respect to **any dispute under the provisions of ss. 627.730-627.7405** between the insured and the insurer, or between an assignee of an insured's rights and the insurer, **the provisions of ss. 627.428 and 768.79 apply, except as provided in subsections (10) and (15)** . . . .

Fla. Stat. §627.736(8), Fla. Stat. (emphasis added).

The Florida Legislature incorporated subsection (10) to Section 627.736(8), Fla. Stat., as to the application of attorney's fees and costs.

Fla. Stat. 627.736(8) does not say a dispute *as to benefits*.

Fla. Sat. 627.736(8) says *any dispute*.

The exceptions of subsections (10) and (15) make sense, and it makes sense as to why the legislature specifically cited to these subsections as exceptions as to the broad language used of "any dispute." 627.736(10), Fla. Stat., is a notice requirement to the insurer—a last chance for the insurer to revisit the claim and issue any payments it owes to avoid a suit against it. The notice requirement in subsection (10) specifically sets forth how the insurer can avoid liability. It does not state it can avoid liability by simply paying outstanding medical benefits only. It says it can avoid liability if it pays "the overdue claim specified in the notice. . .together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250 . . . ." If the insurer pays the total amount sought in benefits "together with" outstanding interest and penalty, then an insured or an assignee of the insured cannot file a suit against the insurer. Similarly, 627.736(15), Fla. Stat., states all claims from the same healthcare provider must be brought in a single claim. Thus, Section 627.736(8), Fla. Stat., does not provide for attorney's fees and costs if multiple suits are filed for bills from the same healthcare provider unless good cause is show why multiple suits should be brought separately. There are no other exceptions under the text of Section 627.736(8), Fla. Stat., as to the application of Section 627.428, Fla. Stat.

The Court also notes that even as the Florida Legislature amended the No-Fault Statute multiple times since 2000, it did not change the provision regarding avoiding liability in subsection (10)(d). Additionally, the Florida Legislature has not amended subsection (8) regarding when attorney's fees and costs are triggered by the statute.

Thus, a plain reading of Florida's No-Fault Law not only does not limit the type of dispute between an insured, or assignee of the insured, and an insurer, but it further entitles the Plaintiff to its reasonable attorney's fees and costs if a judgment is entered in its favor and against the insurer. As the Defendant here confessed judgment and issued payment in accordance with the Confession, the post-suit payment operates as a judgment in favor of the Plaintiff and against the Defendant thereby entitling Plaintiff to its reasonable attorney's fees and costs. *See Wollard*, *supra*; and *Lopez*, *supra*.

In the instant case, this Court is bound by several cases—in particular, *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000) [25 Fla. L. Weekly S1103a]; *Magnetic Imaging Sys, I, LTD., v. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D679a], and *United Auto. Ins. Co. v. 5-Star Rehab. Ctr., Inc., a/a/o Jesika J. Francisco*, 28 Fla. L. Weekly Supp. 797a (Fla. 11th Jud. Cir. Oct. 27, 2020) (App.).

In *Ivey*, the Florida Supreme Court reversed the Third District's interpretation of Section 627.736(8), Fla. Stat., stating that:

> **Florida law is clear that in "any dispute" which leads to judgment against the insurer and in favor of the insured, attorney's fees shall be awarded to the insured**. . . . That is, under PIP law, the focus is outcome-oriented. **If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees.** It is the incorrect denial of benefits, not the presence of some sinister concept of "wrongfulness," that generates the basic entitlement to the fees if such denial is incorrect. It is clear to us that the purpose of this provision is to level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress I the courts. Thus, we find that the Third District's holding on this issue, is patently in express and direct conflict with the firmly grounded principles embedded in Florida's no-fault insurance scheme.
>
> . . .
>
> It is therefore obvious that Allstate voluntarily paid Ivey's claim only after the lawsuit was filed and without any time of settlement agreement which would preclude her from recovering her attorney's fees . . . . The decision below would incorrectly deny application of statutory attorney's fees when insurers come to the realization during litigation that a denial of benefits has been incorrect.

774 So. 2d at 684-85 (citations omitted) (emphasis added).

Further, in *Magnetic Imaging*, the insurer issued a post-suit payment for outstanding statutory interest in a class action case regarding underpaid statutory interest. 847 So. 2d at 988-89. After issuing the post-suit payment of statutory interest, the defendant disputed plaintiff's entitlement to attorney's fees and costs. *Id.* In reversing the trial court's ruling and finding the plaintiff was entitled to attorney's fees and costs, the Court stated that "current PIP law (as evidenced by sections 627.428(1) and 627.736(8)) 'is outcome oriented. If a dispute arises between an insurer and an insured, and judgment is entered in favor of the insured, he or she is entitled to attorney's fees and costs.' " *Id.* at 990 (quoting *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a]). It further noted that where an insurer issues a post-suit payment, that payment operates as a confession of judgment entitling the plaintiff to its attorney's fees and costs. *See id.* (citing *Ivey*, at 684-85).

More recently, the Eleventh Circuit in its appellate capacity heard a case on all fours to the facts here. *See 5-Star Rehab.*, *supra*. In *5-Star Rehab.*, the defendant-appellant, received two demand letters for outstanding bills from the plaintiff. Although it issued payment for benefits, statutory interest as well as penalty and postage for the first demand letter, the defendant failed to pay the demand penalty for the second demand letter. Following summary judgment in favor of the plaintiff and entitlement in favor of the plaintiff, defendant appealed the issue of entitlement. In affirming entitlement, the Eleventh Circuit in its appellate capacity noted Section 627.736(10)(d), Fla. Stat., provides an insurer an opportunity to avoid liability if it issues complete payment including outstanding statutory interest as well as penalty and postage, and noted that this very provision is referenced in Section 627.736(8), Fla. Stat. *Id.* It further held that "[o]nce the final judgment below was entered in the Provider's favor, *Ivey* makes clear that 'attorney's fees shall be awarded to the insured.' " *Id.* (quoting *Ivey*, *supra*.).

In another case where the defendant-insurer stipulated to outstanding amounts but disputed the plaintiff's entitlement to attorney's fees and costs, Judge Melendez in *Doctor Ralph Miniet Practice a/a/o Yanet Rodriguez v. Geico Gen. Ins. Co.*, found:

> **Neither §627.428 nor §627.736 require the amount at issue in litigation of a personal injury protection dispute derive specifically from the $10,000.00 in available personal injury protection policy benefits.** In *Magnetic Imaging Sys. I, Ltd. V. Prudential Prop. & Cas. Ins. Co.*, 847 So. 2d 987, 989 (Fla. 3d DCA 20030 [28 Fla. L. Weekly D679a], the Third District held that a confession of judgment of PIP interest (not a policy benefits [sic] but a statutory benefit) triggered the award of fees under §627.428. In *Rodriguez v. Government Employees Ins. Co.*, the Fourth District held that a $0.00 judgment in favor of the insured on the insurer's claim mandated an award of fees under §627.428. 80 So. 3d 1042, 1044 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2788a]. Numerous courts have found entitlement to attorney's fees and costs when a judgment for penalty under Fla. Stat. §627.736(10) was obtained. *See USAA General Indemnity Company v. Cohen Chiropractic Group, P.A. a/a/o Emy Fahie*, 23 Fla. L. Weekly Supp. 522e (Fla. 17th Jud. Cir. (Aug. 15, 2015); *5 Star Rehabilitation Center, Inc. a/a/o Jesika J. Francisco v. United Auto. Ins. Co.*, 25 Fla. L. Weekly Supp. 91a (Fla. 11th Jud. Cir. County Ct. February 15, 2017); *MR Services I, Inc. d/b/a C & R Imaging of Hollywood v. State Farm Mutual Auto. Ins. Co.*, 21 Fla. L. Weekly

Supp. 1069b (Fla. 17th Jud. Cir. County Ct. June 4, 2014).

To allow an insurer to avoid exposure to §627.428 attorney's fees liability would remove any incentive for an insurer to pay policy benefits timely. As such, the Court finds that the penalty provision of the Florida No-Fault Law is both valid and enforceable and enforces same with an award of attorney's fess and costs to [p]laintiff.

25 Fla. L. Weekly Supp. 900a (Fla. Miami-Dade Cty. Ct. 2017) (emphasis added). The Court is bound by, and agrees with, *Ivey*, *Magnetic Imaging*, and *5-Star Rehab*. The interpretation of the relevant statutory provisions by these cases are in line with the plain meaning of Sections 627.736(8) and (10)(d), Fla. Stat.

As applied to the facts in this matter—which are stipulated to—Plaintiff submitted a valid Pre-Suit Demand Letter requesting the due and owing benefits for the services at issue along with statutory interest and penalty and postage. Defendant issued payment for the outstanding benefits and statutory interest but did not issue complete payment as it failed to also pay for the penalty and postage. Plaintiff filed suit against the Defendant arising from the dispute between outstanding amounts owed under Section 627.736(10)(d), Fla. Stat., and Defendant issued payment for the outstanding amounts only after Plaintiff filed suit. Based on these facts, but for Plaintiff's suit, Defendant would have reneged its obligations to pay the penalty and postage owed pursuant to the No-Fault Statute.

Despite case law on point to this case, and which are binding on this Court, Defendant's only argument centered on last year's decision from the Fourth District Court of Appeals in *S. Fla. Pain & Rehab. Of West Dade v. Infinity Auto Ins. Co.*, Case No. 4D21-438 (Fla. 4th DCA Apr. 21, 2021) [318 So. 3d 6] [46 Fla. L. Weekly D915a]. Although the *S. Fla. Pain & Rehab.*, is not binding on this Court as there is case law from the Third District Court of Appeals and the Eleventh Circuit in its Appellate Division this Court that deals with the matters at issue in the instant case, this Court is nonetheless compelled to address the Fourth District's opinion in *S. Fla. Pain & Rehab.* For the reasons set forth below, this Court agrees with Judge Levitt's detailed and thorough order analyzing *S. Fla. Pain & Rehab.*, and adopts its analysis specifically finding that although:

[t]he Fourth District utilized the proper analysis of statutory interpretation [it], remarkably, did not analyze all pertinent statutory language. To reiterate, section 627.736(10)(d) provides,

> If, within 30 days after receipt of notice by the insurer, the overdue claim specified in the notice is paid by the insurer together with applicable interest and a penalty of 10 percent of the overdue amount paid by the insurer, subject to a maximum penalty of $250, no action may be brought against the insurer.

The Fourth District, for unknown reasons, omitted the words 'together with applicable interest and penalty . . .' from the statute. Section 627.736(10)(d) speaks for itself but clearly indicates that no action may be brought against the insurer if the insurer timely pays the overdue claim *together with* applicable interest and a penalty. Thus, following logically, if an insurer does not pay the claim '***together with*** applicable interest and a penalty,' then an action may be brought. *Id.* (emphasis added). The statute does not end with failure to pay the claim and does not require that the insurance contract contain a provision allowing fees for interest and penalty. . . .

Courts must not interpret a statute that would lead to an absurd or unreasonable result. *Dep't of Highway Safety and Motor Vehicles v. Patrick*, 895 So. 2d 1131 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D349a]. **Words also may not be excised from the statute and must be enforced.** *See Haworth v. Chapman*. 113 Fla. 591, 595 (Fla. 1933) (A statute must be read to take all parts into consideration and give them all effect.) **The legislature did not intend to authorize insurers to withhold applicable interest and a penalty with impunity; an action may be brought if they do not pay them.** §627.736(10)(d), Fla. Stat. 2021. This Court must follow the law as written and does so in this Order.

Angels Diagnostic Group (a/a/o Alejandro Morales) v. United Auto. Ins. Co., Case No. 2021-001220 SP 25 (Fla. Miami-Dade County Ct. July 13, 2021) [29 Fla. L. Weekly Supp. 553a] (emphasis added).

So, too, will this Court follow the law as it was written.

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** that that Plaintiff's Motion is **GRANTED** and Defendant's Motion is **DENIED**. Final Judgment is hereby entered in favor of the Plaintiff. The Court retains jurisdiction to determine quantum of Plaintiff's attorney's fees and costs.

* * *

Insurance—Personal injury protection—Attorney's fees—Amount—Hours—Prevailing medical provider is awarded attorney's fees for hours reasonably expended rather than hours actually worked

L.E.R.G. MEDICAL INC., a/a/o Omar Peiro, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-010635-SP-05, Section CC06. October 22, 2021. Luis Perez-Medina, Judge. Counsel: Michael Ira Libman, Law Offices of Michael I. Libman, Miami, for Plaintiff. Karla Burgos, Law Office of Terry M. Torres & Associates, Doral, for Defendant.

ORDER AND FINAL JUDGMENT AWARDING PLAINTIFF'S ATTORNEY FEES AND COSTS

THIS CAUSE having come before the Court on the Law Offices of Michael I. Libman's Motion for Attorney's Fees, Interest on Attorney's Fees and Costs, and the Court having heard testimony from witnesses, having reviewed the evidence presented, having reviewed the entire record in this matter, and being otherwise fully advised in the premises, the Court **ORDERS AND ADJUDGES** as follows:

1. This was an action for Personal Injury Protection ("PIP") filed by Plaintiff on or about June 30, 2017. Plaintiff's Amended Complaint was then filed on July 14, 2017. Defendant ultimately confessed judgment on or about January 10, 2019. The Law Office of Michael I. Libman, Esq. and Michael I. Libman, Esq. (hereinafter referred to collectively as "Libman"), representing Plaintiff, filed its Motion for Attorney's Fees, Interest on Attorney's Fees and Costs on January 14, 2019. A hearing on Libman's Motion was heard on July 30, 2021.

2. After hearing testimony from all witnesses, reviewing all exhibits and the record in this matter, this Court finds that counsel for Plaintiff reasonably expended time in the prosecution of this breach of contract (PIP) lawsuit, compensable pursuant to Fla. Stat. §627.428 and §627.736.

3. In determining the number of reasonable hours, the Court has considered all of the factors enumerated in *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), *Standard Guaranty Insurance Company v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), and Rule 4-1.5, Rules Regulating the Florida Bar.

4. "When deciding what constitutes a reasonable sum as compensation, Judges are not required to abandon their common sense or what they learned as lawyers." *Herssein v. AGA Service Company d/b/a Allianz Global Assistance, Jefferson Ins. Co., and American Airlines, Inc.,* 28 Fla. L. Weekly Supp. 411b (Miami-Dade County Court 2020) (citing *Ziontz v. Ocean Trail Unit Owners Ass'n, Inc.,* 663 So. 2d 1334, 1335 (Fla. 4th DCA 1993). "Irrespective of the 'expert opinions presented at a fee hearing, Courts will closely scrutinize attorney fee awards to ensure their reasonableness' and will not abandon their own experience or common sense." *Id.* (citing *Kuhnlein v. Dep't of Rev.,* 662 So. 2d 309, 312 (Fla. 1995) [20 Fla. L. Weekly S526a]). "Even when there is evidence supporting the award of attorney's fees, no court is obliged to approve a judgment which 'is so obviously contrary to the manifest justice of the case' and 'so

obviously offends even the most hardened conscience.' " *Id.* (citing *Nunez v. Allen,* 2019 WL 5089715 (Fla. 5th DCA Oct. 11, 2019) [44 Fla. L. Weekly D2511a]).

5. The first step in considering the number of hours expended is whether there is adequate documentation to support the number of hours claimed by Plaintiff's counsel. *Rowe,* 472 So. 2d at 1150. Florida Courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee. *Id.* When determining a reasonable hourly rate, the Court must look to the documentation presented supporting the number of hours claimed. *Id.* Counsel is expected to claim only those hours that could be properly billed to the client. *Id.* Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the Court finds to be excessive or unnecessary. *Id.*

6. While providing adequate and current records supporting the number of hours claimed is the first step in the inquiry, judges should reduce the hours claimed when they are: (a) excessive or "too thorough"; (b) duplicative of time spent by other lawyers for the same party; or (c) were simple ministerial tasks that were more appropriately handled by support staff. *See Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983) ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary"); *North Dade Church of God, Inc. v. JM Statewide, Inc.,* 851 So. 2d 194, 196 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b] ("Duplicative time charged by multiple attorneys working on the case are generally not compensable . . . [nor is] excessive time spent on simple ministerial tasks such as reviewing documents or filing notices of appearance."). "Courts must be particularly concerned with 'notorious 'billable hours' syndrome, with its multiple evils of exaggeration, duplication, and invention. *Universal Property & Casualty Ins. Co. v. Deshpande,* 314 So. 3d 416, 420 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2511a] (citing *Miller v. First Am. Bank & Trust,* 607 So. 2d 483, 485-86 (Fla. 4th DCA 1992).

7. This Court is persuaded by the Order rendered by Judge Gonzalez-Whyte in *New Life Medical And Rehab Center Inc. v. Progressive Select Ins Co.,* 2014-008940-CC-05 (Miami-Dade County Court, filed August 2, 2021) [29 Fla. L. Weekly Supp. 469a] which addressed the identical issues raised in this fee hearing.

8. Under the "hour setting" portion of a fee award it is important to distinguish between the "hours actually worked" and the "hours reasonably expended," because the hours actually worked is not the issue. *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras,* 633 So. 2d 1103, 1110-11 (Fla. 3d DCA 1994). This Court finds that many of the hours claimed by Plaintiff are not supported by the timesheets provided or the testimony of his fee expert.

9. This Court agrees with Defendant that the pre-suit time billed by Libman is not compensable. *See United States Fidelity & Guarantee Co. v. Rosado,* 606 So. 2d 628 (Fla. 3d DCA 1992); *United Auto. Ins. Co. v. Affiliated Health Ctrs., Inc.,* 22 Fla. L. Weekly Supp. 687a (11th Jud. Cir. App. Div. 2015); *Apple Medical Center, LLC a/a/o Melianie Melien v. Progressive Select Ins. Co.,* 25 Fla. L. Weekly Supp. 748a (11th Jud. Cir. App. Div. 2017). The Court could not find any evidence in the record showing that Defendant acted unreasonably justifying the award of pre-suit time. *See Rosado,* 606 So. 2d at 629.

10. On or about June 30, 2017, a Complaint alleging a jurisdictional amount of $99.00 or less was filed by Plaintiff. Before the return of service was filed with the Court, Plaintiff filed an Amended the Complaint alleging a jurisdictional amount of over $5,000.00 and a stated amount of $7,342.40. While both pleadings allege that the bills at issue were attached, only the Amended Complaint included the attachment. In addition, there is no evidence in the docket that Plaintiff paid a filling fee commensurate with the corrected jurisdictional amount. While Plaintiff and its counsel may have decided to save cost by pleading in this manner, it is not reasonable to require Defendant subsidize their actions. Plaintiff and its counsel had in its possession all the records needed to file the proper pleading at the commencement of the lawsuit. Thus, the time Plaintiff spent amending the complaint falls squarely on Libman's shoulders and cannot be shifted to Defendant.

11. The record in this matter also demonstrates that Plaintiff's counsel refused to take reasonable steps to coordinate depositions, requiring countless unilaterally scheduled depositions, preparation for those depositions, and motions for sanctions. Plaintiff never filed any evidence relating to its efforts to coordinate deposition dates with the Defendant. Plaintiff never sought Court intervention to coordinate the depositions or even schedule a hearing on its multiple motions for sanction. As a matter of fact, the only hearing held in this case was the Pre Trial hearing. No depositions were ever taken in this case, no motions ever heard, nor were there any orders signed by the Court, other than an order invoking the rules of civil procedure. The Court finds that Plaintiff did not provide sufficient evidence to meet it burden of proving that it sufficiently coordinated with Defendant to set the requested depositions. Thus, Plaintiff's practice of unilaterally setting depositions, preparing for those depositions, filing multiple motions for sanctions without asking the Court to hear these motions is unreasonable. "Many unnecessary hours were billed by Plaintiff's counsel as a direct result of these practices and the Court agrees with Defendant that they are not compensable." *New Life Medical And Rehab Center Inc. v. Progressive Select Ins. Co.,* 2014-008940-CC-05 (Miami-Dade County Court August 2-2021) (J. Gonzalez-Whyte) [29 Fla. L. Weekly Supp. 469a].

12. Plaintiff's counsel has not met his burden of showing with competent, substantial evidence why all of his fees should be paid in this matter. Defendant, however, has met its burden as the party opposing the fee award. Defendant's expert, Gladys Perez, Esq., provided the Court with a detailed report and testimony explaining why certain hours should be reduced or disallowed completely. For the reasons discussed above and based upon the testimony and other evidence presented at the hearing, as well as the record in this matter, the Court has determined the following hours to be reasonable.

13. Pursuant to *Rowe,* and the factors enumerated in the Rule 4-1.5, Rules Regulating the Florida Bar, this Court finds that ***Michael I Libman, Esq.,*** has expended a total of ***17.40*** reasonable hours in the prosecution of this case and is entitled to be compensated at the rate of ***$500.00*** per hour for his time, equating to ***$8,700.00***.

14. This Court further finds that Plaintiff's counsel is entitled to taxable costs in the amount of ***$80.00***.

15. The Court finds that this case is not the type of case to which a multiplier should be applied under the *Rowe* and *Quanstrom* guidelines.

16. Pursuant to *Quality Engineered Installation, Inc. v. Higley South, Inc.,* 670 So.2d 929 (Fla. 1996), Plaintiff's counsel is entitled to collect (pre-judgment) interest on the fee award of ***$8,780.00*** from January 10, 2019, through today, in the amount of ***$1,547.03*** (1,016 DAYS at a rate of 6.33%).

17. A total judgment amount of attorney fees, costs and prejudgment interest in the amount of ***$10,327.03*** is hereby entered in favor of the Law Offices of Michael I. Libman and against Infinity Auto Insurance Company, for which let execution issue.

18. A total judgment in the amount of ***$6,500.00*** (***13*** hours at a reasonable expert fee of ***$500.00)*** is hereby entered in favor of Plaintiff's expert, Stuart Yanofsky, Esq., and against Infinity Auto Insurance Company, for which let execution issue.

19. This Court reserves jurisdiction to enforce this Final Judgment, as well as any previous Judgments and/or Orders in this matter, and to do any and all other acts necessary in this cause.

20. This judgment shall bear interest at the legal rate until paid in full.

* * *

Insurance—Personal injury protection—Affirmative defenses—Rescission—Material misrepresentations on application—Evidence—Hearsay—Former testimony—Transcript of insured's examination is hearsay evidence and not admissible under hearsay exception for former testimony—Affidavit filed by insurer in support of summary judgment on material misrepresentation defense does not create genuine issue of material fact where affidavit merely states that insurer determined that insured failed to include all household members and/or additional drivers on application but does not state that claimant was household member or additional driver or state any information that would contradict testimony of insured that claimant was not household member or additional driver at time of application—Further, where policy states that insured will be notified of additional premium and be given opportunity to pay additional premium if insurer determines that application information is inaccurate or incomplete, insurer's remedy on learning that insured had allegedly failed to disclose household member or additional driver on application was to recompute premium and seek payment from insured, not to rescind policy—Summary judgment is entered in favor of provider on misrepresentation defense

PAN AM DIAGNOSTICS OF ORLANDO, a/a/o Ishmeal Abdul Griffin, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-014974-SP-25, Section CG01. November 29, 2021. Linda Melendez, Judge. Counsel: Adriana de Armas, Pacin Levine, P.A., Miami, for Plaintiff. Andrew W. Bray, Vernis & Bowling, for Defendant.

ORDER DENYING DEFENDANT AMENDED MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT AS TO DEFENDANT'S FIRST AFFIRMATIVE DEFENSE

THIS CAUSE having come before the Court on November 10, 2021, on Defendant, Amended Motion for Final Summary Judgment ("Defendant's Motion for Summary Judgment") and Plaintiff's Amended Motion for Final Summary Judgment as to Defendant's First Affirmative Defense ("Plaintiff's Motion for Summary Judgment"), and the Court having heard argument of counsel, as well as having reviewed applicable law, and otherwise fully advised in the premises, it is hereby **ORDERED** and **ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED** and Plaintiff's Motion for Summary Judgment is **GRANTED** for the reasons set forth herein.

This case arises out of a motor vehicle accident that occurred in Miami-Dade County on June 19, 2015. The claimant, Ishmeal Griffin ("Claimant"), sought diagnostic treatment from the Plaintiff following injuries arising from the subject motor vehicle accident. The Plaintiff obtained an assignment of benefits under the subject policy and timely submitted bills for the services rendered. The Defendant did not issue payment. The Plaintiff subsequently submitted a Notice of Intent to Initiate Litigation to which the Defendant submitted a response stating it had conducted an investigation and determined material misrepresentations were made at the time the insurance application was sold to the insured, Tina Griffin ("Insured"). The Plaintiff then filed the instant action. The Defendant filed its Answer to Plaintiff's Complaint wherein it asserted material misrepresentation as its affirmative defenses.

On December 31, 2020, following *Wilsonart, LLC v. Lopez*, the Florida Supreme Court formally adopted the federal summary judgment standard by amended Fla. R. Civ. P. 1.510. The new standard took effect on May 1, 2021. The Court noted "the amended rule adopts the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986); and *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (together, the 'federal summary judgment standard')."

Rule 1.510(a) states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Specifically, "summary judgment is proper 'if the pleadings, depositions, answer 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.' " *See also Celotex*, 477 U.S. at 322. In other words, "the plain language of Rule 56(c) mandates the entry of summary judgment . . . 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." *Id*. Moreover, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts" and the court should not adopt a version of the facts that is "blatantly contradicted by the record" when ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. at 380.

The central questions before the Court in this matter are whether there was a material misrepresentation in the alleged failure to disclose additional drivers and/or household members and whether Defendant properly rescinded the subject policy based on the allegations of material misrepresentation.

In support of its Motion for Summary Judgment and in opposition to Defendant's Motion for Summary Judgment Plaintiff relies on the affidavit and deposition testimony of Insured. This Court finds the Insured's affidavit and deposition testimony are admissible summary judgment evidence and next must determine whether it meets Plaintiff's burden. The affidavit states the subject policy was purchased prior to the loss and further stated that Claimant was neither a regular operator of the vehicle nor did he reside with Insured at the time the application was completed. *See* Affidavit of Tina Griffin ¶¶ 3-4. Insured's deposition further corroborates the information set forth in the affidavit specifically listing the address where Claimant lived at the time the application was completed and the subject policy was purchased. *See* Deposition of Tina Griffin 12:11-15; 12:25-13:3; and 13:20-14:3. The deposition additionally corroborated the affidavit by stating in further detail that Claimant was not an additional driver. *See* Deposition of Tina Griffin 23:10-14. As such, Insured's affidavit and subsequent deposition testimony meet Plaintiff's burden of production and thus the burden shifts to Defendant in order to show a genuine dispute as to any material fact.

On the other hand, Defendant—in support of its Motion for Summary Judgment and in opposition to Plaintiff's Motion for Summary Judgment—relies on the affidavit of Lisa Robison and the Examination Under Oath ("EUO") of Claimant. This Court finds the affidavit of Lisa Robison is admissible summary judgment evidence and next must determine whether it meets Defendant's burden of production as to its own Motion for Summary Judgment and whether it creates a genuine issue of material fact as it applies to Plaintiff's Motion for Summary Judgment.

However, this Court does not find the EUO transcript of Claimant is admissible summary judgment evidence. The EUO transcript is hearsay as it is an out of court statement offered to prove the truth of the matter asserted. In order for this Court to find the subject transcript admissible summary judgment evidence, there would need to be an applicable exception under Section 90.804(2), Fla. Stat. In the instant

case, the Defendant seeks to use the EUO transcript as former testimony.

Section 90.804(2)(a), Fla. Stat., states in pertinent part:

> *Former Testimony.*—**Testimony given as a witness at another hearing** of the same or different proceeding, **or in a deposition** taken in compliance with law in the course of the same or another proceeding**, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.**

Fla. Stat. §90.804(2)(a) (emphasis added).

> [T]he rule applies if the following requirements are met: (a) the former testimony was taken in the course of a judicial proceeding in a competent tribunal; (b) the party against whom the evidence is offered, or his privy, was a party to the former trial; (c) the issues are substantially the same in both cases; (d) a substantial reason is shown why the original witness is not available; (e) the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness.

Gables MR(A) a/a/o Jose Villaroel v. State Farm Mut. Auto. Ins. Co., 26 Fla. L. Weekly Supp. 766a (Fla. Miami-Dade County Ct. Oct. 22, 2018) (citing *Johns-Manville Sales Com. V. Janssens*, 463 So. 2d 242 (Fla. 1st DCA 1984)). As in the *Villaroel* case, the EUO of Claimant was taken pursuant to the terms of the subject policy during the claims handling process of the subject claim, and thus, there was no opportunity for cross-examination or to object to questions posited. The EUO of Claimant was taken prior to any judicial proceeding. The very nature of an EUO as the one in the instant case is fundamentally different from that of a deposition. *Id*. (citing *Goldman v. State Farm*, 660 So. 2d 300 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1844a]).

Additionally, this Court cannot agree the EUO transcript is admissible summary judgment as the Defendant failed to provide proof that Claimant was provided a true and correct copy of the EUO transcript at the time the statement was taken. *See* Fla. Stat. §92.33 (providing "[e]very person who shall take a written statement by any injured person with respect to any accident . . . shall at the time of taking such statement, furnish to the person making such statement a true and correct complete copy thereof.").

Defendant could have sought the deposition of Claimant at any time in the past four years, and for unknown reasons, it did not. Defendant cannot come now before this Court with an EUO transcript that fails to meet the former testimony exception and without a reason as to why there is an unavailable declarant. As such, this Court cannot take the EUO transcript of Claimant as admissible summary judgment evidence.

Even if this Court were to agree with Defendant and find the EUO transcript fell under a hearsay exception, the EUO transcript does not conclusively show that no genuine issue of material fact exists. The EUO transcript would at most serve to create a genuine issue of material fact against the affidavit and deposition testimony of Insured presented by the Plaintiff, which would simply mean neither party would be entitled to summary judgment. Were it not for Defendant's own policy language as detailed below.

The Court next looks at the affidavit of Lisa Robison in support of Defendant's Motion for Summary Judgment. The affidavit of Ms. Robison states that following an investigation, the Defendant determined Insured failed to include all household members and/or additional drivers when she executed her application for the subject policy. However, the affidavit does not state any information that would contradict the affidavit or deposition testimony of Insured. Although it states that Defendant's investigation determined there were additional household members and/or additional drivers who were not listed in the Insured's application, it does not state that Claimant was a household member or additional driver at the time the application was executed.

Even if this Court were to agree with the Defendant that the affidavit of Lisa Robison creates a genuine issue of material fact as to the issue of material misrepresentation, the affidavit does not state that the Defendant's findings determined it would not have sold the subject policy to Insured. Rather, Lisa Robison's affidavit states would have charged an additional premium $922.00.

Defendant's own policy states in page 19 that:

> [i]n the event we determine that you have been charged an incorrect premium for coverage requested in your insurance application for insurance, we shall promptly mail you a notice of any additional premium due us. If within 10 days of notice of additional premium due (or a longer period as specified in the notice), you fail to either:
>
> (i) Pay the additional premium and maintain this policy in full force under its original terms; or
>
> (ii) Cancel this policy and demand a refund of any unearned premium; then this policy shall be cancelled effective 14 days from the date of the notice (or a longer time period as specified in the notice).

Although the Defendant determined a higher premium would be warranted, Defendant has presented no evidence that it informed its Insured of the higher premium. As there is no evidence in the record of the aforementioned notice, Defendant is unable to demonstrate that it provided its Insured the opportunity to cure as required under its policy. Pursuant to its own policy, Defendant is obligated to provide the requisite notice of the higher premium to Insured and further obligated to provide Insured an opportunity to cure by providing a minimum of 10 days to pay the higher premium to avoid cancellation of the policy.

Rather, Defendant chose not to provide notice of the higher premium and instead opted to rescind the entire policy. After the Plaintiff filed suit, Defendant asserted the affirmative defense of material misrepresentation and now requests this Court recognize its right to rescind under Section 627.409, Fla. Stat.

Section 627.409(1), Fla. Stat., states:

> 1. Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. **Except as provided in subsection (3), a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy** only if any of the following apply: The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.

Fla. Stat. §627.409(1) (emphasis added). Even under the above statutory provision that the Defendant argues provides it a right to rescind, it specifically states a misrepresentation "may prevent recovery under the contract." It does not stand for the proposition that policy language providing broader terms to cure any misrepresentations will be invalidated by the statute itself. In other words, the relevant statutory provision allows an insurer to contract additional terms and conditions which would allow an insured to cure any misrepresentations.

As such, Section 627.419(1), Fla. Stat., applies in the instant case. Specifically, it states:

> **Every insurance contract shall be construed according to the entirety of its terms and conditions** as set forth in the policy and as amplified, extended, or modified by any application therefore or any rider or endorsement thereto.

Fla. Stat. §627.419(1) (emphasis added). The insurance contract is comprised of the insurance application and the insurance policy. *See Mathews v. Ranger Ins. Co.*, 281 So. 2d 345 (Fla. 1973). In the instant case, the insurance contract provides the Defendant both the right to rescind the policy if it has determined a material misrepresentation has occurred as well as the right to determine whether an additional premium is warranted and ability for an insured to cure same.

Absent an ambiguity in the language of the contract, the court is bound to interpret the plain meaning of the policy as written. *See Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943 (Fla. 2013) [38 Fla. L. Weekly S511a]. However, where an insurance contract is unclear and ambiguous, the subject ambiguity is interpreted in favor of broader coverage and in favor of the insured. *See id.* (noting "[i]t has long been a tenet of Florida insurance law that an insurer, as writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer. Thus, where one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted."). As this Court has previously noted "Florida Statutes only provide for the minimum coverage required, carriers are not constrained by said minimum coverage and the parties are permitted to contract for broader coverage." *Gables MR(A) a/a/o Armando Orovio v. Star Cas. Ins. Co.*, 29 Fla. L. Weekly Supp. 42a (Fla. Miami-Dade County Ct. Mar. 4, 2021) (citing *Sturgis v. Fortune Ins. Co.*, 475 So. 2d 1272-73 (Fla. 1985); and *Wright v. Auto-Owners Ins. Co.*, 739 So. 2d 180-81 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2033a]). Unless the provisions in the contract violate public policy or statutory law, "parties are free to contract out of state law." *Id.* (citing *Green v. Life & Health of Am.*, 704 So. 2d 1386, 1390-91 (Fla. 1998) [23 Fla. L. Weekly S42a].

Based on the record, this Court finds the facts in the instant case are analogous to the facts in *Orovio*. In *Orovio*, the insurer conducted an investigation following an automobile accident and determined the insured failed to include an additional household member in his insurance application. The insurer further determined that had they known of the additional household member, they would have issued a higher premium. However, the insurer failed to notify the insured as to the higher premium and did not provide the insured an opportunity to cure despite its own policy stating it would provide notice and an opportunity to pay to avoid cancellation. The insurer instead opted to rescind the policy under the more stringent standard under Section 627.409, Fla. Stat. This Court found that in adding the language as to notice and opportunity to cure in its insurance contract, the insurer contracted out of state law and was thus obligated to follow the terms of its own policy.

In the instant case, even if this Court were to agree with Defendant's version of the facts that Insured should have listed Claimant as an additional household member and/or addition driver, this Court finds the Defendant is obligated to comply with the terms of its own policy. The Defendant did not determine it would not have sold the policy to Insured, but, rather, that it would have issued the policy at a higher premium. The Defendant could make such a determination based on the language of in its own policy. In light of the ambiguity created by the Defendant in its own policy providing the Defendant both the right to rescind and the right to recalculate the premium, this Court is bound to interpret the policy provisions "in favor of the insurer." *Id.* (citing *Ruderman*, supra.) "Had Defendant's policy been silent as to rectifying any inaccurate or incomplete information . . . then Defendant could have applied the statutory defense of material misrepresentation and thereby prevent recovery under the insurance policy resulting in the rescission of the subject policy." *Id.* (citing *Ruderman*, supra.) Simply put, the Defendant cannot disregard the language in its own policy—and its own determinations based on said language—and attempt to rescind the subject policy pursuant to the more stringent Section 627.409, Fla. Stat. *See Green*, supra.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment is **DENIED** and Plaintiff's Motion for Summary Judgment is **GRANTED**.

* * *

Insurance—Personal injury protection—Failure to satisfy conditions precedent—Demand letter—Abatement—Where medical provider moved to abate action to file new demand letter immediately upon notice that insurer had issue with content of its demand letter, motion to abate is granted

COMPREHENSIVE HEALTH CENTER, LLC, a/a/o Serge Nicolas, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-008740-SP-24, Section MB01. April 18, 2022. Stephanie Silver, Judge. Counsel: Howard W. Myones, Myones Legal, PLLC, Fort Lauderdale, for Plaintiff. Michael Rosenberg, Adrianna Christine de la Cruz-Munoz, Gregory J. Willis, and Annette Strauch, Cole, Scott & Kissane, P.A., for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO ABATE TO PERMIT SERVICE OF STATUTORY 30 DAY DEMAND LETTER

THIS CAUSE came before the Court for consideration on the Plaintiff's Motion to Abate to Permit Service of Statutory 30 Day Demand Letter, and the court, being fully advised in the premises, rules as follows:

Plaintiff submitted a Statutory Demand Letter to Geico on April 16, 2021. Geico responded to the demand letter on May 20, 2021, making a payment of benefits, interest, penalty and postage. As the demand response allegedly did not make proper payment pursuant to Fla. Stat. 627.736(5)(a)(1-5) and Geico's policy, the Plaintiff filed suit on August 28, 2021. On November 10, 2021, the Defendant filed its Answer and Affirmative defenses and made no mention of a defective demand letter. On January 19, 2022, the Defendant, by and through its new counsel, filed a motion for leave to amend answer and affirmative defenses and for the first time alleged that Plaintiff's demand letter, which was timely sent, and timely responded to by Geico, failed to comply with Fla. Stat. 627.736(10). After an extensive hearing on the matter, this Court granted the Defendant's motion and ordered that Defendant's answer was deemed filed as of March 1, 2022. On March 3, 2022, despite not conceding that its initial demand letter was defective, the Plaintiff moved to abate this action to allow it to serve a demand letter that would make Defendant's newly filed affirmative defense null and void. . Plaintiff relies upon *Angrad v. Fox,* 552 So.2d 1113 (Fla. 3rd DCA 1989)(premature filing of medical malpractice action may be cured through abatement to allow passage of requisite presuit time after notice); *Dukanauskas vs. Metropolitan Dade County,* 378 So.2d 74, 76 (Fla. 3rd DCA 1979)(no attempt to provide notice was made in sovereign immunity case during limitations period, thereby precluding abatement to cure); *Wright v. Life Insurance Company of Georgia,* 762 So.2d 992 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D1527b] (proper remedy for premature litigation is abatement or state of claim); *Thomas v. Suwannee County,* 734 So.2d 492 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1186b] (General rule is that action filed prematurely should be abated until cause of action matures, rather than dismissed). *See, Central Palm Beach Imaging, LLC v. Mercury Insurance Company of Florida*, 17 Fla. L. Weekly Supp. 1042a (Fla. 17th Jud. Cir. 2010); *Physicians Rehab Group v.*

State Farm Mutual Automobile Insurance Company, 17 Fla. L. Weekly Supp. 123b (Fla. 11th Jud. Cir. 2009); *William H. Myones, D.M.D., P.A. a/a/o Lana Davidson vs. State Farm Mutual Automobile Insurance Company*, 28 Fla. L. Weekly Supp. 239a (Fla. Broward Cty. Ct. May 6, 2020); *Dr. Gary R. Boraks, LLC vs. State Farm Fire and Casualty Insurance Company*, 17 Fla. L. Weekly Supp., 1230a (Fla. Orange Cty. Ct. July 27, 2010).

Defendant relies upon *Progressive Exp. Ins. Co., Inc. v. Menendez,* 979 So.2d 324 (Fla. 3rd DCA 2008) [33 Fla. L. Weekly D818d] for the proposition that when a plaintiff fails to comply with a statutory condition precedent, the lawsuit is not merely premature, and dismissal, and not abatement is the proper remedy. However, the 3rd DCA also held in *Menendez* that the Plaintiff waived its right to move for an abatement because of its own inaction, not because it was not an available remedy. Specifically, the 3rd DCA states that after receiving notice of the demand letter issue from Defendant's Answer, Amended Answer and Motion for Summary Judgment, "the plaintiffs could have asked the trial court to abate the premature action until they complied with the statute." Furthermore, the 3rd DCA held that because the Plaintiff in that case took the position that they did not have to comply with he presuit demand requirement and failed to seek abatement. . .plaintiffs waived their right to argue on appeal the failure of the trial court to abate their action." *Id.* at 334. Therefore, this Court holds that Defendant's contention that it cannot abate the action is incorrect.

A trial court's denial of a stay or abatement of an action is reviewed for abuse of discretion. *Lightsey v. Williams,* 526 So.2d 764 (Fla. 5th DCA 1988). In this case, the Plaintiff moved to abate this action immediately upon receiving notice that Geico had an issue with the content of the demand letter. This Court, within its discretion and based upon the actions of the Plaintiff in this case, agrees with the Honorable Robert W. Lee in C*entral Palm Beach Imaging, LLC v. Mercury Insurance Company of Florida*, 17 Fla. L. Weekly Supp. 1042a (Fla. 17th Jud. Cir. 2010) and Kathleen McCarthy in *William H. Myones, D.M.D., P.A. a/a/o Lana Davidson vs. State Farm Mutual Automobile Insurance Company*, 28 Fla. L. Weekly Supp. 239a (Fla. Broward Cty. Ct. May 6, 2020) and orders that this case be abated for 60 days from the date of this Order.

This Court recognizes the unique facts in this case.

ACCORDINGLY, it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion to Abate is GRANTED. Plaintiff shall submit an amended demand letter within 20 days of this hearing to both Defendant's counsel of record, as well as the individual specified by the insurer for the purposes of receiving Pre-Suit Demand letters, in compliance with Florida Statute, Chapter 627.736(10). If payment is properly made pursuant to F.S. 627.736(10) within 30 days of receipt of the amended demand letter, it shall not constitute a confession of judgment and Geico shall not be responsible for attorney's fees or costs under F.S. 627.428. Assuming Plaintiff complies with the deadline to submit its amended demand letter, this case shall reopen 60 days from the date of this Order.

* * *

Insurance—Discovery—Failure to comply—Sanctions

UNIVERSAL X RAYS CORP., a/a/o Maykel Garcia, Plaintiff, v. UNITED AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-024264-SP-23, Section ND05. April 9, 2022. Chiaka Ihekwaba, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Sherria Williams, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THIS CAUSE came before the Court on March 22, 2022, upon Plaintiff's Motion for Sanctions as a result of Defendant's having failed to timely comply with the Court's June 27, 2021 discovery order (the "Discovery Order"), and the Court having considered the motion, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Plaintiff's Motion for Sanctions is GRANTED, for the following reasons:

Plaintiff propounded its Second Set of Interrogatories to Defendant on April 23, 2021 (the "Interrogatories"). As a result of Defendant's failure to respond, object or request an extension of time to respond to the Interrogatories, on June 1, 2021, Plaintiff sent to Defendant a "Good Faith Letter Re: Plaintiff's Ex Parte Motion to Compel Defendant's Discovery Response to Second Set of Interrogatories", which failed to elicit a response on the part of Defendant. This Court entered the Discovery Order on June 27, 2021, requiring Defendant to respond to the interrogatories no later than July 7, 2021. As a result of Defendant's failure to comply with the Discovery Order, on July 15, 2021, Plaintiff filed its Motion to Enforce the Discovery Order and for sanctions. On January 10, 2022, Plaintiff coordinated a hearing on the Motion to Enforce the Discovery Order. Defendant did not provide the interrogatory answers until March 11, 2022, eight months after having been ordered to do so.

The Court finds the above-described timeline to be not excusable. Pursuant to Rule 1.380(b)(2), Fla.R.Civ.P., if a party fails to obey an order to provide discovery the court shall require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorney's fees, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The Court does not find that Defendant's failure to timely comply with the Discovery Order was substantially justified or that other circumstances make an award of expenses unjust.

Accordingly, the Court awards sanctions against the Defendant in the amount of $600.00, representing the reasonable expenses caused by Defendant's failure to timely comply with the Discovery Order. Defendant shall pay the sanctions award within twenty (20) days from the date of the entry of this Order.

* * *

Insurance—Automobile—Default—Vacation—Denial—Affidavit stating that Department of Financial Services failed to provide service of process to insurer due to computer server error is insufficient to establish excusable neglect where affiant fails to state dates when alleged error was discovered and reported to insurer—Insurer failed to establish due diligence in seeking to set aside default where initial motion to vacate default was legally insufficient, insurer did not establish any arguable basis for relief until nearly nine months after date of judgment, and insurer provided insufficient evidence of reason for lengthy delay

COR INJURY CENTERS OF NORTH MIAMI, INC., a/a/o Marco Franco, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-002905-SP-25, Section CG02. March 11, 2022. Elijah A. Levitt, Judge. Counsel: Adriana De Armas, Pacin Levine, P.A., Miami, for Plaintiff. Sarah Hafeez, Cole, Scott & Kissane, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT

This cause came before the Court on February 23, 2022, for hearing on Defendant's Motion to Vacate Default Judgment, and the Court, being advised in the premises and that the parties agreed to vacate the default judgment, hereby denies Defendant's Motion.[1] The parties are encouraged to continue to discuss settlement options, but this matter is closed by final judgment.

LEGAL AUTHORITY

Plaintiff moved to vacate the Default Judgment for excusable neglect under Florida Rule of Civil Procedure 1.540(b). In most cases, for the trial court to vacate a default judgment under Rule 1.540(b), Florida law requires the movant to demonstrate excusable neglect, a meritorious defense, and due diligence to set aside the dismissal. *Geer v. Jacobsen,* 880 So. 2d 717, 720 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1102a]. "Excusable neglect must be proven by sworn statements or affidavits. Unsworn assertions of excusable neglect are insufficient." *DiSarrio v. Mills*, 711 So.2d 1355, 1356 (Fla. 2d DCA 1998) [23 Fla. L. Weekly D1506a] (citations omitted). The Court finds that Defendant proposed meritorious defenses but failed to exercise due diligence and demonstrate excusable neglect in setting aside the default judgment.

RELEVANT PROCEDURAL HISTORY

1. On February 3, 2021, Plaintiff filed the present case alleging breach of contract damages for personal injury protection benefits under section 627.736, Florida Statutes (2021), claiming damages in an amount less than $99.00. [DE 2].

2. On March 8, 2021, Plaintiff served the State of Florida Chief Financial Officer ("CFO") as Registered Agent for service of process for licensed insurers doing business in the State of Florida. [DE 8]. Accordingly, Defendant needed to respond by March 29, 2021.[2]

3. After Defendant failed to file a responsive pleading, on March 31, 2021, Plaintiff moved for default. [DE 19].

4. On April 1, 2021, the Court entered an order of default against Defendant. [DE 20].

5. On May 14, 2021, Plaintiff moved for Entry of Final Judgment. [DE 21].

6. On May 18, 2021, the Court entered a Final Judgment in the amount of $60.00. [DE 22].

7. On June 4, 2021, Defendant's counsel filed a Notice of Appearance and Demand for Jury trial. [DEs 24 and 25].

8. On June 14, 2021, Defendant filed a boilerplate Motion to Vacate Default Judgment under Florida Rule of Civil Procedure 1.540(b) containing no factual basis for relief or meritorious defenses. [DE 27]. Defendant did not argue that the judgment was void for lack of service. *See id.*

9. On June 28, 2021, Defendant's counsel filed a notice of changing counsel within firm. [DE 28].

10. On December 9, 2021, Defendant filed its Answer and Affirmative Defenses. [DE 30].

11. On January 3, 2022, Defendant set the Motion for hearing for February 23, 2022. [DE 31].

12. On February 11, 2022, Defendant filed the affidavit of a Management Review Specialist in the Office of the General Counsel, Service of Process Unit, for the State of Florida Department of Financial Services. [DE 34]. This unit assists the Florida CFO to receive and route legal process as Registered Agent for service of process for licensed insurers doing business in the State of Florida. *Id.* The Specialist claims that service was not provided to Defendant due to a computer server issue. *Id*.

13. Prior to the hearing, the Court was informed that Plaintiff agreed to the Motion.

ANALYSIS

The Motion must be denied for failing to meet the requirements to set aside the Default Judgment under Florida Rule of Civil Procedure 1.540. First, the Motion and Affidavit of the State of Florida specialist ("the affidavit") are insufficient to demonstrate excusable neglect. The affidavit contains no dates as to when the alleged error was discovered and reported to Defendant or Defendant's counsel. Neither Defendant nor Defendant's counsel provided an affidavit as to when they learned of the error. The affidavit is insufficient to entitle Defendant to relief.

Second, Defendant did not exercise due diligence in setting aside the Default Judgment. On June 4, 2021, Defendant's counsel filed a Notice of Appearance. On June 14, 2021, Defendant filed a legally insufficient Motion to Vacate Default and did not request a hearing for more than eight (8) months. Almost six (6) months passed before Defendant filed its December 9, 2021, Answer and Affirmative Defenses. On February 11, 2022, almost eight (8) months after filing the Motion to Vacate Default Judgment, Defendant filed an affidavit as to lack of service but not excusable neglect. As the initial Motion was legally insufficient, Defendant did not establish any arguable basis for relief for nearly nine (9) months from the date of Final Judgment. Defendant knew, or should have known, about the Default Judgment as of June 4, 2021. Defendant provided insufficient evidence for the reason behind the lengthy delay. This Court is tasked with the proper administration of its docket. A vacatur of the judgment would reward Defendant for its inexcusable inaction and significantly negatively impact this Court's administrative duties.

Wherefore, Defendant's Motion to Vacate Default Judgment is denied.

---

[1]The Court commends Plaintiff for its professionalism in agreeing to vacate the judgment, but the Court denies the Motion for the reasons contained herein.

[2]March 28, 2021, was a Sunday.

* * *

Consumer law—Debt collection—Fair Debt Collection Practices Act—Motion to dismiss FDCPA counterclaim to debt collection action is granted—Counterclaim asserting that plaintiff has knowledge that debt is not legitimate and that amount owed is not correct does not allege misconduct that goes beyond conduct that is inherent and expected in adversarial process and does not allege sufficient facts regarding conduct by plaintiff

RED TARGET LLC, Plaintiff, v. VENUS HEDGEMOND, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-024839-CC-23, Section ND03. March 25, 2022. Linda Singer Stein, Judge. Counsel: Richard Weissman, O&L Law Group, P.L., Tampa, for Plaintiff. Seth Wieder, Law Office of Shaya Markovic, P.A., Hollywood, for Defendants.

ORDER UPON PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM

THIS CAUSE came on to be heard on January 25, 2022 upon Plaintiff's Motion to Dismiss Defendants' Counterclaim. The Court having heard argument of Counsel for the parties, reviewed the applicable case law and being otherwise fully advised in the premises, FINDS AS FOLLOWS:

1. Plaintiff filed a lawsuit to collect on the outstanding balance due and owed on the Defendants' defaulted auto loan account.

2. In response to Plaintiff's Complaint, the Defendants filed a Counterclaim alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA") based only on the allegation that Defendants dispute the legitimacy and amount of the debt and that Plaintiff has knowledge that the debt is not legitimate and that the amount allegedly owed is incorrect.

3. Defendants also allege Plaintiff violated Florida Statute § 679.610 and §537.012.

4. A motion to dismiss for failure to state a cause of action should allege that the pleading in question fails to adequately state any legally recognizable cause of action that can be the basis for the relief sought. *Fox v. Professional Wrecker Operators, Inc.*, 801 So.2d 175, 178 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D2824a]; it is to raise nothing more than the sufficiency of the pleading and the court must confine itself strictly to the allegations within the four corners of the complaint. *See Thorpe v. Gelbwaks*, 953 So.2d 606 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D727a] and *Albert Properties, Inc. v. Vizcaya at*

Palm-Aire Ass'n, 841 So.2d 674, 675 (Fla 4th DCA 2003) [28 Fla. L. Weekly D907a].

5. A complaint that simply strings together a series of sentences and paragraphs containing legal conclusions and theories does not establish a claim for relief. *See* Fla.R.Civ.Pro 1.110(b); *see e.g., Barrett v. City of Margate,* 743 So.2d 1160, 1162-63 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2398a] ("It is insufficient to plead opinions, theories, legal conclusions or argument."); *Maiden v. Carter,* 234 So.2d 168, 170 (Fla. 1st DCA 1970) ("It is a fundamental principle of pleading that the complaint, to be sufficient, must allege ultimate facts as distinguished from legal conclusions which, if proved, would establish a cause of action for which relief may be granted."). When the only purported factual allegations in a complaint are merely legal conclusions, it is axiomatic that factual allegations therefore do not exist in the complaint. *Fernandez v. Tricam Industries, Inc.*, No. 09-22089-CIV, 2009 WL 10668267 at *2 (S.D. Fla. Oct. 21, 2009).

6. To survive a motion to dismiss, a complaint "must contain sufficient factual matters accepted as true to 'state a claim to relief that is plausible on its face.' " *Ashcroft*, 556 U.S. at 662; *Twombly*, 550 U.S. at 557; *Eckstein*, 2011 WL 13225165, at 1; *Pierce v. State Farm Mut. Auto. Ins. Co.*, No. 14-22691-CIV, 2014 WL 7671718, at 2 (S.D. Fla. Dec. 17, 2014). "[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C478a]; *South Fla. Water Mgm't Dist. v. Montalvo*, 84 F.3d 402, 408 (11th Cir. 1996); *Vila v. Miami-Dade Cty.*, 65 F. Supp. 3d 1371, 1377 (S.D. Fla. 2014). As a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss. *South Fla. Water Mgm't Dist.* 84 F.3d at 408; *Ledea v. Metro-Dade County Police Dept.*, No. 13-23117-CV, 2016 WL 8997454, at 1 (S.D. Fla. Jan. 29, 2016.

7. [T]he filing of a debt-collection lawsuit without the immediate means of proving the debt does not have the natural consequence of harassing, abusing, or oppressing a debtor." *Harvey v. Great Seneca Financial Corp*., 453 F.3d 324 (6th Cir. 2006).

8. Rather, the debt collector's conduct must manifest "a tone of intimidation," *Jeter v. Credit Bureau, Inc*., 760 F.2d 1168, 1179 (11 Cir. 1985).

9. While courts have held that the FDCPA may, under certain circumstances, apply to conduct in state court litigation, several courts, including the Eleventh Circuit, have recognized that the conduct at issue must amount to more than the mere litigation of a disputed claim. That is, to state a claim under the FDCPA, the complaint must allege misconduct that goes beyond the conduct that is inherent and expected in the adversarial process. *Miljkovic v. Shafritz & Dinkin*, 791 F.3d 1291, 1307 (11th Cir. 2015) [25 Fla. L. Weekly Fed. C1344a]

10. In the instant case, Defendants' Counterclaim does not allege sufficient facts that go beyond the conduct that is inherent and expected in the adversarial process.

11. Additionally, Defendants' Counterclaim does not allege sufficient facts of the conduct by the Plaintiff which is the natural consequence of harassing, abusing, or oppressing the debtors.

12. Finally, all counts of Defendants' Counterclaim are legally insufficient as they allege no specific facts regarding Plaintiff or the instant action and do not rise to a level of sufficiently plead facts to survive a motion to dismiss. Thus, the Defendants' Counterclaim does not sufficiently state a cause of action.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. Plaintiff's Motion to Dismiss Defendants' Counterclaim is hereby **GRANTED**.

2. All Counts (Counts I, II, III, AND IV) of Defendants' Counterclaim are hereby **DISMISSED WITHOUT PREJUDICE**.

3. Defendants shall have twenty (20) days from the date of this Order to file an Amended Counterclaim.

* * *

Insurance—Personal injury protection—Coverage—Denial—Cancellation of policy—Summary judgment is entered in favor of medical provider on insurer's affirmative defense of cancellation of policy for nonpayment of premium where insurer that used incorrect form or method of postal service delivery failed to provide proper notice of cancellation—Further, fact that insurer renewed policy on at least ten occasions after insured paid premium and late fees established uniform conduct of doing business not consistent with cancellation

MANUEL V. FEIJOO, M.D., et al., a/a/o Nafiz Mohammed, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2017-002765-SP-26, Section SD04. March 30, 2022. Lawrence D. King, Judge. Counsel: Kenneth B. Schurr, Law Offices of Kenneth B. Schurr, P.A., Coral Gables, for Plaintiff. Robert Phaneuf, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on March 29, 2022, and for consideration of Plaintiff's Motion for Summary Judgment, which motion was filed with the Clerk of Court on September 28, 2021. All counsel of record were present.

The Court having heard argument of counsel, reviewed Defendant's Notice of Filing Opposition Affidavit and Sworn Evidence in Opposition to Plaintiff's Motion for Summary Judgment, filed with the Clerk of Court on March 8, 2022, the Clerk's docket ledger, and reviewed the following documents filed in support of the respective motions including the deposition transcripts of Thomas Patchen conducted August 13, 2021, and Iran Rieche conducted July 14, 2021, the affidavit of Iran Rieche, and being otherwise advised in the premises hereby enters the following ruling.

WHEREFORE, IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is **GRANTED**.

The Court has applied the current standard and burden of proof required by Rule 1.510, Florida Rules of Civil Procedure (2021), governing the trial court's consideration of motions for summary judgment. *Celotex v. Catrett*, 106 S.Ct. 2548, 91 L. Ed. 2d 265, 477 U.S. 317 (1986).

Respectfully, the Court finds that there are no genuine issues of material fact that remain as to Defendant's Affirmative Defense of cancellation of auto insurance policy for non-payment of premium. Specifically, Defendant failed to provide proper Notification of Cancellation of Policy, having failed to comply with Chapter 627.728 (5), Florida Statutes (2012). Defendant utilized an incorrect form or method of U.S. Postal Service delivery to claimant, related to Defendant's election to cancel the policy in question. *Aries v. Cayre*, 785 So.2d 656 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1413a]; *Best Meridian Ins. Co. v. Tuaty*, 752 So. 2d 733 ((Fla. 3d DCA 2000) [25 Fla. L. Weekly D808a]; *Sotomayor v. Seminole Cas. Ins. Co*., 650 So.2d 663 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D401a]. Therefore, said cancellation for non-payment of premium and denial of coverage was a nullity.

Moreover, Defendant acted not in conformity with the cancellation of the policy as it renewed the claimant's automobile insurance policy both before and after coverage denial on at least ten (10) occasions, This occurred after the claimant paid the monthly premium and late fee. *See Bergdorf v. Allstate Co*., 541 So.2d 716 (Fla. 4th DCA 1989). *See contra Sepko v. Providian Auto & Home Ins. Co.*, 748 So.2d 322 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2659b]. This Court must follow Bergdorf and the analysis therein, as Plaintiff has met its

burden based upon the record before the Court in the case *sub judice,* that a uniform conduct of doing business was created by Defendant. Indeed, Defendant allowed the claimant to rely on it, and therefore coverage was afforded for the loss claimed *even after the cancellation of the policy by Defendant*. A close reading of the facts as reflected in the *Bergdorf* opinion by the Fourth District Court of Appeal, show a striking similarity to the facts of record in this personal injury protection action before this Court.

Summary Judgment in favor of the Plaintiff as to the non-payment of premium affirmative defense raised by Defendant is appropriate. *Bedford v. Doe,* 880 F.3d 993 (8th Cir. 2018). *See also Hervey v. Alfonso,* 650 So.2d 644 (Fla. 2d DCA 1995) [20 Fla. L. Weekly D326a].

* * *

Arbitration—Labor relations—Motion to refer truck driver's claim that his former employer violated federal and state labor laws to binding arbitration is granted where there is valid written arbitration agreement, arbitrable issue exists, and former employer did not waive its right to arbitration—No merit to argument that conflict between Federal Arbitration Act and Florida Arbitration Code makes arbitration agreement unenforceable—Because of FAA's exclusion for truck drivers engaged in interstate commerce means, agreement is controlled by FAC, not FAA

CHANTA SKINNER NIXON, Plaintiff, v. TEMPEST TRANSPORTATION INC., et al., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-026520-CC-05, Section CC06. November 10, 2021. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO REFER CLAIM TO BINDING ARBITRATION

THIS CAUSE came before the Court on the 7th day of October, 2021 on Defendant's Motion to Refer Claims to Binding Arbitration and after hearing argument of counsel, reviewing Defendant's Motion and Plaintiff's Response including applicable case law, it is **ORDERED AND ADJUDGED**:

Defendant's Motion is GRANTED.

Plaintiff, a truck driver, is suing her former employer, an interstate trucking company, alleging that it violated federal and state labor laws. Defendant is looking to have the dispute settled under an arbitration agreement signed by both parties. Plaintiff is challenging the arbitration agreement, arguing that the Federal Arbitration Act conflicts with the Revised Florida Arbitration Code, making the FAC unenforceable. Plaintiff cites to the Supreme Court's decision in *New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019) [27 Fla. L. Weekly Fed. S628a]. According to Plaintiff, she cannot be compelled to arbitrate since *New Prime* held that the FAA does not apply to contracts of employment for any "class of workers engaged in foreign or interstate commerce." *Id.* at 537.

In Florida, arbitration law involving interstate commerce is governed by two acts- the Federal Arbitration Act (FAA) under title 9 of the United States Code, §§ 1-16 (2006), and the Revised Florida Arbitration Code (FAC), under Chapter 682, Fla. Stat. Statute, Chapter 682 (2013). To the extent the FAC is not in conflict with the FAA, FAC controls. *Shotts v. OP Winter Haven, Inc.,* 86 So. 3d 456, 463-64 (Fla. 2011) [36 Fla. L. Weekly S665b].

The FAA was enacted by Congress "to reverse the longstanding judicial hostility toward arbitration that had existed at English common law and that had been imported by American courts." *Id.* at 461-62. The FAA was intended to place arbitration agreements on the same footing as other contracts. *Id.* at 462. "Under both federal statutory provisions and Florida's arbitration code, 'there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.' " *Id.* at 463-464 (quoting *Seifert v. U.S. Home Corp.,* 750 So.2d 633, 636 (Fla. 1999) [24 Fla. L. Weekly S540a]).

In *New Prime,* a former truck driver brought a federal suit against his employer, an interstate trucking company, alleging that it violated federal and state labor laws. The employer sought to compel arbitration under the FAA. *Id.* at 536. The Court concluded that the FAA did not apply to a truck driver engaged in interstate commerce. *Id.* at 537. The Court, however, did not hold that an alternative dispute resolution could not be used. Quite the contrary, the Court explained that by the time the Act was adopted in 1925, "Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers" and it did not want to unsettle those arrangements by including those workers under the FAA. *Id.* Thus, the exclusion of these workers was not to shield them from arbitration but to allow for arbitration under other applicable laws.

In this case, unlike *New Prime,* Defendant is not asking this Court to compel arbitration under the FAA. The FAA exclusion, discussed in *New Prime,* simply means that the Arbitration Agreement signed by Plaintiff and Defendant is not controlled by the FAA but could be controlled by another applicable law. Thus, there is no conflict between the FAA and the FAC. The FAC controls.

Having, concluded that a valid written agreement to arbitrate exists, that an arbitrable issue exists, and that Defendant did not waive its right to arbitration, the Court has no authority to address the other issues raised by Plaintiff in her Response to Defendant's Motion to Compel Arbitration. *Yam Exp. & Imp. LLC, v. Nicaragua Tobacco Imports, Inc.,* 298 So. 3d 1173, 1175 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D223a]. Accordingly, Defendant's Motion to Refer Claim to Binding Arbitration is GRANTED.

* * *

Insurance—Personal injury protection—Statutory interest—Motion for rehearing of order granting summary judgment in favor of medical provider for payment of interest is granted—Affidavit of litigation adjuster who possesses personal knowledge of insurer's business records and practices is sufficient to lay foundation for admission of attached business records—Further, same business records are before court due to their attachment to affidavit of insurer's records custodian filed in support of earlier motion for summary judgment—Evidence conclusively establishes that insurer issued payment that included interest in response to demand letter—No merit to arguments that issuance of payment to provider's counsel constituted payment of attorney's fees or did not constitute payment to provider

AFFILIATED HEALTHCARE CENTERS, INC., a/a/o Julio Paez, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2012-012544-SP-25, Section CG01. March 28, 2022. Linda Melendez, Judge. Counsel: George A. David, George A. David, P.A., Coral Gables, for Plaintiff. Mayte Peña, Shutts & Bowen, LLP, Miami, for Defendant.

ORDER GRANTING ALLSTATE'S MOTION FOR REHEARING, VACATING ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, VACATING FINAL JUDGMENT IN FAVOR OF PLAINTIFF AND ENTERING FINAL JUDGMENT IN FAVOR OF ALLSTATE

This matter came before the Court on March 17, 2022, on Allstate's Motion for Rehearing of this Court's Final Judgment in favor of Plaintiff entered on July 30, 2021, and this Court's Order Granting Plaintiff's Motion for Summary Final Judgment entered on July 1, 2021. Plaintiff, Affiliated Healthcare Centers, Inc. (hereinafter "Plaintiff") was represented by George A. David, Esquire, of George

A. David, P.A., and Defendant, Allstate Fire and Casualty Insurance Company (hereinafter "Allstate") was represented by Mayte Peña, Esquire, of Shutts & Bowen, LLP. The Court having reviewed the record before the Court, the Motion for Rehearing, having heard argument of the parties, and being otherwise fully advised in the premises, finds as follows:

Plaintiff filed this lawsuit on or about June 14, 2012 seeking damages for breach of contract alleging that additional payment of PIP benefits was due.

In December of 2019, Allstate filed its Motion for Entry of Final Judgment based upon the issue of fee schedule election objecting to Plaintiff proceeding on the issue of allegedly unpaid interest on the pre-suit demand payment, claiming that the issue was not pled and waived by virtue of having previously proceeded to summary judgment hearing in December of 2014.

In January of 2020, after hearing argument of the parties, this Court issued an order finding that the alleged unpaid interest issue properly remained pending before the Court. In June of 2021, this Court heard argument of the parties on their respective Cross-Motions for Summary Judgment on the issue of allegedly unpaid interest; In July of 2021 the Court entered an order and final judgment in favor of the Plaintiff. Allstate filed its timely Motion for Rehearing on August 14, 2021.

Plaintiff contends that it is owed $77.47 in interest in relation to Allstate's pre-suit demand payment of benefits in the amount of $3,205.89 and Allstate contends that a check it issued and submitted to Plaintiff's counsel in response to Plaintiff's pre-suit demand letter totaling $337.47 included the subject $77.47 in interest Plaintiff now seeks[1].

On May 8, 2012, the Plaintiff submitted a pre-suit demand letter to Allstate in accordance with section 627.736(10), Florida Statutes (2011). On June 12, 2012, Allstate sent correspondence to Plaintiff's counsel in response to the demand letter advising that Allstate had issued payment in the amount of $3,205.89 for benefits, $77.47 for interest, $250.00 for penalty and $10.00 for postage, pursuant to the Florida fee schedule.[2] On June 18, 2012, Counsel for Plaintiff received check number 127730551 issued by Allstate in the amount of $337.47 made payable to counsel for Plaintiff, George A. David, P.A., representing the exact total amount of payment for interest, penalty and postage ($77.47 for interest, $250.00 for penalty and $10.00 for postage) indicated by Allstate in its June 12, 2012 demand response letter. Both checks contained identification information regarding the subject claim such as the claimant's name, policy number, claim number, and stated "in payment of loss on 9/20/2011."[3]

Plaintiff contends that Allstate's inclusion of payment of interest with penalty and postage in the check for $337.47 made payable to Plaintiff's counsel does not constitute payment to the Plaintiff of interest in connection with the pre-suit demand.

Rule 1.530(a) of the Florida Rules of Civil Procedure provides, in pertinent part, "[o]n a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment." *See also Balmoral Condominium Ass'n v. Grimaldi*, 107 So. 2d 1149, 1152 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D174b]. A motion for rehearing gives the court an opportunity to consider matters which it may have overlooked, and to correct errors if it becomes convinced that it has acted in a manner inconsistent with applicable law. *Carollo v. Carollo*, 920 So.2d 16, 19 (Fla. 3d DCA 2004) [30 Fla. L. Weekly D99a] (internal citations omitted).

Over Allstate's objection, this Court maintains its finding in its January 21, 2020 Order, finding that Plaintiff's Complaint and November 10, 2014 Motion for Final Summary Judgment raised an issue with interest which had not been previously decided by the Court. Thus, the issue properly remained before the Court for adjudication.

After review of the hearing transcript of the June 22, 2021 hearing on the parties' Cross-Motions for Summary Judgment, this Court finds that although Plaintiff had filed an opposition to Allstate's summary judgment motion in which it challenged the sufficiency of Allstate's Affidavit prior to the hearing, Plaintiff did in fact fail to address any objection to the Affidavit of Allstate's Litigation Adjuster at the June 22, 2021 hearing on summary judgment. Thus, any such objections are deemed **waived.**[4]

Nonetheless, after hearing argument from the parties regarding the sufficiency of Allstate's Affidavit at the March 17, 2022 hearing on Allstate's Motion for Rehearing, the Court further finds that Allstate's Affidavit sufficiently laid the foundation for admissibility of Allstate's business records attached thereto via the testimony of a qualified witness, Allstate's Litigation Adjuster. In the subject Affidavit, the Affiant states her position within Allstate as a "litigation adjuster" and states that the affidavit is being made based upon her "review of Allstate's business records which were made on or near the time of time of the event, which were made by or from information transmitted by a person with knowledge and that they were kept in the regular course of business" as required by section 90.803(6), Florida Statues. Florida law requires nothing more.

Plaintiff argues that the Adjuster is not the records custodian and that the Adjuster must set forth in greater detail the basis of her familiarity with the business records and practices of Allstate in order to be a qualified witness to lay the proper foundation for admissibility of business records. However, the Florida Supreme Court in its opinion in *Jackson v. Household Finance Corporation III*, holds the exact opposite—"we reject the notion that the witness must also detail the basis for his or her familiarity with the relevant business practices of the company or give additional details about those practices as part of the initial foundation because this would be inconsistent with the plain language of the statute." 298 So. 3d 531, 538 (Fla. 2020) [45 Fla. L. Weekly S205a]. Thus, Allstate's affidavit, made by its litigation adjuster, who by virtue of her position within Allstate, possesses the necessary personal knowledge[5], and lays out the foundational requirements of section 90.803(6), Florida Statutes, is in fact sufficient.

Moreover, and perhaps most significant, the exhibits attached to the Litigation Adjuster's Affidavit, which the Plaintiff seeks to strike, are the very same documents attached to the Affidavit of Stephanie Santana, Records Custodian for Plaintiff's counsel, filed by the Plaintiff in support of its own Motion for Summary Judgment. Thus, even if the Court were to find that Allstate's Affidavit is insufficient to introduce the pertinent records attached thereto, the same exact documents would still be before the Court for consideration through Plaintiff's submission. Allstate's business records attached to its affidavit do not require authentication in this case as Plaintiff itself submitted and is relying on the very same documents in its own motion. Thus, there is sufficient evidence before the Court to make a ruling on the parties' Cross-Motions for Summary Judgment on the Issue of Interest, as whether the Court considers copies of the correspondence and checks issued in response to the pre-suit demand letter attached to Allstate's Affidavit *or* Plaintiff's Affidavit, is of no consequence as the records are one in the same.

Plaintiff contends that Allstate failed to issue payment of interest in the amount of $77.47 when it issued payment of additional benefits in response to Plaintiff's pre-suit demand letter. However, the evidence before the Court conclusively establishes that Allstate did in fact issue payment in the amount of $337.47 which *included* $77.47 in interest in response to the pre-suit demand letter.

Attached to the Affidavit of Plaintiff's Records Custodian are two

checks received by Plaintiff's counsel in response to Plaintiff's pre-suit demand letter. Thus, by virtue of its filings and submissions in support of its Motion for Summary Judgment, Plaintiff concedes that it received one check made payable directly to the Plaintiff in the amount of $3,205.89 and a second check made payable to Plaintiff's counsel in the amount of $337.47 in response to the pre-suit demand letter. Plaintiff argues however, that it *did not know* that the second check received in the amount of $337.47 included $77.47 of interest, but by virtue of its filings and submissions in support of its motion, Plaintiff concedes that it received correspondence from Allstate advising the Plaintiff that it was issuing payment in the amount of "$3,205.89 for benefits, $77.47 for interest, $250.00 for penalty and $10.00 for postage"—the exact amounts received by the Plaintiff via the two checks attached to Plaintiff's Affidavit[6].

Plaintiff further argues that the second check in the amount of $337.47, which Allstate advised included the $77.47 due in interest, was for payment to Plaintiff's counsel in his individual capacity as it was made payable to Plaintiff's counsel's firm rather than the Plaintiff itself. However, the record evidence and Florida law does not support this contention. Section 627.736(10), Florida Statutes, specifically states as it relates to pre-suit demand letters "the insurer is **not** obligated to pay ***any*** attorney's fees if the insurer pays the claim. . .within the time prescribed by this section" (emphasis supplied). Thus, in addition to the fact that Plaintiff was on notice of each amount being paid in response to the demand, Plaintiff's counsel was not entitled to any fee in connection with the pre-suit demand letter pursuant to Florida law and thus any payments issued by Allstate in response to the pre-suit demand could not have been made as payment to counsel in his individual capacity.

The Plaintiff argues nonetheless, that the demand payment to its counsel for $337.47, which included $77.47 in interest, cannot be considered payment to Plaintiff because Plaintiff's retained counsel is a "third party" and/or "the wrong entity." Initially, the Court notes that Plaintiff's argument is contradictory to the position it held in its very own demand letter where it sought that payment of statutory penalty and postage be issued *directly* to its Counsel on its behalf. Under section 627.736(10), Florida Statutes, an **insured or insured's assignee** who submits a demand letter which results in payment of additional benefits, *is entitled to payment of statutory penalty and reimbursement of postage*. Thus, Plaintiff's own demand letter sought that payment of some of the monies specifically *due directly to the Plaintiff itself* be paid through issuance of payment to its counsel. Yet, the Plaintiff, now claims that issuance of payment through its counsel does not constitute payment at all.

Furthermore, Allstate did not issue payment to a random "third-party," but rather issued payment to the attorney who submitted a demand letter to it seeking payment on behalf of the Plaintiff *in its capacity as counsel for Plaintiff*. In Plaintiff's pre-suit demand letter, the very first sentence states "[p]lease be advised I represent Affiliated Healthcare Centers, Inc., in this case and that this is a demand for payment. . ." placing Allstate on notice of counsel's status as retained legal counsel for the Plaintiff. Attorneys in their capacity as counsel for a party are permitted to and have been receiving and accepting payments on behalf of their clients for centuries.

Importantly, Plaintiff has not put forth any evidence, brought forth any Florida statutory or case law to support the contention that payment to Plaintiff through retained counsel is improper, nor is the Court aware of any statutory or case law which stands for such proposition.

Thus, ultimately, the summary judgment evidence before the Court establishes that Allstate issued two checks in response to the Plaintiff's demand letter. One check for the amount of $3,205.89 representing payment of benefits and a second check in the amount of $337.47, which included $77.47 in interest, as indicated in Allstate's demand response correspondence sent to Plaintiff's counsel. Therefore, the summary judgment evidence before the Court establishes that Allstate did in fact issue payment inclusive of the $77.47 that Plaintiff seeks via this lawsuit and thus, the Court must enter final judgment in favor of Allstate.

Accordingly, based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Allstate's Motion for Rehearing is hereby **GRANTED**; This Court's July 1, 2021 Order Granting Plaintiff's Motion for Summary Final Judgment is hereby **VACATED;** This Court's July 30, 2021 Final Judgment in favor of Plaintiff is hereby **VACATED;** Plaintiff's Motion for Summary Judgment is hereby **DENIED**; and Allstate's Response and Cross-Motion for Summary Judgment is hereby **GRANTED**.

IT IS FURTHER ORDERED AND ADJUDGED:

That Final Judgment is entered in favor of Allstate in this case. Plaintiff shall take nothing by this action, and Defendant shall go hence without day. This Court reserves jurisdiction to determine Allstate's entitlement to and amount of attorney's fees and costs.

---

[1]The amount of interest, $77.47, is not in dispute.

[2]*See Exhibit B* to the Affidavit of Stephanie Santana, Records Custodian for George A. David, P.A. attached as *Exhibit M* to Plaintiff's Motion for Summary Judgment.

[3]*See Exhibit D* to the Affidavit of Stephanie Santana, Records Custodian for George A. David, P.A. attached as *Exhibit M* to Plaintiff's Motion for Summary Judgment; *see also Exhibit D* to the Affidavit of Lisa Ash attached as *Exhibit 1* to Allstate's Motion for Summary Judgment.

[4]*See E.J. Associates, Inc. v. John E. and Aliese Price Foundation, Inc.*, 515 So. 2d 763, 763-64 (Fla. 2nd DCA 1987) (holding that where the appellant filed a motion to strike affidavits, but failed to pursue any action before the trial court on its motion to strike the affidavits prior to and at the summary judgment hearing, the appellant waived any objection it may have had); *see also Jelic v. CitiMortgage, Inc.*, 150 So. 3d 1223 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D2410a] (holding that mortgagor waived her claim that summary judgment affidavit submitted by mortgagee was deficient where mortgagor failed to object to the affidavit during the summary judgment proceedings).

[5]An affiant only need be a witness with personal knowledge of the organization's regular business practices relating to creating and retaining the record(s) at issue, not a records custodian and a qualified witness's personal knowledge "will necessarily come from the witness's training or experience, or mostly likely, a combination of both." *Jackson v. Household Finance Corporation III,* 298 So. 3d 531 (Fla. 2020) [45 Fla. L. Weekly S205a].

[6]It is not disputed that both checks issued by Allstate in response to Plaintiff's pre-suit demand have been cashed.

* * *

Insurance—Personal injury protection—Affirmative defenses—Payment in full—Medical provider's response to insurer's affirmative defense of payment in full, that provider did not receive mailed checks, was an avoidance argument that required filing of reply—Where insurer complied with PIP statute by mailing checks in properly addressed postpaid envelope upon receipt of demand letter, provider's proof of nonreceipt of checks is irrelevant

MANUEL V. FEIJOO, M.D., P.A., Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2015-020945-SP-05, Section CC06. April 8, 2022. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT RE: BILLS PAID IN FULL

THIS CAUSE, having come before the Court for hearing on December 08, 2021 on Defendant's Motion for Final Summary Judgment RE: Bills Paid in Full and the Court, having heard argument of counsel and having considered all of the evidence filed by the parties in support or opposition to the Motion, and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED:

Defendant's Motion for Final Summary Judgment RE: Bills Paid

in Full is **GRANTED**.

The only issue addressed by this Court is whether Plaintiff was reimbursed by Defendant prior to Plaintiff filing this lawsuit. In its Motion for Final Summary Judgment, Defendant argues that since payment was issued upon receipt of Plaintiff's demand, there is no genuine dispute as to any material fact and summary judgment should be granted.

In support of its argument, Defendant submitted the affidavit of its Corporate Representative, Monica Johnson. In her affidavit, Ms. Johnson attested that payment in the amount of $163.24, representing a demand of $142.57 in benefits and $20.67 in interest was mailed to the Law Offices of Michael Libman, Plaintiff's attorney. *Johnson Aff.* ¶ 10. An additional check in the amount of $15.41 covering a demand for penalty and postage was also sent. *Id.* Proof of mailing from the post office as well as copies of the two drafts dated November 19, 2014 were also submitted by Defendant. Neither of the two drafts were ever cashed.

In countering Defendant's argument, Mr. Libman, filed the affidavit of its Corporate Representative, Diana Pradere. In her affidavit, Ms. Pradere attested that "upon review of [its] books, ledger and mail received, no checks dated 11/19/2014 [were] ever received by the Law offices of Michael I. Libman, P.A". *Pradere Aff.* ¶ 5.

Defendant argues that Plaintiff's failure to file a reply to its affirmative defense, as required by Rule 1.100(a) of the Florida Rules of Civil Procedures, precludes the Court from considering Plaintiff's non-receipt argument.

Pursuant to Rule 1.100(a), a reply is only required in situation where the Plaintiff wishes to avoid an affirmative defense by asserting a new matter which would prevent the use the affirmative defense. *Moore Meats, Inc. v. Strawn In & For Seminole Cty.,* 313 So. 2d 660, 661 (Fla. 1975). Avoidance means "an allegation of new matter in opposition to a former pleading that admits the facts alleged in the former pleading and shows cause why they should not have their ordinary legal effect." *Id.* Where the pleader "wishes simply to treat an affirmative defense as denied, and no new matter of affirmative defense is to be asserted thereto, then the affirmative defense is deemed denied, and a reply of simple denial would be surplusage." *Id.*

In *Gamero v. Foremost Ins. Co.,* 208 So. 3d 1195, 1196-97 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D158b], plaintiff filed suit for breach of the insurance contract, Foremost answered and asserted, as an affirmative defense, that Gamero's claim was excluded from coverage because the loss constituted marring. Gamero, argued that the affirmative defense was waived by Foremost's conduct "in initially acknowledging coverage and paying a portion of the claim." *Id.* at 1197. The court found that Gamero failed to preserve the issue by not filing a reply in avoidance of Foremost's affirmative defense.

In this case, Plaintiff is trying to avoid Defendant's affirmative defense by submitting the affidavit of Ms. Pradere. In her affidavit, Ms. Pradere does not deny the issuance and mailing of a payment, she only attests that the payment, for some unknown reason, was never received. Therefore, Plaintiff is making an avoidance argument requiring a reply.

Plaintiff non-receipt argument fails to deny Defendant's proof of mailing since there is no evidence indicating that the mailing was sent to the wrong address or that proper procedures were not followed. Ms. Pradere's affidavit fails to provide any evidence explaining why the payment was not received. For example, the affidavit does not state that the mailing was improperly addressed. Quite the contrary, Ms. Pradere's affidavit does not even provide an address for Mr. Libman. Plaintiff also fails to provide any evidence, other that the non-receipt of payment, that Defendant did not follow procedures, that the proof of mailing was improper, or that Defendant failed to comply with United States postal regulations. Therefore, Plaintiff is unable to deny Defendant's proof of mailing.

While proof of mailing creates a presumption, although not an irrebuttable one, that the mailing was received *Scutieri Jr. v. Miller,* 584 So. 2d 15, 16 (Fla. 3d DCA 1991), when an insurer establishes that a notice was mailed in accordance with the subsection of the statute, the insured's evidence of nonreceipt is irrelevant. *Aries Ins. Co. v. Cayre,* 785 So. 2d 656, 658 (Fla. 3d DCA 2001) [26 Fla. L. Weekly D1413a] (citing *Woodcock v. Motors Insurance Corp.,* 422 So.2d 959, 960 (Fla. 3d DCA 1982); *see also Glenney v. Service Ins. Co.,* 660 So.2d 1132, 1133 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D2029c]; *Boman v. State Farm Mut. Auto. Ins. Co.,* 505 So.2d 445, 450 (Fla. 1st DCA 1987). In, *Cayre*, a case addressing a compatible but not identical statutory provision, when an insurer mails a notice to an insured using a proper Unites States postal proof of mailing, "the notice is complete upon mailing and it is immaterial whether the insured failed to receive the notice." *Cayre*,785 So. 2d at 660.

Florida's PIP statute contains a similar provision addressing issuance of timely payment. Florida Statute § 627.736(4)(b)5 states:

> For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as being made on the date a draft or other valid instrument that is equivalent to payment *was placed in the United States mail* in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery. (emphasis added).

According to the PIP statute, payment is legally made on the date the "payment was placed in the United States mail." Proof of non-delivery is only relevant when payment is not properly posted as required by statute. Proper proof of mailing means a United States postal proof of mailing which conforms to the requirements of United States postal regulations. *Cayre.,* 785 So. 2d at 658.

In this case, Ms. Johnson's affidavit attests that on October 25, 2014 Defendant received a demand letter from Mr. Libman. On or about November 10, 2014, the requested amount was provided to Mr. Libman. Drafts in the amounts requested were issued on November 19, 2014. On November 21, 2014, within the 30 days required by statute, the drafts were mailed to the Law Offices of Michael Libman. United States postal form 3877 was used and singed by the Postmaster. A USPS stamp, dated November 21, 2014 was posted on the form and the postage was paid by Defendant.

Since Defendant complied with F.S. § 627.736(4)(b)5, proof of nonreceipt of the payment is irrelevant. Accordingly, Defendant's Motion for Final Summary Judgment Re: Bills Paid in Full is GRANTED. This case is dismissed with prejudice. Plaintiff shall take nothing and Defendant shall go hence without day. This Court retains jurisdiction to award attorney fees and costs.

* * *

Insurance—Default—Vacation—Excusable neglect—Motion to vacate default is denied—Conclusory affidavit stating that insurer's corporate policy relating to assignment of lawsuits and case management was inadvertently not followed does not establish excusable neglect

AVENTURA ORTHOPEDICARE CENTER (PA), a/a/o Elsa Varela, Plaintiff, v. UNITED AUTO. INS. CO., Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-033317-SP-23, Section ND03. April 13, 2022. Linda Singer Stein, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Nabil Nahlah, for Defendant.

ORDER ON DEFENDANT'S MOTION TO VACATE ORDER OF DEFAULT

THIS CAUSE came before the Court on March 30, 2022 upon Defendant's Motion to Vacate Order of Default. Having considered the motion and the affidavit of Brittany Brooks filed in support, having heard argument of counsel and being otherwise fully advised, it is

ORDERED that Defendant's Motion to Vacate Order of Default

is DENIED without prejudice, for the following reasons:

On October 11, 2021, United Automobile Insurance Company ("United Auto") was served with the Summons and Complaint. United Auto's response to the Complaint was due on November 1, 2021. United Auto failed to respond to the Complaint or file any paper in this action within the time period required by law. Accordingly, on November 16, 2021, Plaintiff filed and served its Motion for Entry of Default by the Clerk (the "Motion for Default"), the Certificate of Service of which shows that the motion was mailed to United Auto at 1313 NW 167 Street, Miami Gardens, FL 333169. On December 1, 2021, this Court entered a Default against United Auto, for failure to serve or file a response or any paper as required by law.

On February 8, 2022, Defendant filed its Motion to Vacate Order of Default, in support of which Defendant filed the affidavit of Brittany Brooks, Esq. (the "Brooks Affidavit"). According to paragraph 5 of the Brooks Affidavit, the Motion for Default "was never served upon Defendant". The Brooks Affidavit further asserts that "when a lawsuit is served, it is the corporate policy and regular practice and procedure of United Auto for clerical staff to promptly assign files and enter to-dos into case management software to ensure that deadlines are not missed." The Brooks Affidavit further asserts that "in this case, United Auto's corporate policy was inadvertently not followed, as [Attorney Brooks] was not assigned the lawsuit until more than two months after the Default in this case had been entered, and that when the lawsuit was assigned, no calendar event or "to-do" corresponding to the correct due date for a responsive pleading was generated"; and that "there was nothing in the file or assignment correspondence to reflect that either a motion for default had been filed or that an order had been entered on same."

Florida has a long-standing policy of liberality in granting motions to set aside defaults. *Omni Insurance Company v. Hernandez*, 9 Fla. L. Weekly Supp. 424a (9th Judicial Circuit (Appellate) 2002), *citing North Shore Hospital, Inc. v. Barber*, 143 So.2d 849 (Fla. 1962). In order to prevail on a motion to vacate a default, a party must establish that the failure to act is due to "excusable neglect"; and that it has acted with due diligence in moving to set aside the default within a reasonable time. *Bequer v. National City Bank*, 46 So. 3d 1199 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2485a]; *Rosenblatt v. Rosenblatt*, 528 So.2d 74 (Fla. 4th DCA 1988).

In order to establish excusable neglect, a party must do more than state that a mistake was made. In *Omni Insurance Company*, *supra*, where the defendant's affidavit contained no explanation other than a vague reference to the claims manager's workload and a statement that she simply made a mistake, the appellate court found that to be insufficient to meet the burden of proving excusable neglect. In the words of the Court:

> Despite the liberal policy toward vacating default judgments, Florida courts require more than a statement that a mistake was made. 'The requirement that the defendant demonstrate excusable neglect requires more than a conclusionary statement. A party moving to vacate a default must set forth facts explaining or justifying the mistake or inadvertence by affidavit or other sworn statement. *Inter-Atlantic Ins. Services, Inc. v. Hernandez*, 632 So.2d 1069, 1070 (Fla. 3d DCA 1994) . . . Moreover, the mere failure of the defendant itself to act is not the same as excusable neglect. *Goldome v. Davis*, 567 So.2d 909 (Fla. 2d DCA 1990).

In *Hurley v. Government Employees Insurance Co.*, 619 So.2d 477 (Fla. 2d DCA 1993), where the affidavits submitted by GEICO failed to explain "what happened to the complaint or suit papers other than admitting that the complaint was received by GEICO . . . and then was lost or misfiled", the District Court of Appeal concluded that GEICO was grossly negligent and was therefore unable to show excusable neglect in order to set aside a default.

Relying upon *Hurley*, the *Bequer* Court reversed the trial court's order setting aside the default judgment, finding that there was no excusable neglect where the defendant's affidavits simply outlined the defendant's policies and procedures concerning responding to lawsuits, but failed to offer any explanation as to what happened that resulted in the failure to respond to the third-party complaint.

In the case now before this Court, the Brooks Affidavit is inaccurate, as it erroneously asserts that the Motion for Default was never served upon United Auto. The Certificate of Service shows that the Motion for Default was mailed to United Auto at its Miami Gardens address. In addition, the Brooks Affidavit fails to set forth facts explaining or justifying the mistake or inadvertence, and is simply conclusory in nature. No explanation and no facts are offered as to the identity of the person who was charged with the responsibility of assigning the lawsuit to Attorney Brooks. No explanation and no facts are offered as to the identity of the clerical staff person who was charged with the responsibility of promptly assigning this lawsuit and entering to-dos into United Auto's case management software to ensure that deadlines were not missed. No explanation and no facts are offered as to the identity of the person who was charged with the responsibility of calendaring the November 1, 2021 deadline to respond to the Complaint. No explanation and no facts are offered as to whether calendaring instructions were given and not carried out, or whether instructions were simply not given.

In order to establish the requisite excusable neglect and due diligence in seeking to set aside the December 1, 2021 Default, it was incumbent upon United Auto to submit an affidavit that offered more than simply stating that United Auto's corporate policy was inadvertently not followed, as [Attorney Brooks] was not assigned the lawsuit until more than two months after the Default in this case had been entered, and that when the lawsuit was assigned, no calendar event or "to-do" corresponding to the correct due date for a responsive pleading was generated"; and that "there was nothing in the file or assignment correspondence to reflect that either a motion for default had been filed or that an order had been entered on same." *Bequer*, *supra*; *Hurley*, *supra*; *Omni Insurance Company*, *supra*.

Accordingly, United Auto failed to meet its burden of establishing excusable neglect in seeking to set aside the Default. This Court does not address the issue of whether United Auto acted with due diligence in moving to set aside the default within a reasonable time, where United Auto failed to move to set aside the Default until 7 weeks after entry of the Default.

Defendant's motion is DENIED WITHOUT PREJUDICE.

* * *

Landlord-tenant—Eviction—Notice—Dismissal—Complaint dismissed without leave to amend because tenancy was not terminated prior to filing of eviction complaint—Proper notice of termination is a statutory condition precedent to a complaint for eviction—Landlord failed to satisfy the condition precedent where landlord's first notice, which was the only notice applicable to complaint filed, was rendered a nullity by landlord's subsequent notices

19370 COLLINS AVE 901 (LLC), Plaintiff, v. CYD YARDENY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-017715-CC-23, Section ND06. February 28, 2022. Ayana Harris, Judge. Counsel: Casey R. Cummings and Marc E. Rosenthal, Rosenberg Cummings & Edwards LLC, Fort Lauderdale, for Plaintiff. Stephen P. Lewis, Law Office of Lewis & Guerrero, P.A., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND SERVE PLAINTIFF'S THIRD AMENDED COMPLAINT

THIS CAUSE came to be heard on January 13, 2022, on the Defendant's Motion to Dismiss Plaintiff's Second Amended Com-

plaint. After hearing argument from both counsels, reviewing the motion, pleadings and exhibits attached thereto, and the applicable legal authorities, and being otherwise being fully advised in the premises, the Court hereby finds as follows:

RELEVANT FACTS

1. Plaintiff filed a residential eviction action on October 5, 2020, seeking possession pursuant to a lease non-renewal termination notice served on Defendant on September 2, 2020, and expiring October 1, 2020 (hereinafter, "First Notice").

2. Thereafter, Plaintiff served a Three-Day Notice on Defendant dated February 24, 2021, for failure to pay double rent totaling $19,000 (hereinafter, "Second Notice").

3. The complaint was amended on March 17, 2021, to include a new cause of action relying on the Second Notice.

4. On August 31, 2021, Plaintiff served Defendant another notice titled "Notice From Landlord To Tenant-Termination For Failure To Pay Rent", which alleged Defendant owed Plaintiff $15,300.00 in unpaid rent for May, June, July and August 2021 (hereinafter, "Third Notice").

5. On November 3, 2021, the complaint was amended a second time (hereinafter, "Second Amended Complaint") to include two additional counts that relied on the Third Notice.

6. On November 15, 2021, Plaintiff filed a voluntary dismissal without prejudice of all counts that relied on the Third Notice and a count for money damages that relied on the Second Notice.

ANALYSIS AND FINDINGS

Defendant argues the complaint should be dismissed in its entirely without leave to amend because Plaintiff's subsequent notices were superseding notices that rendered the First Notice null and void and therefore did not terminate the Defendant's tenancy. As a result, Defendant reasons that Plaintiff failed to satisfy a condition precedent for filing the action namely, to terminate the tenancy first with the service on Defendant of a non-defective notice of tenancy termination. Because the tenancy was not terminated prior to filing the eviction complaint, no cause of action existed at the time the case was filed, and the complaint must be dismissed without leave to amend.

Florida law is clear that a proper notice of termination is a statutory condition precedent to a complaint for eviction. *See*; *Rolling Oaks Homeowners Assn v. Dade County,* 492 So.2d. 686 (Fla. 3rd DCA 1986); *Investment and Income Realty v. Bentley,* 480 So.2d 219 (Fla. 5th DCA 1985); 7 Fla. L. Weekly Supp. 482 (Broward Cty. 2000). The service of a subsequent notice by a landlord renders previous notices to be null and void. *Langford v. Hill,* 9 Fla. L. Weekly 391b (Alachua Cty. 2002); *Spence v. Francis,* 9 Fla. L. Weekly Supp. 405a (Broward Cty. 2002). When Plaintiff served the Second Notice on Defendant, it rendered the First Notice null and void. Likewise, when Plaintiff served the Third Notice on Defendant, it rendered both the Second and First Notices null and void. The basis for the eviction complaint was the expiration of the term of the month-to-month tenancy however, since the First Notice, the only notice applicable to an action for possession based on the termination of the Defendant's month-to-month tenancy was rendered a nullity by the Second and Third Notices, Plaintiff failed to satisfy a condition precedent of terminating the tenancy before filing the action.

The Court agrees with Defendant that the instant eviction action should be dismissed with prejudice and without leave to amend.

Accordingly, it is hereby ORDERED AND ADJUDGED:

1. Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint therefore is hereby **GRANTED**. The Second Amended Complaint is hereby dismissed without leave to amend.

2. Plaintiff's Motion For Leave to Amend and Serve Plaintiff's Third Amended Complaint is **DENIED**.

3. The Court retains jurisdiction to award costs and attorney's fees.

* * *

Contracts—Account stated—Credit card debt—Periodic credit card billing statement attached to complaint which states a balance due, but does not support any prior dealings or transactions between the parties, was insufficient to state cause of action for account stated—Count asserting claim based on account stated dismissed

CAPITAL ONE BANK (USA), N.A., Plaintiff, v. GARY D. DEUTSCH, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-122592, Division P. April 2, 2022. Susan S. Lopez, Judge. Counsel: Kevin J. Spinozza, Pollack & Rosen, P.A., Coral Gables, for Plaintiff. Richard F. Cipriano, III, The Cipriano Law Firm, Brandon, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AS TO COUNT I (ACCOUNT STATED) ONLY

THIS CAUSE having come before the Court at the hearing held on March 30, 2022, on Defendant's Motion to Dismiss, and the Court having heard argument of counsel, having reviewed the file, and being fully advised in the premises, the Court finds as follows:

1. On December 28, 2021, Plaintiff filed a Complaint against Defendant to collect the balance allegedly owed on a credit card account.

2. The Complaint sounded in Count I (Account Stated) and (Count II) Unjust Enrichment.

3. Paragraph 9 of the Complaint asserts that: "Before the institution of this action, Plaintiff and Defendant had business transactions between them and on February 24, 2021, they agreed to the resulting balance."

4. Attached to the Complaint was only the first page of a periodic credit card billing statement which was for a billing cycle of January 27, 2021 to February 23, 2021, alleged to be rendered by Plaintiff to Defendant which reflects a balance due of $25,724.17. In pertinent part, the periodic credit card billing statement shows under the heading "Account Summary", a "Previous Balance" of $25,373,45, "Payments" of $0.00, "Other Credits" of $0.00, and "Transactions" of $0.00. There were no other exhibits or statements attached to the Complaint.

5. Defendant's Motion to Dismiss only addressed the account stated cause of action. Defendant asserts and this Court agrees that Plaintiff failed to state a cause of action for an account stated.

6. "An account stated must be based upon previous dealings and transactions between the parties; and while it is not necessary, in order to support a count upon an account stated, to show the nature of the debt or to prove the specified items constituting the account, it must appear that at the time of the accounting there have been previous transactions and dealings between the parties of and concerning which an account was stated." *Daytona Bridge Co. v. Bond*, 36 So. 445 (Fla. 1904).

7. This Court is persuaded by the decisions of *Capital One Bank v. Kem*, 25 Fla. L. Weekly Supp. 618a (4th Jud. Cir. 2016) and *Capital One Bank v. Onesko*, 24 Fla. L. Weekly Supp. 701a (10th Jud. Cir. 2016). In both *Kem* and *Onesko*, the court granted a motion to dismiss an account stated cause of action because the statement attached to the complaint stated a balance due, but did not support any prior dealings or transactions between the parties. Similarly, in the present case, the periodic credit card billing statement attached to Plaintiff's Complaint states a balance due, but does not support any prior dealings or transactions between Plaintiff and Defendant.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED THAT:

1. Defendant's Motion to Dismiss is **GRANTED.**

2. Count I (Account Stated) is **DISMISSED WITHOUT PREJUDICE.**

3. Count II (Unjust Enrichment) stands as currently pleaded.

4. Plaintiff shall have sixty (60) days from the date of this Order within which to file an Amended Complaint.

* * *

Insurance—Discovery—Depositions—Corporate representative—Second deposition—Protective order—Good cause—Insurer's motion for protective order is denied—Nothing in rules of civil procedure forbids second discovery deposition, and insurer has not shown good cause for protective relief—Moreover, insurer pointed to no record evidence supporting oppression, undue burden, or undue expense

SASA ZIVULOVIC, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-041262, Division J. April 21, 2022. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Catherine Vann Arpen, Dutton Law Group, Tampa, for Defendant.

ORDER DENYING DEFENDANT'S MOTIONS FOR PROTECTIVE ORDER

BEFORE THE COURT following an April 21, 2022 hearing are Defendant's Motion for Protective Order Regarding Plaintiff's Request for Depositions of Debra Twidwell and Merari Turnil (Mar. 9, 2022), and Defendant's Motion for Protective Order Regarding Plaintiff's Request for Second Deposition of Defendant's Corporate Representative (Jan. 14, 2022). Upon consideration,

1. Defendant's Motion for Protective Order Regarding Plaintiff's Request for Second Deposition of Defendant's Corporate Representative (Jan. 14, 2022) is DENIED. Nothing in the Rules of Civil Procedure forbids a second discovery deposition. *Medina v. Yoder Auto Sales, Inc.*, 743 So. 2d 621, 623 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2421a]. And Defendant has not shown good cause required under Rule 1.280(c). Lack of relEvance is not a proper ground for protective relief under Rule 1.280(c), and counsel's assertions that the testimony sought would not lead to the discovery of admissible evidence does not rise to the level of "good cause." *Hepco Data, LLC v. Hepco Med., LLC*, 301 So. 3d 406, 413 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D843b]; *Bush v. Schiavo*, 866 So. 2d 136, 140 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D396a]. Moreover, Defendant has not pointed to record evidence supporting oppression, undue burden, or undue expense. *Cf. Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D315b] (dismissing certiorari petition and holding that the trial court did not err in overruling the objection to the production of documents as constituting an undue burden where the objection was not supported by record evidence). In any event, Plaintiff is entitled to a deposition concerning—at the very least—the six new affirmative defenses in the amended answer.

2. Defendant's ore tenus motion to limit the scope of the corporate representative deposition is DENIED.

3. Defendant's Motion for Protective Order Regarding Plaintiff's Request for Depositions of Debra Twidwell and Merari Turnil (Mar. 9, 2022) is DENIED. Lack of relevance is not a proper ground for a protective order, and Defendant has not made the requisite showing for undue burden or oppression. *Hepco Data*, 301 So. 3d at 413; *Bush*, 866 So. 2d at 140; *Cavey v. Wells*, 313 So. 3d 188, 195 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D515a].

4. Defendant's argument that Plaintiff lacks standing and therefore the Court lacks jurisdiction to afford the additional discovery is not persuasive.

5. The parties shall confer by phone within 7 days of this order to mutually coordinate the date and time of the depositions.

* * *

Insurance—Summary judgment—Evidence—Hearsay—Business records exception—Underwriting affidavit filed by insurer in support of motion for summary judgment is stricken and motion for summary judgment is denied where affiant merely echoes statutory elements of hearsay exception for business records and identifies employment and familiarity with different company

UNITED HEALTH GROUP & ASSOCIATES, LLC, a/a/o Krista Martinez, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 21-CC-000565. March 25, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Alex Avarello and Jessica McQueen, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE UNDERWRITING AFFIDAVIT OF ROSE CHRUSTIC AND DENYING DEFENDANT'S AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on March 22, 2022 on Plaintiff's Motion to Strike Defendant's Notice of Filing Underwriting Affidavit of Rose Chrustic in Support of Defendant's Amended Motion for Final Summary Judgment. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. On August 19, 2021, Defendant filed Defendant's Notice of Filing Underwriting Affidavit of Rose Chrustic in support of its Amended Motion for Final Summary Judgment.

2. However, this affidavit was deficient, containing primarily inadmissible hearsay. For an affidavit to be admissible, it: [M]ust be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts therein referred to in an affidavit must be attached thereto or served therewith. Fla. R. Civ. P. 1.510(e) (2021).

3. To lay the proper foundation for the admission of records under the business records exception to the hearsay rule, the records proponent's witness must do more than merely echo the statutory elements of the exception and identify employment and familiarity with a different company. The witness must demonstrate that he personally has the sufficient knowledge to affirm the statutory elements of the business records exception by demonstrating personal knowledge of the methods utilized by the business regarding the records at issue, such as how the records were created, what they were used for, and how they were maintained. *Jackson v. Household Fin. Corp.*, 298 So.3d 531, 526 (Fla. 2020) [45 Fla. L. Weekly S205a].

4. Florida Evidence Code - **90.803** (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. *90.902*(11), unless the sources of information or other circumstances show lack of trustworthiness.

5. As such, Plaintiff's Motion to Strike Defendant's Notice of Filing Underwriting Affidavit of Rose Chrustic is **HEREBY GRANTED**.

* * *

FLORIDA WELLNESS CENTER, INC., a/a/o Yaneidy Perez, Plaintiff, v. PROGRESSIVE AMERICAN INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County. Case No. 2020-CC-052740. January 25, 2022. Leslie Schultz-Kin, Judge. Counsel: Timothy Patrick, Patrick Law Group,

P.A., Tampa, for Plaintiff. Cameron Frye, De Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, Tampa, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER having come before the Court at 10:00 a.m., on January 20, 2022, pursuant to Plaintiff's, FLORIDA WELLNESS CENTER INC., a/a/o YANEIDY PEREZ ("Plaintiff") Motion for Sanctions (the "Motion"), and the Court having reviewed the Motion, the response in opposition to the Motion, and having heard the argument of counsel, reviewed the court file and the record, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Sanctions is hereby **DENIED**.

2. The Court finds that based on the record, the pleadings, the applicable *Florida Rules of Civil Procedure*, the Florida Bar Guidelines for Professional Conduct, and the 13th Judicial Circuit Standards of Professional Courtesy, the record is completely devoid of any basis for an entry of sanctions against Defendant, PROGRESSIVE AMERICAN INSURANCE COMPANY, or its counsel.

* * *

Insurance—Personal injury protection—Venue—Forum selection clause in policy stating that any legal action against insurer to determine coverage under policy "shall be filed and maintained in the county where the policy was issued," does not restrict venue to Miami-Dade County where policy failed to define "issued" and contained no terms expressly mandating venue exclusively in Miami-Dade County—Action against domestic corporation—Where insurer has shown that venue would be proper in Miami-Dade County under section 47.051 where insurer maintains its corporate office, but has not addressed applicability of two other venue options provided in statute, insurer has not met burden of clearly showing that venue is improper in Hillsborough County

TAMPA BAY IMAGING LLC, a/a/o Claudia Chamorro, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-092983. April 8, 2022. Michael J. Hooi, Judge. Counsel: Todd A. Migacz, FL Legal Group, Tampa, for Plaintiff. Teodora Siderova, Law Offices of Kubicki Draper, Tampa, for Defendant.

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

The Court heard Defendant's Motion to Dismiss re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051, or in the Alternative, Defendant's Motion to Transfer Venue on March 17, 2022. Having considered Defendant's Motion and supporting materials, Plaintiff's materials filed in opposition to the Motion, argument of counsel for the parties, the court file, relevant case law, and being otherwise fully advised, the Court denies the Motion.

Background

1. Plaintiff filed this breach of contract action on September 2, 2021, seeking "unpaid and overdue PIP and possibly MPC coverage" under a policy of insurance issued by Defendant.

2. On November 4, 2021, Defendant filed its Motion, alleging that venue is improper on multiple grounds. Initially, Defendant argues that the relevant insurance policy requires the litigation be brought in the county the policy was issued, which Defendant asserts is Miami-Dade County. Second, Defendant argues that Florida Statutes section 47.051 also requires that this action be filed and litigated in Miami-Dade County. In support of its Motion, on February 23, 2022, Defendant filed the Affidavit of Jean Labossiere.

Analysis

3. Improper venue is a defense that can be raised by a motion dismiss. *See* Florida Rule of Civil Procedure 1.140(b); *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So. 2d 487, 490 (Fla. 2d DCA 1970). But "[t]he widely accepted practice in Florida courts, including the Florida Supreme Court, is that where venue is improper, the case should be transferred, not dismissed." *Russomano v. Maresca*, 220 So. 3d 1269, 1271 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D1416a]; *see also McClain v. Crawford*, 815 So. 2d 777, 778 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D1143b] (stating "the remedy for improper venue is a transfer to the proper venue, not dismissal").

4. On a motion contesting the propriety of a plaintiff's selected venue, a defendant "has the burden of clearly proving that the venue selected by the plaintiff is improper" and "must demonstrate where the proper venue is." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.*, 238 So. 2d 665, 667 (Fla. 4th DCA 1970).

Transfer on the Basis of the Policy's Forum Selection Clause

5. Defendant asserts that the insurance policy contains a mandatory forum-selection clause that requires that this action be brought in Miami-Dade County. *See* Def.'s Motion pp. 2-5.

6. The policy provision states: "Any legal action against 'us' to determine coverage under this policy shall be filed and maintained in the county where the policy was issued." United Automobile Insurance Company Florida Personal Automobile Insurance Policy, Part G, Section 3 (p. 18).[1]

7. Defendant argues that the insurance policy was issued in Miami-Dade County, *see* Affidavit of Jean Labossiere ¶¶ 5 & 12, and is therefore the proper venue for this matter.

8. In opposition, Plaintiff has cited *Robles v. United Automobile Insurance Company*, __ So. 3d __, 2021 WL 1743606, 46 Fla. L. Weekly D1009a (Fla. 1st DCA May 4, 2021). In *Robles*, the First District Court of Appeal considered the same forum selection clause at issue in this case. *See Robles*, 2021 WL 1743606 *1. The appellate court reversed the trial court's transfer of the underlying action, concluding that "[t]he policy fail[ed] to define 'issued' and contain[ed] no terms expressly mandating venue exclusively in Miami-Dade County." *Id.* The court rejected the insurer's attempt to define "issued" through its corporate representative's affidavit, *id.*, and concluded that "[t]he forum-selection clause in this insurance contract is reasonably interpreted as *not* restricting venue to Miami-Dade County." *Id.* at *2.

9. Because Defendant has not distinguished this matter from *Robles*, the Court declines to have this matter transferred under the policy's forum-selection clause.

Transfer on the Basis of Florida Statutes § 47.051

10. Defendant also argues that Florida Statutes section 47.051 requires that this matter be filed and litigated in Miami-Dade County. *See* Def.'s Motion pp. 5-6. Defendant contends that because it is a domestic corporation, has its corporate office from which it transacts its ordinary business in Miami-Dade County, and does not maintain a corporate office in Hillsborough County, this matter should be dismissed or transferred to Miami-Dade County.

11. Florida Statutes section 47.051[2] provides three possible venue options for actions against domestic corporations: the county (1) "where such corporation has, or usually keeps, an office for transaction of its customary business"; (2) "where the cause of action accrued"; or (3) "where the property in litigation is located."

12. Defendant's argument focuses solely on the first option in section 47.051—the county where the corporation has an office to

transact its customary business. While Defendant has provided evidence indicating that under section 47.051's first option, venue would be proper in Miami-Dade County, and Hillsborough County would not be an option under that provision,[3] it has not addressed the propriety of venue in Hillsborough County under either of the other venue options in section 47.051—in particular, where the cause of action accrued.

13. Plaintiff can bring an action against Defendant in any county that meets one of the three venue options in section 47.051 for domestic corporations. *See Williams v. Union Nat'l Ins. Co.*, 528 So. 2d 454, 456 (Fla. 1st DCA 1988) (stating "[t]he plaintiff has the prerogative of selecting venue; and so long as the selection is one of the statutory alternatives, it will not be disturbed"). Having not addressed the other venue options, Defendant has not met its burden of clearly showing that venue is improper in Hillsborough County.

For these reasons, Defendant's Motion is **DENIED.**

---

[1]The insurance policy is attached to the affidavit of Jean Labossiere filed January 31, 2022.

[2]Florida Statutes section 47.051 states:

Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located.

[3]The affidavit of Defendant's corporate representative Jean Labossiere indicates Defendant's corporate office, from which it transacts its customary business, is in Miami-Dade County, and "Defendant does not maintain an office from which it transacts its customary business in Hillsborough County, Florida." Affidavit of Jean Labossiere ¶ 4.

* * *

Insurance—Personal injury protection—Action seeking declaration on effectiveness of PIP policy to elect use of schedule of maximum charges is denied, as Florida Supreme Court has already resolved issue

LAROCCA CHIROPRACTIC CENTERS, LLC, a/a/o Tyreste Fortune, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 18-CC-014984, Division L. March 16, 2022. Michael Baggé-Hernández, Judge. Counsel: Amy T. Sullivan, Morgan and Morgan, Tampa, for Plaintiff. David B. Kampf, Ramey & Kampf, P.A., Tampa, for Defendant.

FINAL JUDGMENT IN FAVOR OF STATE FARM AND DENYING PLAINTIFF'S STATEMENT OF CLAIM FOR DECLARATION THAT STATE FARM'S POLICY FAILED TO COMPLY WITH FLORIDA NO-FAULT LAW

THIS CAUSE, having come to be heard before the Court on Plaintiff's Statement of Claim for Declaratory Relief, and the Court having reviewed the file and hearing argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDGED that:

1. Plaintiff's Statement of Claim is clear that Plaintiff's cause of action solely seeks declaratory relief finding that State Farm's policy does not comply with Fla. Stat. §627.736. Paragraph 28 specifically states "it is not an 'action for benefits' under Section 627.736 ".

2. Per Paragraph 37 of Plaintiff's Statement of Claim, Plaintiff sought this Court to address:

(a) Does State Farm's Policy Form 9810A adopt an impermissible Hybrid Method to calculate PIP benefits?

(b) Has State Farm failed to clearly and unambiguously elect the Fee Schedule Method in Policy Form. 9810A?

(c) With respect to PIP and Med Pay claims .submitted under Policy Form 9810A which were issued by State Farm since January 1, 2013, was State Farm required to pay such claims in accordance with the Reasonable Amount Method described in Section 627.736(1)(a) and (5)(a), instead of the Hybrid Method or the Medicare Fee Schedule Method described in Section 627.736(5)(a)1-5?

3. Plaintiff requested this Honorable Court to issue an order finding that State Farm failed to comply with the cited statute and, thus, the issues based on paragraph 37 should be determined in Plaintiff's favor. See Relief provision of Plaintiff's Statement of Claim.

4. There is no longer a valid need for Plaintiff to obtain such relief as the Supreme Court of Florida addressed the exact policy language at issue and held that "the PIP policy issued by State Farm was effective to authorize the use of the schedule of maximum charges under the relevant provisions of section 627.736(5), Florida Statutes (2013)." *MRI Associates of Tampa, Inc. v. State Farm Mut. Auto. Ins. Co.* Case No. SC-18-1390 (Fla. 2021) [46 Fla. L. Weekly S379a].

5. The Florida Supreme Court upheld the Second District Court of Appeal opinion that addressed the exact policy language at issue. See *State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc.*, 252 So. 3d 773. (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1149a].

6. Thus, this Court denies Plaintiff's Statement of Claim and request for judgment in favor of Plaintiff. In reliance upon *MRI Associates of Tampa, Inc. v. State Farm Mut. Auto. Ins.* Co. Case No. SC-18-1390 (Fla. 2021) [46 Fla. L. Weekly S379a], State Farm shall hereby be entitled to final judgment in its favor.

7. Plaintiff shall take nothing from this cause of action and Defendant shall go hence without a day.

8. This Court reserves jurisdiction to address Defendant's entitlement to attorneys' fees and costs as well as the reasonableness of attorneys' fees and costs.

* * *

Insurance—Homeowners—Coverage—Conditions precedent—Insured's complete failure to comply with post-loss obligation to provide requested records and documents entitles insurer to summary judgment—Untimely notice of loss—Insurer is also entitled to summary judgment where 33-month delay in reporting loss was unreasonable as matter of law, and insurer was prejudiced by delay

GRAN FORTUNA CORP., Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20037076, Division 53. April 12, 2022. Robert W. Lee, Judge.

Final Summary Judgment in Favor of Defendant

This cause came before the Court on April 11, 2022 for hearing of the Defendant's Motion for Summary Judgment. Counsel for both parties appeared. Based on consideration of the arguments made at the hearing, as well as the matters of record and relevant legal authorities, the Court rules as follows:

This case is in a jury trial posture with the pretrial conference set for July 1, 2022, and a case management conference set for May 6, 2022 to determine compliance with the pretrial order. The Defendant filed its Motion for Summary Judgment on December 1, 2021. In opposition to the Defendant's Motion, the Plaintiff filed the affidavit of the homeowner Alberto Sanchez on February 2, 2022, and the affidavit of its expert Grant Renne on March 22, 2022.

Findings of Undisputed Facts. The following facts are undisputed. On September 20, 2017, Hurricane Irma struck South Florida. "Shortly after" the hurricane, the homeowner (Sanchez) "noticed small staining on the ceiling of the master room" of the insured property. Sanchez Aff.¶¶ 3-4. Sanchez did not "think much of" the staining, so he simply painted over it. *Id.* ¶4. However, more than a year later in 2019, he noticed more staining on the ceiling of another part of the property (*Id.* ¶5), but again made no claim with Citizens. In 2020, Sanchez noticed more "stains in multiple areas of [the] property," and on June 19, 2020, then reported the claim to Citizens.

Because of the substantial delay between the date of loss and the

date of reporting (33 months), Citizens issued a reservation of rights letter when it assigned an adjuster. On June 23, 2020, pursuant to its rights under the insurance policy, Citizens sent the insured a letter which requested six categories of documentation. See Policy, page 14 of 24, attached as Exhibit B to Defendant's Motion. The owner did not provide the requested documents, and thereafter Citizens requested the documents on two more occasions. The owner still failed to respond to the request, and at no point prior to suit did he provide these documents to Citizens. Ultimately, on August 29, 2020, the Citizens adjuster concluded she was unable to determine the cause of the loss because of the passage of time, and Citizens accordingly denied the claim.

Shortly before suit was filed, Citizens was provided a sworn proof of loss on November 5, 2020, which included the Plaintiff's adjuster's report. However, neither the sworn proof of loss nor the adjuster's report was made part of the record for purposes of this Motion. Nevertheless, Citizens is not asserting a defense based on the failure to provide a sworn proof of loss. The Plaintiff filed suit just over a month later on December 9, 2020.

The position of Citizens in this Motion is three-fold. One, the homeowner's delay in reporting the loss was not "prompt" as a matter of law. Two, the delay prejudiced Citizens' ability to adjust the claim. And three, the homeowner failed to provide the requested "records and documents," thus resulting in a forfeiture of coverage.

Conclusions of Law. Post-loss obligations provided in a policy may give rise to a coverage defense if the insured fails to comply with the obligation. *Nunez v. Universal Prop. & Cas. Ins. Co.*, 325 So.3d 267, 272 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D1747b]. Post-loss obligations are deemed conditions precedent to coverage, which must be substantially complied with to authorize an insurer's performance (i.e., payment). *Huertas v. Avatar Prop. & Cas. Ins. Co.*, 47 Fla. L. Weekly D277a, D278 (Fla. 4th DCA Jan. 26, 2022) [47 Fla. L. Weekly D277a]; *Lopez v. Avatar Prop. & Cas. Ins. Co.*, 313 So.3d 230, 235 (Fla. 5th DCA 2021) [46 Fla. L. Weekly D555b].

Each post-loss obligation is analyzed separately to determine if there has been substantial compliance with that obligation. *Nunez*, 325 So.3d at 274 (finding that complying with the obligations to promptly report the claim, to allow inspection of the home, and to provide a sworn proof of loss do not "bear on whether [the homeowner] complied with the specific, pertinent policy requirement or condition at issue"). So, in the instant case, the Court separately considers the failure of the homeowner to report the loss for 33 months (almost three years), and the failure of the homeowner to provide the requested documents and records.

Substantial Compliance. When a homeowner has complied to some extent with a particular post-loss obligation, it generally becomes a question of fact whether the homeowner has "substantially" complied. If there has been no "substantial" compliance, then the homeowner can still overcome the failure to do so by showing the failure to comply did not prejudice the insurer. If, however, the insured "wholly fails" to comply with a specific post-loss obligation, the insurer is entitled to a directed verdict on that issue. *See Nunez*, 325 So.3d at 275. Substantial compliance is an issue only when there has been some effort at compliance. *See id.*

Prejudice to Insurer. For an insured's material failure to comply with a post-loss obligation to constitute a forfeiture of coverage, the insurer must be prejudiced by the failure to comply. *Universal Prop. & Cas. Ins. Co. v. Horne*, 314 So.3d 688, 692-93 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D201b]. *See also Nunez*, 325 So.3d at 275. Upon an insured's failure to substantially comply with a post-loss obligation, prejudice is presumed, and the burden is on the insured to show a lack of prejudice. *Horne*.

However, in the Fourth DCA, a showing of prejudice is not required upon a material failure to comply with a post-loss obligation if there was a *complete* failure to comply *prior to* the lawsuit being filed. *Id.* at 692 n.7 (citing *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So.2d 300 (Fla. 4th DCA 1994) and *Rodrigo v. State Farm Fla. Ins. Co.*, 144 So.3d 690 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D1760a]). *See Dias v. Universal Prop. & Cas. Ins. Co.*, 330 So.3d 38, 40 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2359a]. *See also Edwards v. Safepoint Ins. Co.*, 318 So.3d 13, 18-19 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1086a]. Additionally, the Fourth DCA agrees that any cooperation by the insured is sufficient to trigger a jury question, but only if the focus is on the post-loss obligation specifically at issue. For instance, if the insured fails to provide a sworn proof of loss, but cooperates in other ways, the insured's cooperation in such an instance would not operate to create a jury issue on the question of the condition precedent to provide a sworn proof of loss. *Edwards*, 318 So.3d at 18-19. In *Edwards*, the insured submitted a repair receipt and an estimate, but did not provide a sworn proof of loss. The Fourth DCA held that the providing of a receipt and estimate had no bearing on whether the insured provided the required sworn proof of loss, and thus the trial court was correct in entering summary judgment in favor of the insurer on its defense of failure of a condition precedent (no sworn proof of loss). *Id.* at 19. These were two separate conditions precedent, each of which had to be looked at separately.

In this Court's view, *Edwards* is directly on point here. The providing of the sworn proof of loss prior to suit in the instant case has no bearing on the insured's complete failure to provide the "records and documents" requested by Citizens on three occasions, particularly when the insured provided no explanation for failure to do so. As a result, Citizens is entitled to summary judgment in its favor on its defense of failure of a condition precedent (i.e., not providing requested records and documents).

Timeliness of Reporting Claim. Next, as an alternative ground, the Court considers the timeliness of the insured's notice of loss. Most policies require that the insurer be given prompt notice of the loss. What constitutes "prompt" notice is often disputed. Florida law is clear, however, that instantaneous notice is not required. *See Guzman v. Southern Fidelity Ins. Co.*, 332 So.3d 67, 70 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D2628a]. Beyond that, the picture is murky. "Notice is said to be prompt when it is provided 'with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case.' " *Restoration Construction, LLC v. Safepoint Ins. Co.*, 308 So.3d 649, 652 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D2732a] (overturning trial court decision granting summary judgment in favor of the insurer on timeliness of notice). *See also Guzman*, 332 So.3d at 71 (when homeowner waited 7 days to notify insurer, and insurer waited another 5 days before sending an inspector, the question of whether notice was prompt was for the jury); *Everett v. Avatar Prop. & Cas. Ins. Co.*, 310 So.3d 536, 541 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D259a] (when insurer claimed insured did not give notice of the claim until two and a half weeks after the loss event, this type of delay would "usually" be a question of fact). However, the appellate court in *Guzman* noted that delays substantially longer, giving examples from 6 ½ months to 5 years, could result in a finding of no prompt notice as a matter of law. 332 So.3d at 71. Additionally, the Guzman court suggested in passing that prejudice to the insurer is part of the analysis. *Id.*

In the instant case, Sanchez was aware of some "staining in the ceiling" shortly after Hurricane Irma struck South Florida. He admitted he ignored the stain and painted over it. He further acknowledged that sometime within the next two years, he saw additional ceiling staining, but again made no claim to Citizens until at least more than 6 months after that. (Sanchez's affidavit is unclear when he actually noticed the stains in 2019 and 2020, so it could have been

longer than six months.)

In the Court's view, no matter how you look at the facts proffered by Sanchez in his affidavit, his "notice" to Citizens was simply not prompt. He was aware he had a loss of some type in 2017, shortly after Hurricane Irma. His affidavit states that he "did not think much of" the initial stain and that's why he simply painted over it, although he acknowledges that this stain on his ceiling happened "[s]hortly after Hurricane Irma."

Another trial court has ruled that a 416-day delay in reporting the loss was untimely as a matter of law. The court held that the measuring of timeliness begins when the " 'person seeking coverage' first becomes aware of the loss." The court next determined that the insurer was prejudiced by the delay because the insurer was "deprived of the ability to independently and timely investigate the claim." *At Home Auto Glass, LLC v. Progressive Select Ins. Co.*, 29 Fla. L. Weekly Supp. 724a, 725 (Miami-Dade Cty. Ct. Sept. 27, 2021) (in this case, the plaintiff apparently agreed that 416-day delay was untimely, but argued that the trigger date should be a later date).

Certainly, in the instant case, Citizens has been prejudiced by the delay in reporting of the claim. Its adjuster simply could not determine how the loss occurred due to the passage of time. Additionally, as argued by defense counsel, costs of repairs have gone up—the Plaintiff believes a whole new roof is needed now, whereas it would have cost less to merely mitigate the loss within a reasonable time after it occurred. As noted in the *At Home Auto* case, the insurer has been "deprived of the ability to independently and timely investigate the claim."

Conclusion. The Court finds two independent grounds to grant the Defendant's motion. First, the insured completely failed to comply with the post-loss obligation to provide requested records and documents. Second, the delay in reporting this claim was unreasonable as a matter of law, and Citizens was prejudiced by the insured's failure to promptly provide notice of the claim. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment is GRANTED. As a result, it is

ORDERED AND ADJUDGED that Final Summary Judgment is hereby entered in favor of the Defendant, Citizens Property Insurance Corporation, and against the Plaintiff, Gran Fortuna Corp. The Plaintiff shall take nothing in this action, and the Defendant shall go hence without day. The Court reserves jurisdiction to determine any issue involving attorney's fees and costs.

FURTHER, the case management conference set for May 6, 2022 is CANCELED, and the pretrial conference set for July 1, 2022 is CANCELED.

* * *

Landlord-tenant—Commercial lease—Eviction—Default—Failure to deposit rent into court registry

GATOR JACARANDA LTD., Plaintiff, v. PHISAMAI MCLEOD, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22011847, Division 49. April 12, 2022. Nina W. Di Pietro, Judge. Counsel: Mark A. Goldstein, Miami, for Plaintiff. Paul S. Martin, for Defendant.

Default Judgment for Eviction

This action came before the Court upon Plaintiff's Motion for Final Default Judgment of Eviction and the Court being fully advised in the premises, it is

Ordered as follows:

1. Plaintiff/landlord filed this action to evict the Defendant tenants from a commercial premises.

2. The Defendants filed an Answer and on March 29, 2022, and the Court ordered the Defendants to deposit the April rent into the court registry. The Defendants failed to deposit the rent and the Court's Order of March 29, 2022, cautioned Defendants that if they failed to deposit the April rent a default final judgment of eviction would be entered without further notice or hearing.

3. The Defendant tenant is required to deposit the rent into the court registry to assert any defense other than payment. *Stanley v. Quest Intern. Inv., Inc.* , 50 So.3d 672, 674 (Fla. 4th DCA 2011) [35 Fla. L. Weekly D2636a].

4. Section 83.232, Fla. Stat., was enacted to prevent delinquent tenants from unjustly enriching themselves at their landlord's expense by occupying the premises rent-free while their landlord sues to evict them. *Premici v. United Growth Properties, L.P.,* 648 So. 2d 1241, 1244 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D228c]. Pursuant to Section 83.232, Fla. Stat., since the Defendants failed to make the Court Ordered deposit the Plaintiff is entitled to an immediate judgment for possession of the premises. *Park Adult Residential Facility, Inc. v. Dan Designs, Inc.,* 36 So.3d 811 (Fla. 3rd DCA 2010) [35 Fla. L. Weekly D1192a]; *Kosoy Kendall Assocs. LLC v. Los Latinos Rest., Inc.,* 10 So. 3d 1168 (Fla. 3rd DCA 2009) [34 Fla. L. Weekly D1075a].

5. Based on the foregoing, Plaintiff's Motion is granted. Plaintiff, Gator Jacaranda, Ltd., shall recover from the Defendants, Phisamai Mcleod and Nattachai Chanya,, possession of the real property located at [Editor's note: address redacted], Plantation, Florida 33322, for which let Writ of Possession issue forthwith.

* * *

Attorney's fees—Prevailing party—Landlord-tenant—Both parties prevailing on significant issues—Defendant's motion for attorney's fees denied

CHARLES BERNARD DELONG, Plantiff, v. LUIS VIDAL LANDONI, et al., Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21052244, Division 54. April 22, 2022. Florence Taylor Barner, Judge. Counsel: Alexander P. Johnson, Law Office of Alexander Patrick Johnson, PL, Fort Lauderdale, for Plaintiff. Alexander E. Borell, The Law Offices of Alexander E. Borell, West Palm Beach, for Defendants.

Amended Order Denying Motion for Attorneys Fees and Costs

THIS CAUSE came before the Court on Defendants' Motion to tax attorneys fees and costs:

IT IS HEREBY ORDERED AND ADJUDGED that

On February 17, 2022 this matter came before for court on a non-jury trial on Plaintiff, tenant's, complaint to recover his $2300 security deposit, and on Defendants' counterclaim for $6,227.79 in damages. On March 17, 2022 to court entered an order adjudging that: Plaintiff failed to prove his cause and shall go without day. Landlord was entitled to retain the full security deposit plus pet fee. The court does not award any damages on the counterclaim filed in this action. The court determines that Defendants are the prevailing parties, and reserves jurisdiction on Defendants' entitlement to attorneys fees.

Defendant moved for judgment taxing attorneys fees and court costs on March 30, 2022 arguing that under §83.49(3)(c) the prevailing party in a security deposit case is entitled to an award for reasonable attorneys fees. Plaintiff objected, arguing that where both parties have prevailed on a substantial issue before the court it is within the court's discretion whether to award attorneys fees.

The case was heard before the court on April 20,2022. Plaintiff cited *Marcosky v. Intesso,* 8 Fla. L. Weekly Supp. 273a (Circuit Court 9th Judicial Circuit in its appellate capacity, 2001) in which tenant sued to recover his entire security deposit based on landlord's failure to properly claim it by certified mail within 30 days and that landlord had also failed to return the unclaimed portion of the security deposit. The court found that as Tenant had failed to provide a forwarding address as required under §83.49(5) landlord was relieved of the

obligation to make his claim by certified mail within 30 days, and thus landlord prevailed on the claim to recover the entire deposit. The court further ruled that tenant prevailed on his claim to recover the unclaimed portion of the security deposit. As each party had prevailed on one of the two significant issue, the Circuit court in its appellate capacity ruled that the trial court had not abused its discretion in in denying attorneys fees and costs to each party.

In the instant matter the court cites *Checci v. Gordon* 524 So.2d 501 (Fla. 3rd DCA 1988) holding that where both parties prevail on separate issues, neither party is entitled to attorneys fees and costs.

WHEREFORE, this court determines that as each party has prevailed on a significant issue herein, it is within this court's discretion to deny Defendants' motion for attorneys fees and costs. So ordered, Defendants' motion is denied.

* * *

Landlord-tenant—Eviction—Motion to stay writ of possession based on payment of rent is denied where tenant did not raise issue of payment until after entry of judgment and did not tender withheld rent into court registry

BIO 1 LLC, Plaintiff, v. DENEISHA BRAZZLE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22014250, Division 53. April 18, 2022. Robert W. Lee, Judge.

Order Denying Defendant's Motion to Stay Writ of Possession

The Defendant's Motion to Stay Writ of Possession is DENIED. First, in this residential eviction case, the Defendant failed to raise the issue of payment of rent in her initial answer. Second, even had the Defendant done so, under Florida law she was required to tender the withheld rent into the Court Registry. The Defendant was clearly advised of these requirements in the summons. Additionally, by not raising the issue of payment until after the judgment was entered, the Defendant has waived the issue. As a result, the Defendant is not entitled to a hearing. Fla. Stat. sec. 51.011(1) ("all defenses . . . shall be contained in the defendant's answer which shall be filed within 5 days after service of process"); Fla. Stat. sec. 83.60(2) (tenant required to deposit rent into the registry).

* * *

Insurance—Default—Vacation—Excusable neglect—Motion to vacate default is granted based on plaintiff's agreement to requested relief rather than on finding of excusable neglect

POMPANO SPINE CENTER LLC, Plaintiff, v. ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21059467, Division 53. April 6, 2022. Robert W. Lee, Judge.

Order Vacating Default

This cause came before the Court on April 4, 2022 for hearing of the Defendant's Motion to Set Aside Default. The Defendant claims it timely filed its Answer, but that the Answer did not make its way to the Clerk's docket. Upon questioning at the hearing, defense counsel represented to the Court that it did not receive a rejection email from the Clerk's office advising of the rejection. Defense counsel acknowledged, however, that it did not contact the Clerk's office to find out what happened, although it had a month between the time it discovered that the default had been entered and the date of the hearing. This is concerning to the Court because the Defendant should have addressed the Clerk's position when the Defendant addressed the issue of excusable neglect in its Motion. Additionally, the Defendant stated in paragraph 10 of its Motion that this problem arose from an "Allstate processing error," rather than an error in the Clerk's office. At the hearing, defense counsel conceded that its statement in paragraph 10 was a mistake.

Because this "glitch" issue is usually readily explained by the Clerk, the Court advised the parties that it would ask the Clerk's office to look into the matter. It did not take long. The Clerk immediately advised—upon reseaching the efiling number of the document—that a rejection email was in fact sent out to the parties giving the parties the reason for the rejection. The Court provided the Clerk's response to both counsel. The Court further asked defense counsel to once more look into the matter of the missing email on its end now that it knew the date and time of the rejection (just a few hours after it had filed the document).

Defense counsel responded that it has now located the email. Nevertheless, notwithstanding acknowledging that the Clerk had advised the Defendant that the filed pleading had been rejected, the Defendant argues that it still has demonstrated excusable neglect and due diligence. This Motion, and its related argument, give the Court pause. Here, the Defendant admits it did not review the email sent to it by the Clerk's office, that it made a mistake in drafting its Motion, and that it then made a later mistake when it incorrectly advised the Court that its office did not receive an email from the Clerk's office. That's a lot of "excusable neglect" hoops to jump through, and frankly, the Court expects better from the Defendant's law firm. But for the fact that Plaintiff's counsel has actually agreed to the relief Defendant is seeking, the Court would be inclined to find no excusable neglect here. Accordingly, it is hereby

ORDERED that the Defendant's Motion is GRANTED. The default in this case is hereby VACATED, but admonition given.

* * *

Landlord-tenant—Eviction—Uninhabitable premises—Where landlord's failure to maintain premises in good repair resulted in entry of wild animals into premises, and tenant provided proper notice of condition and tenant's intention to withhold rent, tenant who vacated premises was relieved of obligation to pay rent—Eviction complaint is dismissed, attorney's fees are awarded to tenant, and tenant's motion to claim rents deposited in court registry is granted

MAEGUERITA QUIRE, Plaintiff, v. GIROLLE NOEL, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO21005007 (61). July 23, 2021. Corey Amanda Cawthon, Judge. Counsel: Steven C. Fraser, Steven C. Fraser, P.A., Hallandale Beach, for Defendant.

ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS AND DEFENDANT'S MOTION FOR CLAIM TO RENTS DEPOSITED INTO THE COURT'S REGISTRY

THIS CAUSE having come before the Court on July 21, 2021 on Defendant's Amended Motion to Dismiss and Defendant's Motion for Claim to Rents Deposited into the Court's Registry, the Plaintiff having failed to appear for said hearing and both Defendant and Defendant's counsel being present for said hearing; the Court having reviewed the Motion and the relevant portions of the Court file; heard argument of counsel and testimony presented; reviewed relevant legal authorities; and being otherwise sufficiently advised in the premises, finds as follows:

BACKGROUND

1. This case is an eviction action based on a one-count Complaint for possession filed on or about May 20, 2021.

2. Within the Complaint, Plaintiff indicates the eviction is based on Defendant's material failure "to comply with F.S. 82.52 or the terms of the rental agreement, other than failure to pay rent, and timely notice given of such non-compliance and Defendant continues in possession of the premises without permission of the Plaintiff."

3. The Complaint goes on to state "Copy of the non-compliance attached. This agreement is oral/written (copy of written agreement attached)."

4. Attached to the Complaint is a purported 3-Day Notice addressed to the Defendant and signed by the Plaintiff. The document is undated, though it states "You are hereby notified that you are indebted to me in the sum of $3,550.00. . .and that I demand payment of the rent or possession of the premises within three (3) days. . .from the date of delivery of this notice, to-wit: on or before the 19 day of May, 2021."

5. Of note, the Notice also appears to include a hand-written note, presumably from the Plaintiff, which appears to state "Threaten my life to shoot me. In fear of my life."

6. No other information is provided to clarify what grounds constitute Defendant's material failure to comply with F.S. 82.52 or the terms of the rental agreement, nor does the Plaintiff attach a copy of the subject rental agreement to the Complaint.

7. On or about June 1, 2021, the Defendant deposited the amount of $1,632.02, plus Clerk's fees, into the Court Registry.

8. On or about June 7, 2021, the Plaintiff filed documents with the Court indicating the Defendant vacated the premises, though the Plaintiff did not dismiss the eviction action at that time.

9. Defendant's Amended Motion to Dismiss was subsequently filed on or about June 23, 2021, indicating that Defendant vacated the premises on June 3, 2021, requesting dismissal of this action, and requesting entitlement to attorney's fees pursuant to F.S. 57.105(5).

10. Defendant's Motion for Claim to Rents Deposited into the Court's Registry was filed on or about June 23, 2021 as well, indicating that the monies previously deposited into the Court Registry should be disbursed to Defendant due to Plaintiff's failure to maintain the subject premises, effectively rendering the premises uninhabitable. The Motion states that Plaintiff's failure to maintain the premises has allowed wild animals, including raccoons and opossums to enter the home through various holes and cracks throughout the residence, resulting in Defendant's forced vacating of the premises. The Motion attaches a letter dated May 13, 2021 from Defendant to Plaintiff placing Plaintiff on notice of the issues regarding holes throughout the house, entry of wild animals, and Plaintiff's failure to take action to remedy the situation. The letter also places Plaintiff on notice that Defendant intends to withhold rent for the month of May 2021 until these issues are resolved.

11. At the July 21, 2021 hearing on Defendant's Amended Motion to Dismiss and Defendant's Motion for Claim to Rents Deposited into the Court's Registry, the Defendant presented testimony confirming the information contained in the Motions, including information that wild animals, including raccoons and opossums were entering the actual residence itself where the Defendant and her family resided, including bathrooms and bedrooms. The Defendant also confirmed that she and her family had previously vacated the premises.

ANALYSIS & OPINION

12. Florida Statute 83.51(1) addresses a landlord's obligation to maintain premises, and states:

> The landlord at all times during the tenancy shall:
>
> (a) Comply with the requirements of applicable building, housing, and health codes; or
>
> (b) Where there are no applicable building, housing, or health codes, maintain the roofs, windows, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair and capable of resisting normal forces and loads and the plumbing in reasonable working condition. The landlord, at commencement of the tenancy, must ensure that screens are installed in a reasonable condition. Thereafter, the landlord must repair damage to screens once annually, when necessary, until termination of the rental agreement.

13. Further, Florida Statute 83.60(1) states:

> (a) In an action by the landlord for possession of a dwelling unit based upon nonpayment of rent or in an action by the landlord under s. 83.55 seeking to recover unpaid rent, the tenant may defend upon the ground of a material noncompliance with s. 83.51(1). . .
>
> (b) The defense of material noncompliance with s. 83.51(1) may be raised by the tenant if 7 days have elapsed after the delivery of a written notice by the tenant to the landlord, specifying the noncompliance and indicating the intention of the tenant not to pay rent by reason thereof. Such notice by the tenant may be given to the landlord. . .A material noncompliance with s. 83.51(1) by the landlord is a complete defense to an action for possession based upon nonpayment of rent, and, upon hearing, the court or the jury, as the case may be, shall determine the amount, if any, by which the rent is to be reduced to reflect the diminution in value of the dwelling until during the period of noncompliance. . .

14. Additionally, if the landlord's failure to comply renders the dwelling unit uninhabitable and the tenant vacates, the tenant shall not be liable for rent during the period the dwelling unit remains uninhabitable. *Ralston, Inc. v. Miller,* 357 So.2d 1066 (Fla. 3d DCA 1978); *Berwick v. Kleinginna Investment Corp.,* 143 So.2d 684 (Fla. 3d DCA 1962).

15. Based on the above referenced evidence and testimony, this Court finds that Plaintiff was in material noncompliance with F.S. 83.51(1) due to the landlord's failure to maintain the premises in good repair, resulting in the entry of wild animals into the subject residence.

16. Further, based on the letter presented dated May 13, 2021 and on the testimony provided by Defendant at hearing, this Court finds the Defendant complied with the Florida Statutes in providing proper notice to Plaintiff of landlord's material noncompliance and tenant's intention to withhold rent.

17. Based on the evidence and testimony provided regarding the condition of the subject premises, including the regular entry of wild animals into the residence where Defendant and her family were residing, and Plaintiff's knowledge of this and failure to remedy the issue, this Court finds that Plaintiff's failure to comply with F.S. 83.51(1) rendered the subject premises completely uninhabitable, thus relieving Defendant of the requirement for payment of rent during the time period at issue in this case.

18. Based on the foregoing information, the instant case should not have been filed by the Plaintiff. Further, once Plaintiff had knowledge that Defendant vacated the property, Plaintiff should have acted promptly to dismiss this action.

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

1. The Defendant's Amended Motion to Dismiss is hereby **GRANTED**. The Defendant is entitled to recovery of reasonable attorney's fees pursuant to F.S. 57.105(7). This case is **DISMISSED** with the Court reserving jurisdiction to address the issue as to amount of reasonable attorney's fees.

2. The Defendant's Motion for Claim to Rents Deposited into the Court's Registry is hereby **GRANTED** and the Clerk is directed to disburse the monies presently held in the Court's Registry in relation to this case to the Defendant.

* * *

Volume 30, Number 2
June 30, 2022
Cite as 30 Fla. L. Weekly Supp. ____

MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Judge may attend and speak about their candidacy at partisan political function when judge has no announced political opponent

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE (Elections Subcommittee). Opinion Number: 2022-01 Elections. Date of Issue: March 25, 2022.

ISSUES

1. May a judge, who will be a candidate for election in 2022, attend a partisan political function to speak about the judge's candidacy when the judge currently has no announced opponent?

ANSWER: Yes.

FACTS

The inquiring judge will be standing for election in 2022. As of the date of the judge's inquiry no opponent has announced. The judge has been invited to speak at the regular meeting of a local Republican Executive Committee. There is no reason to conclude that the meeting qualifies as a "social function" as has been prohibited by Florida JEAC Op. 2000-26 [8 Fla. L. Weekly Supp. 56a]. *See also* Op. 2002-08 [8 Fla. L. Weekly Supp. 56a] regarding events described as a "meet and greet." According to the inquiry, the judge has specifically been asked to speak about the judge's candidacy. It is our understanding that the meeting is *not* billed as a candidate's forum *per se.*

DISCUSSION

We begin our analysis with Canon 7C(3) of the Code of Judicial Conduct, which permits judicial candidates to appear at "a political party function" to speak on behalf of their candidacies.[1] The function must not be a fundraiser, which this one apparently is not. Among other things the candidate must not (a) reveal his or her affiliation with any party, (b) suggest any connection with any other candidate (*i.e.,* suggest that the candidate is part of a slate), or (c) express a position on any political issue.

The Committee is confident the inquiring judge has no intention of violating these restrictions. Instead, the inquiry is directed to a fairly narrow issue. Before a judicial candidate may accept such an engagement, the invitation to speak "must include the other candidates, *if any,* for that office." As noted, there are no announced opponents. Thus, the dispositive question is whether an *unopposed* judicial candidate may appear at such events.

Three considerations lead to our conclusion that the judge may attend. The first is the plain language of the rule, specifically the words "if any," which acknowledges the fact that a judicial candidate may not be opposed and yet does not expressly forbid such candidates from attending. Second, an opponent can emerge at any time prior to the deadline for qualifying for placement on the ballot. That date will not occur until after the function this judge is considering attending. The fact that no one has *as yet* announced against the inquiring judge does not mean it will not happen. The judge has no control over the timing of such events and therefore should be permitted to advance the judge's candidacy. Third and finally, in Fla. JEAC Op. 2000-12 [7 Fla. L. Weekly Supp. 815a], this Committee specifically concluded (with two dissents) that unopposed candidates can attend these functions and reaffirmed that conclusion in Fla. JEAC Op. 2004-11 [11 Fla. L. Weekly Supp. 378a].[2]

However, the judge is urged to exercise caution to ensure the appearance will not be reasonably perceived as that political organization's endorsement. This can happen, for example, when the organization has engaged in the selective invitation of candidates for public office to only those it endorses. Or if the judge is invited more than one time to address the political organization despite having no opponent.

REFERENCES

Canon 7C(3), Florida Code of Judicial Conduct
Florida Judicial Ethics Advisory Committee Opinions 2000-12, 2000-26, 2002-08, and 2004-11

[1]The Code also permits speaking on "the law, the improvement of the legal system, [and] the administration of justice," but as noted the invitation considered in this opinion is specifically related to the upcoming judicial election.

[2]Consistent with the Committee's advice in Op. 2004-11, we suggest that the judicial candidate carefully review Canon 7 of the Code of Judicial Conduct, sections 105.071 and 105.09, Florida Statutes, and *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) [28 Fla. L. Weekly S97a], before attending the local political party executive committee meeting.

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—Non-profit organizations—Judge may serve on boards of homeless shelters that serve youth and adults where services provided by shelters contribute to improvement of the law, legal system, and the administration of justice

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-02. Date of Issue: March 25, 2022.

ISSUE

May the inquiring judge volunteer or if asked agree to serve as a member of two separate charitable organizations that serve people with various needs, specifically MB a homeless shelter for youth and CH a homeless shelter for adults?

ANSWER: Yes, as to both charities.

FACTS

The inquiring judge currently assigned to a division that is hybrid in nature. The judge presides over civil domestic cases, criminal cases in general, and a specialty criminal court division dedicated to addressing criminal issues related to the homeless population. The inquiring judge has not been asked to join the boards of either of the organization, but has been asked if the judge has interest in serving. The judge would like to be of service. Neither the CH nor MB has any direct connection to the judicial proceedings conducted by the inquiring judge. However, defendants in the judge's division who are homeless do use their services.

MB—a homeless shelter for youth:

Its website indicates that MB's mission is "to develop strong and confident youth reaching their full potential." MB provides a panoply of services designed to assist the needs of children and their families in conflict resolution, reducing high-risk behaviors, addressing chronic runaways, abuse, abandonment, and truancy. The list is not exhaustive. MB also operates an Emergency Shelter program that helps youth return home or enter foster care placement. MB contracts with the Florida Department of Juvenile Justice Office of Prevention and Victim services to assist children and families in need of services. MB also provides services for runaways through its runaway and homeless program. Judges use MB as a resource to provide shelter to runaways and other children with cases pending in the courts. MB has onsite education with certified public school teachers, mental health counseling, substance abuse prevention services and health-care coordination with access to medical treatment.

CH—a homeless shelter for adults:

CH's stated aim is to "improve the quality of life of those who are vulnerable and homeless . . .through the provision of a continuum of housing and supportive services." It provides emergency assistance with food, clothing and shelter, job training and placement, abuse

treatment and aftercare, healthcare access and health maintenance and transitional and permanent housing. CH has collaborated with the court system to provide pre-arrest and post-arrest jail diversion. There is cross-system collaboration among community stakeholders including: the State Attorney's Office, the Public Defender's Office, the Department of Corrections and Rehabilitation, the Florida Department of Children and Families, the Social Security Administration, public and private community mental health providers, local hospital's public health trust, law enforcement agencies, family members, and mental health consumers. The CH website states the long-term benefits have resulted in "reduced demand for costly acute care services in jails, prisons, forensic mental health treatment facilities, emergency rooms, and other crisis settings; decreased crime and improved public safety; improved public health; decreased injuries to law enforcement officers and people with mental illnesses; and decreased rates of chronic homelessness. . . . Most importantly, the CMHP [Criminal Mental Health Project] is helping to close the revolving door which results in the devastation of families and the community, the breakdown of the criminal justice system, and wasteful government spending."

DISCUSSION:

The Commentary to Canon 4B denotes that a "judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including . . . the improvement of criminal and juvenile justice, and the improvement of justice in the areas of civil, criminal, family, domestic violence, juvenile delinquency, [and] juvenile dependency[.]" Canon 4D encourages a judge to serve as a member, officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice, subject to certain limitations and other requirements of the Code.

Both MB and CH, contribute to the administration of justice and the improvement of the law though the many services they provide. Based upon the information we have been provided we believe it is permissible for the inquiring judge, if asked, serving on the board of either organization. We caution, however, that any extra judicial activities must be conducted in a way that does not cast reasonable doubt on the judge's capacity to act impartially as a judge; undermine the judge's independence, integrity, or impartiality; demean the judicial office; interfere with the proper performance of judicial duties; lead to frequent disqualification of the judge; or appear to a reasonable person to be coercive. See Canon 4A(1)-(6).

REFERENCES

Fla. Code Jud. Conduct, Canons 4A (1)-(6), 4B, and 4D

* * *

Judges—Judicial Ethics Advisory Committee—Memberships, organizations and avocational activities—A judge who presides over criminal cases may make an informative presentation about the criminal justice system to doctors and investigators of local medical examiner's office

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-03. Date of Issue: March 30, 2022.

ISSUES

Whether a judge who presides over criminal cases may make a presentation about the criminal justice system, including on courtroom procedures and etiquette, to doctors and investigators at the local Medical Examiner's office.

ANSWER: Yes.

FACTS

The inquiring judge informs us that the local Medical Examiner's office has hired many new people since the COVID-19 outbreak. The judge, who presides over criminal cases, asks whether it is permissible to speak to members of that office on the subjects enumerated above. The judge describes the subject of any such talks as "basic information."

DISCUSSION

Prior to posing this inquiry the judge reviewed Fla. JEAC Opinions 2005-11 [12 Fla. L. Weekly Supp. 1197b] and 2018-01. Both are on point. The 2005 opinion addressed whether the inquiring judge could teach in the police academy at a local community college. The Committee responded with a "qualified yes." Canon 4B of the Florida Code of Judicial Conduct permits—even encourages—judges to speak publicly, including teaching, about "the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government, subject to the requirements of this code." A majority concluded that the judge could do so, but cautioned the judge against saying or doing anything that could cast reasonable doubt on the judge's ability to remain impartial. The identical result, including cautionary words, was reached in Op. 2018-01, wherein the inquiring judge was considering presiding over a mock trial designed to educate officers about courtroom procedures.

The Committee agrees with the inquiring judge that these prior opinions depict situations analogous to what this judge wishes to do. While police officers typically, if not always, testify on behalf of the prosecution, the public interest is nevertheless served by their receiving proper education and training, and the legal system benefits when they better understand the intricacies of the court system, including such matters as ethical constraints that apply to all witnesses. This does not equate to legal *advice,* which judges cannot give. Medical examiners often testify as well, in both criminal and civil cases. Given that they are unlikely to have a legal on top of a medical education, the legal system similarly benefits when they receive guidance about how the courts operate and how to conduct themselves before judges and juries.

Similarly, in Fla. JEAC Op. 2008-21 [15 Fla. L. Weekly Supp. 1238b] the Committee approved of a judge teaching "law and trial skills" at the annual Dependency Summit sponsored by the Florida Department of Children and Family Services, despite the fact that child dependency is a subject that frequently comes before trial judges. We cautioned only that "the judge should ensure that the course is intended to provide an educational benefit for all attendees" and should "not be designed or taught in a manner that would appear to constitute a training session for DCF attorneys," which "would tend to cast reasonable doubt on the judge's capacity to act impartially."

We also deem it appropriate to refer to a more recent opinion, Fla. JEAC Op. 2020-03 [27 Fla. L. Weekly Supp. 1057a]. Here the inquiring judge was asked to participate in a panel discussion of human trafficking. Contained within that opinion is an excerpt from Fla. JEAC Op. 2019-02 [6 Fla. L. Weekly Supp. 919b], specifically, a laundry list of eight factors that a judge should take into account before agreeing to participate in any extracurricular activity. We also emphasized that a judge should not "go[ ] beyond providing unbiased information to make comments as to how the judge might rule if faced with a human trafficking case."[1]

REFERENCES

Florida Code of Judicial Conduct, Canon 4B

Florida Judicial Advisory Committee Opinions 2005-11, 2008-21, 2018-01, 2019-02, and 2020-03

[1]We did *not* conclude that the judge should avoid serving on the panel just because other participants, such as legislators, prosecutors, or law enforcement personnel, might have an "approach to the issue [that] might be seen as other than totally neutral," so long as the judge "did not depart from strictly neutral approaches to the subject matter."

* * *