Volume 30, Number 3, July 29, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 135-187

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.

- **FIREARMS—BACKGROUND CHECKS. Plaintiffs filed an action against the Florida Department of Law Enforcement seeking damages, injunctive relief, and declaratory relief based on their contention that certain FDLE procedures with respect to background checks performed before the transfer of a firearm by a federal firearms licensee are outside the scope of FDLE's authority, as codified in Sections 790.065 and 790.0655, Florida Statutes, and are therefore preempted under section 790.33. The Court granted a motion for judgment on the pleadings in favor of the FDLE, finding that the complaint was tantamount to a rule challenge and that plaintiffs had not exhausted their administrative remedies. Section 790.33, by which the legislature preempted the field of firearm regulation, was not intended to strike the requirements of the Administrative Procedures Act or to prohibit the FDLE from enacting regulations in the field. Further, plaintiffs' claims did not fall within the narrow exceptions to the exhaustion doctrine. The plaintiffs did not challenge the constitutionality of a statute or claim that the FDLE did not have authority to conduct background checks prior to the transfer of firearms, the agency did not act without colorable authority, and available administrative remedies are not inadequate.** *PRETZER v. SWEARINGEN. Circuit Court, Second Judicial Circuit in and for Leon County. Filed May 17, 2022. Full Text at Circuit Courts-Original, page 141a.*

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FLW SUPPLEMENT

CASES REPORTED.

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

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

TABLE OF STATUTES CONSTRUED (continued)

* * *

TABLE OF CASES TREATED

Case Treated / In Opinion At

TABLE OF CASES TREATED (continued)

* * *

REHEARINGS, CLARIFICATIONS, CORRECTIONS, WITHDRAWN OPINIONS

* * *

Volume 30, Number 3
July 29, 2022
Cite as 30 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Commercial license—Suspension—Refusal to submit to breath test—Invalidation of suspension of licensee's commercial license under section 322.64 because licensee was was not read implied consent warning specific to commercial license did not preclude hearing officer from affirming suspension of licensee's regular driving privilege under section 322.2615 for refusing to submit to breath test—Competent substantial evidence supported finding that trooper had probable cause for arrest where, in addition to observing that licensee had difficulty locating vehicle registration, trooper observed that licensee was speeding, had watery bloodshot eyes, slurred speech and odor of alcohol, and performed poorly on field sobriety exercises—Petition for writ of certiorari is denied

EDWIN TEJADA, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 5th Judicial Circuit (Appellate) in and for Marion County. Case No. 2021-CA-1955. April 13, 2022. Counsel: Elana J. Jones, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(STEVEN G. ROGERS, J.) THIS CAUSE comes before the Court on Petitioner's Amended Petition for Writ of Certiorari, filed on November 11, 2021. Respondent filed a Response to Petition for Writ of Certiorari on January 26, 2022. Petitioner filed both a Reply to Department's Response to Petition for Writ of Certiorari and a Motion for Oral Argument on February 7, 2022. Having considered the same, reviewed the court file, and being otherwise duly advised in the premises, the Court finds as follows:

Factual Background

On August 7, 2021, Trooper Cody Ball observed Petitioner's vehicle travelling at a high rate of speed and, as a result, conducted a traffic stop. Trooper Ball detected signs Petitioner was under the influence of alcohol and had Petitioner perform a series of Field Sobriety Exercises ("FSE") at which point Trooper Ball observed additional indicators of impairment. Trooper Ball placed Petitioner under arrest for driving under the influence of alcohol. Upon request, Petitioner refused to provide a breath sample. Trooper Ball read for Petitioner the Implied Consent pursuant to *Florida Statute* §316.1932. Petitioner still refused to provide a breath sample. On behalf of the Department, Trooper Ball administratively suspended Petitioner's driver license and Petitioner requested a formal review of the administrative suspension. A formal review hearing was held on September 10, 2021.

Petitioner seeks review of the Administrative Order entered by the Department of Highway Safety and Motor Vehicles ("the Department") on September 24, 2021, sustaining the suspension of Petitioner's driver's license for refusal to submit to a breath, blood, or urine test under *Florida Statute* §322.2615, and setting aside the disqualification of Petitioner's driving privilege under *Florida Statute* §322.64.

Petitioner asks this Court to grant the Amended Petition for Writ of Certiorari and enter an order quashing the order suspending Petitioner's driver license that was entered effective August 7, 2021, and reinstating the Petitioner's driving privilege.

Jurisdiction

This Court has jurisdiction to consider this Petition pursuant to Rule 9.030(c)(3), Florida Rules of Appellate Procedure and *Florida Statute* §322.31 (2021).

Standard of Review

In reviewing an administrative agency decision, the Court must consider: (1) whether procedural due process was accorded to the parties; (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)). The Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *See Dep't. of Highway Safety and Motor Vehicles v. Trimble,* 821 So. 2d 1084, 1085 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D807a].

Law and Analysis

Petitioner raises two issues in his Amended Petition for Writ of Certiorari: (1) the hearing officer departed from the essential requirements of law when he found that the administrative suspension of Petitioner's driver license could be sustained and (2) the hearing officer's finding that there existed probable cause for Petitioner's arrest was not supported by competent and substantial evidence.

I. Essential Elements of the Law

Petitioner contends the hearing officer failed to observe the essential requirements of the law by setting aside the disqualification of Petitioner's Class B commercial driver license ("CDL") under section *Florida Statute* §322.64 but upholding the suspension under *Florida Statute* §322.2615. Specifically, Petitioner argues that an individual may possess only one valid driver license at a time. Therefore, because Petitioner possessed a Class B CDL the only driving privilege that could be suspended or disqualified was the privilege afforded by the Class B CDL.

"[T]he departure from the essential requirements of law necessary for the issuance of a writ of certiorari is something more than a simple legal error." *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 889 (Fla. 2003) [28 Fla. L. Weekly S287a] (citing *Ivey v. Allstate Ins. Co.,* 774 So. 2d 679, 682 (Fla. 2000) [25 Fla. L. Weekly S1103a]). "A decision made according to the form of the law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as applied to the facts, is not an illegal or irregular act or proceeding remedial by certiorari." *Haines City Community Development v. Heggs,* 658 So. 2d 523, 525 (Fla.1995) [20 Fla. L. Weekly S318a]. Certiorari is appropriate "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id.* The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs,* 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

Driver licenses are governed by Chapter 322, Florida Statutes. A driver license is defined as "a certificate that, subject to all other requirements of law, authorizes an individual to drive a motor vehicle and denotes an operator's license as defined in 49 U.S.C. s. 30301." *Florida Statute* §322.01(17). Moreover, "[a] person may not have more than one valid driver license at any time." *Florida Statute* §322.03(1)(b). Class B is the second broadest classification of driver license permitting the person who possesses a valid Class B CDL to "drive any class of motor vehicle, other than the type of motor vehicle for which a Class A driver license is required, within this state." *Florida Statute* §322.54(2)(b). The narrowest classification is a Class E license which permits the holder to "drive any type of motor vehicle, other than the type of motor vehicle for which a Class A, Class B, or Class C driver license is required, within this state."

If a Class E license is suspended for refusal to submit to a blood-alcohol test the person whose license was suspended may seek formal

review of the suspension before a hearing officer. *See*, *Florida Statute* §322.2615. During the formal review hearing, the scope of the hearing officer's review is limited to the following:

> 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.

Florida Statute §322.2615. The procedure for suspension of a Class B license is set forth in *Florida Statute* §322.64. The person whose license was suspended may request a formal review. The scope of review for the hearing officer as to the first and second prongs is substantially similar. However, the language of the third prong reads as follows:

> Whether the person was told that if he or she refused to submit to such test he or she would be disqualified from operating a commercial motor vehicle for a period of 1 year or, if previously disqualified under this section, permanently.

Florida Statute §322.64(7)(b)(3). Furthermore, section 322.64(15) states "[t]his section does not preclude the suspension of the driving privilege pursuant to s. 322.2615. The driving privilege of a person who has been disqualified from operating a commercial motor vehicle also may be suspended for a violation of s. 316.193."

The order upholding the suspension of Petitioner's driving privilege found, and it is not disputed here, that Petitioner was read implied consent pursuant to *Florida Statute* §322.2615, which applies to the driving privilege more generally. However, there is nothing in the record to indicate that Petitioner was read implied consent pursuant to *Florida Statute* §322.64 which is specific to CDL holders. Therefore, the hearing officer set aside the disqualification. Here, Petitioner's argument demonstrates disagreement with the hearing officer's interpretation of the law rather than a violation of a clearly established principle of law that resulted in a miscarriage of justice. On certiorari review, such an argument is without merit.

II. Competent and Substantial Evidence

Petitioner next argues the evidence does not establish probable cause for an arrest and the hearing officer's finding that Petitioner was lawfully arrested is not based on competent substantial evidence. Specifically, Petitioner asserts that "there is no basis in the evidence to find that the inability to immediately locate the registration was an indicator on impairment."

Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). "A circuit court is limited to determining whether the administrative findings and judgment are supported by competent substantial evidence. Whether the record also contains competent substantial evidence that would support some other result is irrelevant." *Clay Cty. v. Kendale Land Dev., Inc.,* 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] (citations omitted).

Here, the hearing officer below did not base the finding that Trooper Ball had probable cause to believe that Petitioner was driving under the influence of alcohol solely on the claim that Petitioner had a difficult time finding the registration. Rather, the order states the finding was based on Petitioner's speeding, watery and bloodshot eyes, slurred speech, the odor of alcohol on his breath, and indicators of impairment during the FSEs, (among other things).

Petitioner further argues the DVD recording contradicts Trooper Ball's claim that Petitioner's speech was slurred. Petitioner relies on *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles,* 209 So.3d 1165 (Fla. 2017) [42 Fla. L. Weekly S85a], in which the Supreme Court of Florida held that in the limited context of section 322.2615 first-tier review of a DUI license suspension, a circuit court applies the correct law by rejecting officer testimony as being competent, substantial evidence when that testimony is contrary to and refuted by objective real-time video evidence. Upon review, the testimony of Trooper Ball is not refuted by the video evidence. Accordingly, the Court finds the hearing officer's decision is supported by competent and substantial evidence.

WHEREFORE based on the foregoing, it is therefore ORDERED as follows:

1. Petitioner's Amended Petition for Writ of Certiorari is **DENIED**.

2. Petitioner's Motion for Oral Argument is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Appeals—Certiorari—Mootness—Where term of license suspension expired during pendency of petition for writ of certiorari, issue of validity of suspension is moot—Petition dismissed

ROBERT CORNELIO, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2021-CA-000490. April 25, 2022. Counsel: Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI AS MOOT

THIS CAUSE came before the Court on the Petitioner's Response to Order to Show Cause and the Department's Response to Order to Show Cause, et al., both filed March 25, 2022. Upon consideration of the same, the Court finds that the Petitioner's driver's license suspension, effective December 8, 2020, expired on June 8, 2021, such that the validity of the suspension is moot. As recently held by this Court in *Altman v. Dep't of Highway Safety & Motor Vehicles,* Case No. 2021-CA-755 (November 29, 2021), *rehearing denied,* the Court is bound by the holding in *McLaughlin v. Dep't of Highway Safety & Motor Vehicles,* 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a], which concluded that because the suspension has expired, the issue of the validity of the suspension of the petitioner's driver license is moot. The Court finds that the Florida Supreme Court, on December 9, 2021, declined to accept jurisdiction to resolve the inter-district conflict between *McLaughlin* and other cases on this matter. *See Cordaro v. Dep't of Highway Safety & Motor Vehicles,* 2021 WL 5853778 (Fla. Dec. 9, 2021).

Even if the issues raised by the Petitioner were not moot, the Court could not grant the Petitioner's requested relief to quash the Department's Final Order with directions to reinstate the Petitioner's driving privileges, and remove the suspension from the Petitioner's driving record. *See Broward County v. G.B.V. Int'l, Ltd.,* 787 So. 2d 838, 844 (Fla. 2001) [26 Fla. L. Weekly S463a] (explaining that when an order is quashed, it leaves the controversy pending before the lower tribunal as if no order or judgment had been entered).

Therefore, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DISMISSED**. (DANIEL DISKEY, SUSAN BARTHLE, and LAURALEE WESTINE, JJ.)

* * *

Licensing—Driver's license—Suspension—Appeals—Certiorari—Mootness—Where term of license suspension expired during pendency of petition for writ of certiorari, issue of validity of suspension is moot—Petition dismissed

LAURA TYLER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2021-CA-000068. April 25, 2022. Counsel: Roberto R. Castillo, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI AS MOOT

THIS CAUSE came before the Court on the Petitioner's Response to Order to Show Cause and the Department's Response to Order to Show Cause, et al., both filed March 25, 2022. Upon consideration of the same, the Court finds that the Petitioner's driver's license suspension, effective October 25, 2020, expired on October 25, 2021, such that the validity of the suspension is moot. As recently held by this Court in *Altman v. Dep't of Highway Safety & Motor Vehicles,* Case No. 2021-CA-755 (November 29, 2021), *rehearing denied,* the Court is bound by the holding in *McLaughlin v. Dep't of Highway Safety & Motor Vehicles,* 128 So. 3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a], which concluded that because the suspension has expired, the issue of the validity of the suspension of the petitioner's driver license is moot. The Court finds that the Florida Supreme Court, on December 9, 2021, declined to accept jurisdiction to resolve the inter-district conflict between *McLaughlin* and other cases on this matter. *See Cordaro v. Dep't of Highway Safety & Motor Vehicles,* 2021 WL 5853778 (Fla. Dec. 9, 2021).

Even if the issues raised by the Petitioner were not moot, the Court could not grant the Petitioner's requested relief to quash the Department's Final Order with directions to remove the suspension from the Petitioner's driving record. *See Broward County v. G. B. V. Int'l, Ltd.,* 787 So. 2d 838, 844 (Fla. 2001) [26 Fla. L. Weekly S463a] (explaining that when an order is quashed, it leaves the controversy pending before the lower tribunal as if no order or judgment had been entered).

Therefore, it is hereby

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is hereby **DISMISSED**. (DANIEL DISKEY, SUSAN BARTHLE, and LAURALEE WESTINE, JJ.)

* * *

VALENTINA DJOKIC, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-61-AP-01. April 27, 2022. On a Petition for Writ of Certiorari From a Final Order of a Hearing Officer, Florida Department of Highway Safety and Motor Vehicles. Counsel: Paul F. Gerson, for Petitioner. Elana J. Jones, Assistant General Counsel, FDHSMV, for Respondent.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

OPINION

(PER CURIAM.) The Petition for Writ of Certiorari is GRANTED and the Final Order of the Hearing Officer is QUASHED. *See Martinez Gonzalez v. State,* 29 Fla. L. Weekly Supp. 785a (Fla. 11th Cir. App. Feb. 14, 2022), citing *Barfield v. Dept. of State, Division of Licensing,* 568 So.2d 493, 494 (Fla. 1st DCA 1990) (Department's motion to dismiss appeal as moot treated "as in the nature of a confession of error"). (TRAWICK, WALSH and SANTOVENIA, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath alcohol test—Breath volume—Licensee who purposely avoided submitting valid breath samples refused to submit to breath test

JOSE EDWARDO VELAZQUEZ, Petitioner, v. STATE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, General Civil Division. Case No. 21-CA-9340, Division I. April 21, 2022.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PAUL L. HUEY, J.) The petition is DENIED. *Dept. of Highway Safety and Motor Vehicles v. Cherry,* 91 So. 3d 849, 858 (Fla. 5th DCA 2011) [37 Fla. L. Weekly D1562a] (stating that the failure to provide breath samples constitutes a refusal to submit to the breath test where Florida law is concerned with whether [driver] provided the required number of valid breath samples rather than whether the test was complete, *citing* Fla. Admin. Code R. 11D-8.002(12)); *Dep't of Highway Safety & Motor Vehicles v. Rose*, 105 So. 3d 22, 24 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D2574a] (circuit court is not permitted to reweigh evidence or substitute its judgment for that of the hearing officer).

* * *

COLE PROPERTIES & LAND, LLC, a Florida limited liability company, Petitioner, v. CITY OF FORT LAUDERDALE, a political subdivision of the state of Florida, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE 22-002584 (AW). May 13, 2022.

FINAL ORDER OF DISMISSAL

(JOHN BOWMAN, J.) THIS CAUSE having come before the Court on the parties stipulation for entry of a Final Order of Dismissal, and the Court being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED that the above-styled action be and the same is hereby dismissed, with each party to bear their own costs and attorneys' fees and with prejudice to the Petitioner.

* * *

Municipal corporations—Police officers—Pensions—Change in beneficiary—Pension board erred in denying retired officer's application to designate new wife as his pension beneficiary on ground that officer had already changed his named beneficiary two times and law did not allow for third change—Section 181.161 states that retired officer may change designated beneficiary up to two times without board approval but does not expressly bar any subsequent change of beneficiary

JOHN ALLEN CHIDSEY, Petitioner, v. THE BOARD OF TRUSTEES, HOLLYWOOD POLICE RETIREMENT SYSTEM, Respondents. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21-022257 (AW). June 1, 2022. Petition for Writ of Certiorari from a decision by the Board of Trustees of the Hollywood Police Retirement System. Counsel: Kendall B. Coffey, Coffey Burlington, P.L., Miami, for Petitioner. Robert D. Klausner, Klausner, Kaufman, Jensen & Levinson, P.A., Plantation, for Respondent.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition, Appendix, Response, Reply, Notice of Supplemental Authority & Response, and applicable law, this Court dispenses with oral argument and the Petition for Writ of Certiorari is hereby **GRANTED** and the Final Administrative Order of The Board of Trustees of the Hollywood Police Retirement System, dated November 22, 2021 is **QUASHED**, for the reasons discussed below.

Statement of the Case

Petitioner is a retired City of Hollywood Police Officer currently receiving pension benefits. Petitioner applied to designate his new wife as his pension beneficiary. The Board of Trustees ("Board") declined Petitioner's application finding that Petitioner had changed his named beneficiary on two prior occasions and considering a third change would be a violation of Florida Statutes.

Standard of Review

On a petition for writ of certiorari seeking review the court is limited to a three-part standard. *See City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. The court must review the record to determine whether: (1) procedural due process is accorded; (2) essential requirements of the law have been observed; and (3) administrative findings and judgment are supported by competent, substantial evidence. *Id.* If the Court determines that any one of the three requirements was not met, the Court can only quash the order below but not enter an order to the contrary. *See Nat'l Adver. Co. v. Broward Cnty.,* 491 So. 2d 1262 (Fla. 4th DCA 1986) ("A court's certiorari review power does not extend to directing that any particular action be taken but is limited to denying the writ of certiorari or quashing the order reviewed.").

Here, the Petitioner did not allege violations of procedural due process or that the Board's Final Administrative Order was not supported by competent, substantial evidence. Therefore, this Court's review only addresses whether the Board departed from the essential requirements of the law.

Discussion

The departure from the essential requirements of the law must constitute a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Allstate Ins. Co. v. Kaklamanos,* 843 So. 2d 885, 889 (Fla. 2003) [28 Fla. L. Weekly S287a]. ". . .'[C]learly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review." *Id.* at 890.

Florida Statute Sections 185.161(1)(b) and 185.161(1)(c) are pertinent to this proceeding and read:

> **§185.161(1)(b)** The police officer upon electing any option of this section must designate the joint annuitant or beneficiary to receive the benefit, if any, payable under the plan in the event of the police officer's death, and may change such designation but any such change shall be deemed a new election and is subject to approval by the pension committee. Such designation must name a joint annuitant or one or more primary beneficiaries where applicable. If a police officer has elected an option with a joint annuitant or beneficiary and his or her retirement income benefits have commenced, he or she may change the designated joint annuitant or beneficiary but only if the board of trustees consents to such change and if the joint annuitant last designated by the police officer is alive when he or she files with the board of trustees a request for such change. The consent of a police officer's joint annuitant or beneficiary to any such change is not required. The board of trustees may request evidence of the good health of the joint annuitant being removed, and the amount of the retirement income payable to the police officer upon the designation of a new joint annuitant shall be actuarially redetermined taking into account the ages and gender of the former joint annuitant, the new joint annuitant, and the police officer. Each designation must be made in writing on a form prepared by the board of trustees and filed with the board of trustees. If no designated beneficiary survives the police officer, such benefits as are payable in the event of the death of the police officer subsequent to his or her retirement shall be paid as provided in s. *185.3162.*
>
> **§185.161(1)(c)** Notwithstanding paragraph (b), a retired police officer may change his or her designation of joint annuitant or beneficiary up to two times as provided in s. *185.341* without the approval of the board of trustees or the current joint annuitant or beneficiary. The retiree need not provide proof of the good health of the joint annuitant or beneficiary being removed, and the joint annuitant or beneficiary being removed need not be living.

§§185.161(1)(b), 185.161(1)(c), Fla. Stat.

As mentioned previously, the Board's position was that they were not authorized to consider Petitioner's third request to change Petitioner's pension beneficiary as Florida law limits a retired police officer to only two beneficiary changes. As Petitioner had previously made two beneficiaries changes, the Board determined that it was barred from considering a third request. Florida Statutes Chapter 181 and more specifically, Florida Statutes section 181.161 does not definitively and expressly limit a change of beneficiary to two elections. The clear language of Florida Statues section 181.161(1)(c) states that a retired police officer may change a beneficiary up to two times ***without board.***. This statute does not expressly bar any subsequent change of beneficiary. The language in Florida Statues section 181.161(1)(c) is clear as to what is included, albeit incomplete and void of direction regarding situations not expressly stated. This Court must take the law as written and should not create law. Enacting and drafting the Florida Statutes is the job of the legislature, not the judiciary. For this Court to rule otherwise would require the Court to add additional language to the Florida Statutes that is not presently there. Thus, in adding additional requirements, parameters and restrictions not expressly written in section 181.161 the Board has departed from the essential requirements of the law by denying Petitioner's third request to change beneficiary without due consideration. Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is **GRANTED** and the Final Administrative Order of The Board of Trustees of the Hollywood Police Retirement System, dated November 22, 2021, is **QUASHED** and **REMANDED** back to The Board of Trustees of the Hollywood Police Retirement System to make a decision on the merits as to Petitioner's third change of beneficiary request. (BOWMAN, FAHNESTOCK, and MOON, JJ., concur.)

* * *

Licensing—Driver's license—Suspension—Appeals—Petition for writ of certiorari challenging license suspension is dismissed as untimely where petition was not filed within 30 days of date of suspension—First day after date of suspension is day one of thirty-day filing period, not day zero

CHRISTINA KEALOHILANI SCHLEMMER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 9th Judicial Circuit (Appellate) in and for Orange County. Case No. 2021-CA-009770-O. January 6, 2022. Counsel: Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

FINAL ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI AND DIRECTING CLERK TO CLOSE CASE

(WOOTEN, J.) THIS MATTER came before the Court for consideration of the Petition for Writ of Certiorari, filed on September 23, 2021 (Petition);[1] the Court's Order to Show Cause, filed on October 29, 2021 (Show Cause Order); Petitioner's Response, filed on November 13, 2021; and Respondent's Reply, filed on November 17, 2021. Petitioner is seeking review of a final administrative order of driver's license suspension that was rendered on August 23, 2021. The

Court finds as follows:

Pursuant to Florida Rule of Appellate Procedure 9.100(c)(1), a petition for writ of certiorari must be filed within 30 days of the date of rendition of the order to be reviewed. The 30 day time limit set forth in Rule 9.100(c)(1) is jurisdictional. *See Penate v. State,* 967 So. 2d 364 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D2455a] (appellate court lacked jurisdiction over petition for writ of certiorari that was filed more than 30 days from the date of rendition of the opinion). As acknowledged by both Petitioner and Respondent, the suspension of Petitioner's Driver's License went into effect on August 23, 2021. As a result, the deadline to file the instant Petition was September 22, 2021. *See* Fla. R. Jud. Admin. 2.514(a)(1). Therefore, the instant Petition was filed beyond the 30 day deadline as it was filed on September 23, 2021.

Because the instant Petition appeared to be untimely filed, the Court in its Order to Show Cause directed Petitioner to show cause why the Petition should not be dismissed for lack of jurisdiction as untimely, given that the Petition appeared to have been filed on October 5, 2021. In the Response, Petitioner argues that her Petition should not be dismissed as untimely because it had been initially filed on September 23, 2021 and that September 23, 2021 was the appropriate deadline. The Court disagrees.

Florida Rule of Appellate Procedure 9.420(e) states that computation of time is governed by Fla. R. Jud. Amin. 2.514. The rule advises to "begin counting from the next day" after the rendition of the order. Fla. R. Jud. Admin. 2.514(a)(1)(A). Because the final order of suspension in question was rendered on Monday, August 23, 2021, the following day, Tuesday, August 24, 2021, was the first day of the thirty-day deadline and should be counted as day one. Petitioner instead counted August 24, 2021 as day zero, resulting in a miscalculation of the deadline. As stated above, the thirty-day deadline is jurisdictional and this Court lacks jurisdiction to entertain an untimely petition even if filed only one day late. *See Matheny v. Indian River Fire Rescue,* 174 So. 3d 1129 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D2240a].

Accordingly, Petitioner has failed to show good cause why her Petition should not be dismissed for lack of jurisdiction as untimely. The final administrative order of driver's license suspension was rendered on August 23, 2021. Since the instant Petition was not filed until September 23, 2021 at the earliest, it is untimely and this Court lacks jurisdiction to consider it on the merits. *See* Fla. R. App. P. 9.100(c)(1); *Penate,* 967 So. 2d at 364-65 (court lacked jurisdiction over petition for writ of certiorari filed more than 30 days from the date of rendition of order). Therefore, Court determines that the Petition must be dismissed.

Based on the foregoing, it is ORDERED AND ADJUDGED that the Petition for Writ of Certiorari is DISMISSED. The Clerk of the Court is directed to CLOSE this case forthwith. (LEBLANC and WHITE, JJ., concur.)

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[1]The Court notes that the docket indicates that the case was initiated on September 23, 2021. However, the docket lists October 5, 2021 as the filing date for the petition. Petitioner explains this discrepancy as an issue with the electronic filing which required a corrected version of the petition to be submitted.

* * *

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CIRCUIT COURTS—ORIGINAL

Administrative law—Florida Department of Law Enforcement—Firearms—Rules—Challenge—Exhaustion of administrative remedies—Complaint alleging that Florida Department of Law Enforcement rules, policies, and procedures with respect to background checks for purchase of firearms from a federal firearm licensee are outside of FDLE's statutorily delegated authority is rule challenge—Because plaintiffs have not pursued rule challenge through administrative process, failure to exhaust administrative remedies warrants final judgment in favor of FDLE—No merit to argument that plaintiffs were not required to exhaust administrative remedies because they challenge informal or unwritten FDLE policy and do not mention administrative rule by name—No merit to argument that section 790.33, by which legislature preempted field of firearm regulation, was intended to strike requirements of Administrative Procedures Act or to prohibit FDLE from enacting regulations in the field—Plaintiffs' claims do not fall within narrow exceptions to exhaustion doctrine where plaintiffs do not challenge constitutionality of statute or claim that FDLE does not have authority to conduct background checks prior to transfer of firearms, FDLE did not act without colorable authority, and available administrative remedy is not inadequate—Plaintiffs cannot circumvent administrative process by filing action for declaratory judgment challenging rule

CHRISTOPHER PRETZER, et al., Plaintiffs, v. RICK SWEARINGEN, individually and in his official capacity, and FLORIDA DEPARTMENT OF LAW ENFORCEMENT, Defendants. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2019 CA 1123. May 17, 2022. Angela C. Dempsey, Judge. Counsel: Eric J. Friday, Kingry & Friday, PLLC, Jacksonville; Noel H. Flasterstein, Law Offices of Noel H. Flasterstein, Boca Raton; and David S. Katz and James P. Phillips, Jr., Katz & Phillips, P.A., Lake Mary, for Plaintiffs. Jeffrey D. Slanker, Kristin C. Diot, Matthew J. Carson, Robert J. Sniffen, and Lisa B. Fountain, Sniffen & Spellman, P.A., Tallahassee, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE is before the Court on Defendants' Motion for Judgment on the Pleadings, filed January 31, 2022, and Plaintiff's Response in Opposition thereto filed on April 21, 2022. Upon notice, a hearing was held on April 25, 2022. Both parties were present. Thereafter, the Court permitted both parties to submit proposed orders further detailing their respective arguments. This Court having reviewed the parties' briefs and proposed orders, heard the argument of counsel, and otherwise being fully advised on the premises, it is

ORDERED and ADJUDGED Defendants' Motion for Judgment on the Pleadings is **GRANTED** for the reasons explained below.

THE PLEADINGS

1. Plaintiffs filed their Second Amended Complaint ("Complaint") against Defendants seeking damages, injunctive relief, and declaratory relief. Plaintiffs' Complaint alleges eight counts—six counts for relief under Section 790.33, Florida Statutes, and two counts for declaratory and injunctive relief.[1]

2. Plaintiffs contend that certain Florida Department of Law Enforcement ("FDLE") procedures with respect to background checks performed before the transfer of a firearm by a Federal Firearms Licensee ("FFL") are outside the scope of FDLE's authority, as codified within Sections 790.065 and 790.0655, Florida Statutes, and are therefore preempted under section 790.33, Florida Statutes. Plaintiffs allege some of FDLE's procedures have been formally adopted in Rule 11C-6.009, Florida Administrative Code and other procedures are unwritten and informal. Section 790.0655 was modified in March 2018 as part of the Marjory Stoneman Douglas High School Public Safety Act, which sought to "comprehensively address the crisis of gun violence." *See* Chapter 2018 - 3, Laws of Florida and *National Rifle Association of America, Inc. v. Swearingen,* 545 F. Supp.3d 1247 (N.D. Fla. 2021).

3. More specifically, Plaintiffs contend that "[b]y issuing a response other than Approved or Nonapproved . . . or Conditional Nonapproval with a unique number," "failing to issue a control number" relating to background checks conducted for the purpose of purchasing a firearm from an FFL, and by providing a "Decision Pending" response to an FFL, "Defendants promulgated or enacted a policy, rule or regulation without the authority to do so in direct contravention of Sec. 790.33, Fla. Stat." Comp. ¶¶ 74-78. Plaintiffs also allege that in failing to issue a "control number" for all prospective firearms purchases from an FFL, Defendants have "denied Plaintiffs the right to purchase a firearm," through indefinite delay. *Id.* ¶¶ 80-81.

4. Plaintiffs' Complaint does not allege that Plaintiffs have raised their claims in an administrative forum under Chapter 120, Florida Statues (also known as the Administrative Procedures Act, or "APA"), and therefore does not allege that Plaintiffs have exhausted all available administrative remedies.

LEGAL ANALYSIS

5. In all but name, Plaintiffs' complaint is a rule challenge. Plaintiffs have confirmed this by repeatedly emphasizing in their Response in Opposition and in their argument at the April 25, 2022 hearing, that their challenge is focused on FDLE's statutory authority, or lack thereof, to engage in the allegedly improper actions. Stated differently, Plaintiffs allege that FDLE's rules, policies, and procedures with respect to background checks are outside the scope of its statutorily delegated authority—a quintessential rule challenge.

6. Plaintiffs, admittedly, have not pursued their claims through the administrative process outlined in Chapter 120. Consequently, Plaintiffs have not exhausted all available administrative remedies. For this reason, Final Judgment in favor of Defendants is warranted.

Standard of Review

7. A motion for judgment on the pleadings is governed by the same legal standard as a motion to dismiss for failure to state a cause of action. Fla. R. Civ. P. 1.140(c); *Henao v. Pro. Shoe Repair, Inc.,* 929 So. 2d 723, 725 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D1463a]. Judgment on the pleadings is proper where the trial court lacks subject matter jurisdiction. *See, e.g.*, *Garcia-Roque v. Roque-Velasco,* 855 So. 2d 668 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D2109a] (affirming trial court order granting motion for judgment on the pleadings where the trial court lacked subject matter jurisdiction).

Plaintiff's Have Failed to Exhaust Available Administrative Remedies

A. FDLE

8. FDLE is a statewide law enforcement agency housed within the executive branch. Section 943.03, Fla. Stat. (2022). FDLE's mission is to "promote public safety and strengthen domestic security by providing services in partnership with local, state, and federal criminal justice agencies to prevent, investigate, and solve crimes while protecting Florida's citizens and visitors." *See* FDLE Statement of Agency Organization & Operation (updated October 2021), http://www.fdle.state.fl.us/About-Us/Documents/StatementofAgencyOrg.aspx.FDLE. In support of its mission, FDLE is required to "adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring powers or duties upon it." § 943.03(4), Fla. Stat. ("The department shall adopt rules . . .").

9. As it relates to Plaintiffs' claims, subject to narrow exceptions, FDLE has the statutory authority and duty to conduct background checks prior to the transfer of a firearm by an FFL. § 790.065(2), Fla. Stat. (2022) ("Upon receipt of a request for a criminal history record check, the Department of Law Enforcement shall, during the licensee's call or by return call . . ."). Specifically, in pertinent part, an FFL "may not sell or deliver from her or his inventory at her or his licensed premises any firearm to another person" until that FFL has "[r]equested, by means of a toll-free telephone call or other electronic means, the Department of Law Enforcement to conduct a check of the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request." *Id*. at § 790.33(1)(a)3. In addition, the Legislature has imposed a mandatory waiting period prior to the transfer of a firearm of "3 days, excluding weekends and legal holidays" or until "the completion of the records checks required under s. 790.065, whichever occurs later." §790.0655(1)(a), Fla. Stat. (2022); *but see* § 790.0655(2), Fla. Stat. (listing certain narrow exceptions to the mandatory waiting period). FDLE's procedures for processing background checks have been adopted by rule in the Florida Administrative Code. *See* Rule 11C-6.009, F.A.C. (2022) ("Sale and Delivery of Firearms").

B. Plaintiffs' Preemption Claims

10. Plaintiffs challenge FDLE's internal procedures for processing background check requests received from FFLs pursuant to Section 790.065, alleging that FDLE's procedures violate Section 790.33, Florida Statutes. Pursuant to Section 790.33, the Legislature expressly preempted the field of firearm regulation, including the purchase, sale, and transfer of firearms, "[e]xcept as expressly provided by the State Constitution or *general law*." § 790.33(1), Fla. Stat. (emphasis added). Likewise, the Legislature expressed its intent to "declare all ordinances and regulations null and void which have been enacted by any jurisdictions *other than state and federal*." *Id*. at § 790.33(2)(a) (emphasis added).

11. Section 790.33 further provides a private cause of action to any person or organization adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy, whether written or unwritten, in violation of the Legislature's express preemption of the field of firearm regulation. § 790.33(2)(f), Fla. Stat. (2022).

C. The APA and Exhaustion of Administrative Remedies

12. The APA sets forth a comprehensive system for challenging administrative actions. Generally, "a litigant must exhaust available administrative remedies . . ." *Fla. Carry, Inc. v. Thrasher,* 315 So. 3d 771, 772 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D550a]. Specifically, "[a] petition challenging an agency rule as an invalid exercise of delegated legislative authority shall not be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56 or s. 120.57(1)(e) 1. or (2)(b) . . . unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact." § 120.68(10), Fla. Stat.; *see also Baillie v. Dep't of Nat. Res.,* 632 So. 2d 1114, 1119 (Fla. 1st DCA 1994) ("the requirement that appellants pursue an administrative remedy that can be fully efficacious and more expeditious, before resort to the courts, in no way diminishes judicial authority to remedy a wrong"); *Fla. Dep't of Ag. & Consumer Servs. v. Haire, et al.*, 865 So. 2d 610, 614 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D248b] (same). Stated succinctly, Plaintiffs have pursued their claims in the wrong forum.

13. Plaintiffs contend that because they challenge an informal or unwritten policy of FDLE, and do not otherwise mention Rule 11C-6.009 by name, the requirement to exhaust available administrative remedies does not apply to their claims. Plaintiffs, however, offer a distinction without a difference. The doctrine of exhaustion is not concerned with any particular administrative remedy, but rather asks only whether a litigant has an available administrative remedy—Plaintiffs do under either theory.

14. Regardless of whether their claims are premised on a formally adopted rule or on FDLE's reliance on an unwritten/unadopted policy, Plaintiffs have an available administrative remedy in the APA. The rule challenge provisions set forth at Section 120.56 are available to Plaintiffs in the first instance to test their theories regarding the "enactment" and "enforcement" of Rule 11C-6.009. Likewise, to the extent Plaintiffs' quarrel is with an unwritten or unofficial FDLE "policy," Plaintiffs can challenge any FDLE action premised on an unofficial or unwritten policy, which has substantially affected them. *See* § 120.56(4)(a), Fla. Stat. If Plaintiffs are correct, the APA requires that either all or part of the rule be invalidated (in the case of rule challenges) or that FDLE be ordered to immediately cease reliance on the unadopted rule (in the case of unadopted rule challenges). *See* §§ 120.56(3)(b); 120.56 (4)(e), Fla. Stat.

15. Moreover, there is no suggestion that Section 790.33 was intended to strike the APA, circumvent its application to FDLE's rules and policies, or even address the enactment of rules within the authority conferred by the Legislature. In fact, by its plain language, Section 790.33 specifically exempts the APA, a general law, from its reach. § 790.33(2)(a), Fla. Stat.; *see also Eckert v. Bd. of Com'rs of N. Broward Hosp. Dist.,* 720 So. 2d 1151, 1152 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D2534b] ("Clearly, the APA is 'general law' within the meaning of the constitution.").

16. Furthermore, the remedial provisions of Section 790.33 are designed to deter and punish entities and persons who do not have the *authority to* promulgate ordinances, rules, and policies in the first place from doing so. Indeed, the entire intent of the preemption mandate in section 790.33 is "to declare all ordinances and regulations null and void which have been enacted *by any jurisdictions other than state and federal,* which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof *unless specifically authorized by this section or general law*; and to require local jurisdictions to enforce state firearms laws." § 790.33(2)., Fla. Stat. (emphasis added).

17. The First District Court of Appeal considered this issue and agreed. In *Fla. Carry., Inc. v. Thrasher,* the District Court affirmed a trial court order dismissing Florida Carry's challenge to a state university rule for failure to exhaust administrative remedies, explaining both the rights set forth in Section 790.33 and administrative remedies can co-exist without depriving a party of its constitutional or statutory rights absent extraordinary circumstances. 315 So. 3d at 772. Accordingly, the District Court held "that Florida Carry [was] required to exhaust an available administrative remedy . . . to potentially resolve the specific dispute at issue without first resorting to a judicial forum." *Id*. Plaintiffs' reliance on *R.C. v. Department of Agriculture & Consumer Services,* 323 So. 3d 275 (Fla. 1st DCA 2021) [46 Fla. L. Weekly D1421b] and *Lynch v. Florida Department of Law Enforcement,* No. 1D19-4217, 2021 WL 5626732 (Fla. 1st DCA Dec. 1, 2021) [46 Fla. L. Weekly D2591a], for a contrary position is misplaced because both are inapposite. Specifically, neither case was brought pursuant to Section 790.33, Fla. Stat. or was even filed in circuit court in the first instance. Instead, both cases reached the First District Court of Appeal through the administrative appeal process outlined in the APA under Section 120.68—a remedy also available to Plaintiffs in this case.

D. No Exceptions to the Exhaustion Doctrine Apply in this Case

18. Plaintiffs further allege that their claims fall within the narrow exceptions to the exhaustion doctrine. Namely, Plaintiffs contend the

exhaustion doctrine does not apply because they have (1) brought a constitutional challenge to FDLE's actions; (2) FDLE had no colorable authority for its actions; and (3) brought claims for monetary damages. Plaintiffs' arguments miss the mark.

19. First, Plaintiffs have not brought a constitutional challenge in this case. Rather, Plaintiffs allege a preemption claim—or, more specifically, that FDLE's policies, rules, and procedures, are beyond the scope of its statutory authority under Section 790.065, Fla. Stat., and are therefore preempted by Section 790.33, Fla. Stat. It is the byproduct of FDLE's allegedly improper actions, i.e., the delay in the transfer of the firearm, which Plaintiffs contend offends the constitution.

20. Plaintiffs do not contend, however, that Sections 790.065 and 790.0655 are unconstitutional or that FDLE does not have any authority to conduct background checks prior to the transfer of a firearm. Accordingly, Plaintiffs have not brought a constitutional challenge and their claims are properly subject to the exhaustion doctrine. As the Florida Supreme Court has explained, "[a] suit brought in the circuit court" that "an agency has applied a facially constitutional statute or rule in such a way that an aggrieved party's constitutional rights have been violated . . . should not be allowed." *Fla. Dep't of Ag. & Consum. Servs. v. City of Pompano Beach,* 792 So. 2d 539, 547 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1695b] (quoting *Key Haven Assoc. Enters., Inv. v. Bd. of Trs. of Internal Improvement Trust Fund,* 427 So. 2d 153, 157-57 (Fla. 1982)); *see also Id*. at 548 (holding appellee's claim that department "applied facially constitutional statutes in such a way that their constitutional right[s] . . . ha[d] been denied" did not fall within exception to exhaustion doctrine and motion to dismiss should have been granted).

21. Second, FDLE acted with colorable statutory authority. "This narrow exception is inapplicable where the agency's assertion of authority *has apparent merit or depends upon some factual determination*." *Id*. at 546-47 (emphasis in original). FDLE's actions—taken pursuant to its authority under Section 790.065, the regulations imposed under section 790.0655, and FDLE's rulemaking authority under section 943.03—unquestionably have apparent merit. *See Id*. at 547 (concluding department clearly had colorable statutory authority, where it acted pursuant to its general statutorily delegated authority); *see also Fla. Carry. Inc.,* 315 So. 2d at 772 ("[n]o exception applies here"); *Dep't of Env't Reg. v. Falls Chase Special Taxing Dist.,* 424 So. 2d 787, 796-97 (Fla. 1st DCA 1982).

22. Third, the available administrative remedy is adequate. Plaintiffs contend that because they have requested monetary damages, the APA does not afford them an adequate remedy. However, Plaintiffs' threadbare allegations regarding monetary damages alone are insufficient to support an exception to the exhaustion doctrine. *See Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Assn.,* 689 So. 2d 1127, 1129 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D572a] (setting forth the criteria that must be met before an administrative remedy is considered inadequate). Moreover, administrative review does not preclude Plaintiffs from returning to this Court and seeking any available damages if they are successful in their administrative case. Finally, Plaintiff's argument that this Court is bound by the law of the case included at the end of their proposed order, also fails. The First District Court of Appeal did recognize that firearms applications must be processed without delay, however, the applicable time standards for FDLE's processing of applications was not before the Court. *See Swearingen v. Pretzer,* 310 So. 3d 1084, 1085 and *dissent* FN. 1 (Fla. 1st DCA 2020) [46 Fla. L. Weekly D1a].

E. Plaintiffs' Declaratory Judgment Claims Also Fail

23. Finally, Plaintiffs cannot use artful pleading through the Declaratory Judgment Act to circumvent the requirement to exhaust available administrative remedies. That issue was considered and rejected by the First District Court of Appeal in *Wilkinson v. Fla. Fish & Wildlife Conservation Comm'n,* 853 So. 2d 1088 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D1741a]. There, the District Court affirmed a trial court order dismissing a case for failure to exhaust administrative remedies, holding that the "appellant could not circumvent the administrative process," by filing an action for declaratory judgment challenging the Commission's promulgation of a rule. *Id*. at 1089.

THEREFORE, judgment is entered for the Defendant and against the Plaintiff. The Plaintiff shall take nothing by this action, and the Defendant shall go hence without day. Jurisdiction is reserved to determine entitlement to, and to award costs and fees as may be appropriate under Florida law upon appropriate and timely motion.

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[1]The Complaint also contains class action allegations. Comp. ¶¶ 220-260. Because Plaintiffs' have failed to state a viable claim in their individual capacities, Plaintiffs' class allegations are moot. *Taran v. Blue Cross,* 685 So. 2d 1004, 1006 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D135i] ("[I]f none of the named plaintiffs purporting to represent a class establishes a requisite of a case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class" (internal quotes omitted); *see also Policastro v. Stelk,* 780 So. 2d 989, 991 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D818a] ("A civil action does not become a 'class action' simply because the complaint bears the legend 'class action complaint' or, as required by Florida Rule of Civil Procedure 1.220, 'class representation.' ").

* * *

Torts—Municipal corporations—Trip and fall on municipal sidewalk—Prescriptive easement—Town failed to prove that adjacent landowner's use of town right-of-way to build sidewalk was adverse to town so as to create prescriptive easement that transferred to landowner the legal ownership of sidewalk where trip-and-fall occurred—Motion for summary judgment is denied

PERRY HARRELL, Plaintiff, v. TOWN OF HAVANA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 21-CA-412. April 18, 2022. David Frank, Judge. Counsel: Halley B. Lewis, III, Fonvielle Lewis Messer & McConnaughhay, Tallahassee, for Plaintiff. Scott J. Seagle and Gwyndolyn P. Atkins, Coppins Monroe, Tallahassee, for Defendant.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause having been brought before the Court on April 8, 2022 on Defendant's Motion for Summary Judgment, and the Court having reviewed the motion and response and court file, heard argument of counsel, considered the parties stipulation to facts, and reviewed the additional authorities and legal briefs filed by the parties, finds

This case comes to the Court on a somewhat unusual footing.

The plaintiff has filed a personal injury lawsuit against the defendant Town of Havana ("town") alleging that he sustained injuries when he tripped and fell while walking on a wooden walkway (sidewalk) along 3rd Street in Havana. He alleges the town is responsible for his damages because the land at the spot where he tripped was owned by the town and, thus, the town was responsible for its safe maintenance and operation and for warning of any dangerous conditions. Plaintiff alleges that the town failed to use reasonable care in the performance of this duty. The town denies it owed plaintiff any such duty, asserting that it was not responsible for the maintenance and operation of the sidewalk.

Because it was not specifically stated in the motion or response, during the hearing the Court asked counsel to identify the specific spot where plaintiff fell. Plaintiff's counsel took a larger, color copy of the photograph that appears at the top of the response page 3, used a pen to draw a dot on the sidewalk, showed defense counsel who had no objection, and then handed it to the Court. Pursuant to an agreed survey, the dot is on the Town's portion of the sidewalk.

Normally, that would have ended much of the discussion. Defendant stipulated that, "The Town does not dispute that it owns and

generally has maintenance responsibility for the area within the public right-of-way." Motion at 1.

However, the town argues that despite having title to the portion of the sidewalk where the incident occurred, it no longer is the legal owner.

The town contends it does not own the land because, prior to the trip and fall, a prescriptive easement was created that transferred legal ownership of the land to the adjacent private landowner.

The prescriptive easement argument is the part of this case that is unusual. Prescriptive easements are traditionally and exclusively used by parties seeking to get land, not give land away. Here, the town seeks to establish a prescriptive easement to essentially give a strip of land to a private landowner to avoid potential liability for personal injuries.

Essentially, a prescriptive easement allows a person to acquire the property of another by seizing and using it for a lengthy period during which the rightful owner does nothing to prevent or stop it. The policy justification for adverse possession doctrines like prescriptive easement is that a penalty should inure to a landowner for using land inefficiently. Thomas J. Miceli & C.F. Sirmans, An Economic Theory of Adverse Possession, 15 INT'L REV. L. & ECON. 161 (1995). Florida courts have made it clear that, "Acquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted." *Downing v. Bird*, 100 So.2d 57, 65 (Fla. 1958).

Our First District recently discussed the parameters of prescriptive easement in *Okefenoke Rural Electric Membership Corp. v. Dayspring Health, LLC*, 300 So.3d 371, 372 (Fla. Dist. Ct. App. 2020) [45 Fla. L. Weekly D1701c], review denied, No. SC20-1203, 2020 WL 7400634 (Fla. Dec. 17, 2020):

> A party may establish entitlement to a prescriptive easement by proving the following four elements: (1) that he or she and any predecessors in title have made actual, continuous and uninterrupted use of the lands of another for the prescriptive period (twenty years); (2) that (when the claim is to a right-of-way) the use has entailed a definite route with a reasonably certain line, width and termini; (3) that the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use must be imputed to the owner; and (4) **that the use has been adverse to the owner—that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner** and such that, for the entire period, the owner could have sued to prevent further use.

Id., citing *Suwannee River Water Management District v. Price*, 651 So.2d 749, 750 (Fla. 1st DCA 1995) [20 Fla. L. Weekly D605b] (citations omitted) (emphasis added).

The parties have agreed that the prescriptive easement issue boils down to the question—was the private landowner's use of the land "adverse" to the town—"that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner."

The parties stipulated to the following facts: The sidewalk was built many years ago, presumably by somebody other than the town, and it was there when the current private landowner acquired the property in 1998. Approximately half of the subject strip of land (closest to the building) upon which the sidewalk lies has been and is owned by the private landowner and the other approximate half (closest to the road) has been and is owned by the town. The sidewalk encroaches upon the portion owned by the town. The current private landowner made improvements to the sidewalk to include replacing a wooden railing on the town's portion with a vinyl/plastic rail. The town believed the sidewalk was owned and maintained by the private landowner, and the private landowner believed the sidewalk was owned and maintained by the town.

Without permission (express or implied) from the owner

Defendant contends that because it was never aware that the sidewalk at issue was encroaching on its property, it could not have logically given consent for the sidewalk to exist, mandating a finding of "adversity."

Even if true, lack of consent by a landowner is not entirely dispositive of the "adversity" issue but is merely one factor for the Court to consider. The First District in *Okefenokee* conducted a further factual analysis of the land use in question to see if the facts could still negate a finding of "adversity." The First District noted:

> Declarations or assertions by a claimant are not essential to possession or use under claim of right; rather, the adverse character of possession or use is a question discoverable and determinable from all the circumstances of the case.

Id. at 373, quoting *Hunt Land Holding Co. v. Schramm*, 121 So.2d 697, 700 (Fla. 2d DCA 1960).

The First District applied the standard analysis under Florida law. It conducted a full examination of the circumstances of the case to determine whether the encroaching landowner's use of the land was adverse by determining whether it was either exclusive of the owner or inconsistent with the owner's use and enjoyment. *Downing v. Bird*, 100 So.2d 57 (Fla. 1958), as clarified in *Crigger v. Florida Power Corporation*, 436 So.2d 937 (Fla. 5th DCA 1983). The analysis is the same where the land use at issue is a "shared" use by both parties. *Dana v. Eilers*, 279 So.3d 825, 829 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2383a].

Under some claim of right

There is no record evidence that the private landowner at any point made a claim to the outer portion of the subject strip of land where the incident occurred. The evidence indicates the private landowner had always believed that the town rightfully owned it. *cf. Gay Bros. Construction Co. v. Fla. Power & Light Co.*, 427 So.2d 318, 320 (Fla. 5th DCA 1983) ("Thus, there was an intention to claim the easement where the lines were placed, notwithstanding their placement by mistake.").

Inconsistent with the rights of the owner

In its supplemental memorandum, the town asserts that "The issue before the Court can be distilled to whether the private business' act of constructing a concrete sidewalk on Town property was 'adverse' to the Town's property rights." Notice of Filing Additional Argument in Support of Summary Judgment ("Supp") at 1. Here, the town relies entirely on the existence of the sidewalk alone as grounds for "adversity."

The town, however, readily acknowledges that it is not aware of any case that determined adversity based on the placement of an improvement without more. Supp at 3.

This is likely due to the rule that adversity depends on the nature of the use of the land, not what object is placed upon it:

> Although there is a presumption that a use is permissive, that presumption is not conclusive. Rather, the courts should look to whether the use was beneficial to the actual owner, or was instead an interference with the owner's rights. In effect, the possessor must "hold [the property] as his own and against all persons. All doubts as to the adverse character of a claimant's pattern of use must be resolved in favor of the lawful owner of the property.

Phelps v. Griffith, 629 So.2d 304, 305-06 (Fla. 2d DCA 1993) (citations and quotations omitted); *see also City of Jacksonville v. Horn*, 496 So.2d 204 (Fla. 1st DCA 1986).

There is no record evidence that the town intended or attempted to

do something with the subject land, other than have a sidewalk. The notion that the town could have done things with the land, without an actual effort or desire to do so, is insufficient to establish adversity. *Id.* at 306 ("Although counsel for appellees represented that appellants were "disallow[ed] the right to plant citrus trees" or make other use of the 15-foot strip, there was no showing appellants had ever attempted or desired to use this portion of their land for anything other than a road.").

There is record evidence of only one use by the town. In 1998, the town cut a square hole in the sidewalk to place a metal plate that would provide access to the Town of Havana's water line. Response at 2. There is no evidence that the town's work was impeded in any way by the private landowner or the sidewalk. It apparently accomplished exactly what it set out to do. (There also is no evidence that the town even notified the private landowner before digging and emplacing the hatch.)

The Court finds that the presence of the sidewalk alone does not support a determination of adversity.

The Court finds no evidence that the citizens of Havana or town employees were ever excluded from using the land as a public walkway or barred access to the land for any reason. Thus, no finding of adversity through "exclusive use" can be made.

The Court finds that this use of the land as a public walkway was not inconsistent with the Town of Havana's rights of use and enjoyment, as the evidence showed that the defendant never attempted any other use of the land and that defendant did in fact maintain similar public walkways alongside similar roadways in Havana. Moreover, the sidewalk has given resident pedestrians a path off the roadway and out of traffic, and it has been used for town utilities. These were for public consumption and benefit, not for the private landowner. Thus, no finding of adversity through "inconsistent use" can be made.

"[A prescriptive easement] claimant must establish adversity, as well as the other elements of a prescriptive easement, by clear and positive proof, and the elements 'cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture.' " 279 So.3d at 828. "The law does not favor the acquisition of prescriptive rights and requires a high burden as to allegations and proof. . . ." *Id*.

In summary, the town has not met the high burden of proving that the encroaching landowner's use of the defendant's strip of land was adverse by being either exclusive of the defendant or inconsistent with the defendant's use and enjoyment of the land, or under any other theory.

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

* * *

Torts—Attorneys—Legal malpractice—Plaintiff is granted partial summary judgment on attorney's liability for legal malpractice where attorney was hired to represent plaintiff on slip-and-fall claim before statute of limitations ran, attorney breached duty to plaintiff by failing to file suit before statute of limitations ran and failing to prosecute case, thereby causing case to be dismissed for lack of prosecution, and attorney's failures caused plaintiff to lose her slip-and-fall claim

VIRGINIA ROSENBLUM, Plaintiff, v. G. WILLIAM ALLEN, JR., Defendant. Circuit Court 17th Judicial Circuit in and for Broward County. Case No. CACE20000133, Division 05. May 2, 2022. Martin J. Bidwill, Judge. Counsel: Ben Murphey, Lawlor White & Murphey, LLP, Ft. Lauderdale, for Plaintiff. Gary Shendell and Kevin Denyer, Shendell & Pollock, Boca Raton, for Defendant.

ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

In this legal malpractice case, the Court heard oral argument on Plaintiff's Amended Motion for Summary Judgment on Liability and Defendant's Response thereto by video conference on March 30, 2022. Ben Murphey, Esq. argued for Plaintiff and Kevin Denyer, Esq. argued for Defendant. The Court is fully-advised on the matter.

The facts material to Plaintiff's Motion are undisputed. Defendant has been a member of the Florida Bar since December 19, 1974. On January 4, 2014, Plaintiff was a business invitee at a spa in Broward County for the purpose of getting a massage when she slipped and fell in the spa. Plaintiff's negligence claims arising from her slip and fall were subject to a four-year statute of limitations. Before the statute of limitations ran on her slip and fall claim, Plaintiff hired Defendant to represent her in her slip and fall claim and litigation.

On January 12, 2018 (after the statute of limitations ran) Defendant filed suit for Plaintiff's negligence personal injury claim arising from her slip and fall. On May 14, 2019, the court issued a Notice of Lack of Prosecution in the suit Defendant filed for Plaintiff's negligence personal injury claim arising from her slip and fall. *Rosenblum v. Hospitality Investing Group, LLC*, No. CACE 18-000894 (04) (Fla. 17th Cir. Ct. May 14, 2019). On July 19, 2019 (after the statute of limitations ran) the court dismissed the suit Defendant filed for Plaintiff's negligence personal injury claim arising from her slip and fall. *Rosenblum v. Hospitality Investing Group, LLC*, No. CACE 18-000894 (04) (Fla. 17th Cir. Ct. July 19, 2019).

The Florida Supreme Court has adopted the federal summary judgment standard and announced that summary judgment is an "integral part" of the rules of civil procedure "aimed at 'the just, speedy, and inexpensive determination of every action.' " *In re Ams. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 75 (Fla. 2021) [46 Fla. L. Weekly S95a]. When deciding a motion for summary judgment, Florida Courts are to be guided "by the overall body of case law" discussing summary judgment in federal courts. *Id*. at 76. Summary judgment is warranted where there are no genuine issues of material fact. Fla. R. Civ. P. 1.510(a). Partial summary judgment helps to narrow the issues and expedite the trial. *Rosenthal Collins Group, LLC v. Moneytec LLC*, 2010 WL 11505839, at *4 (S.D. Fla. Nov. 20, 2010) (citing *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1006 n.6 (11th Cir. 1992)); *see also Burk v. United States*, 2012 WL 1185011, at *1 (E.D.N.C. Apr. 9, 2012) (granting partial summary judgment on liability).

A legal malpractice claim has three elements: 1) the lawyer's employment by the client; 2) the lawyer's neglect of a duty; and 3) proximate cause of loss to the client. *E.g., Thompson v. Martin*, 530 So. 2d 495, 496 (Fla. 2d DCA 1988). It is undisputed that before the statute of limitations ran on Plaintiff's slip and fall claim, Plaintiff hired Defendant to represent her in her slip and fall claim and litigation. So, the first element of Plaintiff's legal malpractice claim against Defendant is undisputedly established.

It is undisputed that Defendant failed to file suit on Plaintiff's slip and fall claim before the statute of limitations ran. Failing to file suit before the statute of limitations runs on a client's claim is a breach of a lawyer's duty to the client. *Thompson v. Martin*, 530 So. 2d 495, 496 (Fla. 2d DCA 1988); *Downing v. Vaine*, 228 So. 2d 622, 623-24 (Fla. 1st DCA 1969). It is undisputed that on May 14, 2019, the court in Plaintiff's underlying case issued a Notice of Lack of Prosecution in the underlying case. It is undisputed that on July 19, 2019 (after the statute of limitations ran on the underlying case) the court dismissed the underlying case for Defendant's failure to prosecute the underlying case. Failing to prosecute a case and causing it to be dismissed for lack of prosecution after the statute of limitations has run is breach of a lawyer's duty to the client. *E.g., Thompson,* 530 So. 2d at 496-97. So, the second element of Plaintiff's legal malpractice claim against Defendant is established.

It is undisputed that Defendant failed to file suit before the statute

of limitations ran on Plaintiff's slip and fall claim. When a lawyer fails to file suit before the statute of limitations runs on a client's claim, that failure proximately causes the client to lose the underlying claim. *See Thompson,* 530 So. 2d at 496; *see also Downing,* 228 So. 2d at 623-24. (Fla. 1st DCA 1969). It is undisputed that Defendant failed to prosecute that untimely lawsuit and it was dismissed for lack of prosecution. When a lawyer fails to prosecute a case and causes it to be dismissed for lack of prosecution after the statute of limitations has run, that failure proximately causes the client to lose the underlying claim. *E.g., Thompson,* 530 So. 2d at 496-97. So, the third element of Plaintiff's legal malpractice claim against Defendant is undisputedly established.

Wherefore, Plaintiff's Amended Motion for Partial Summary Judgment on Defendant's Liability is GRANTED. Defendant's liability on the legal malpractice portion of this case is established. Plaintiff still must prove the underlying slip and fall portion of this case (duty, breach, causation, and damages).

* * *

Abortions—Bans—Injunctions—Standing—Motion seeking injunction against enforcement of House Bill 5, which bans pre-viability abortions that were previously allowed, is granted—Plaintiffs, which include clinics and physicians, satisfy three-part inquiry for third-party standing—Plaintiffs have a substantial likelihood of success on the merits of their claim that HB 5 violates the right to privacy contained in the Florida Constitution—Because HB 5 is presumptively unconstitutional, burden shifted to state to show that it survives strict scrutiny review—State has not sustained its burden to prove that its asserted compelling interest in protecting maternal health justifies HB 5's ban on abortion before viability, or that HB 5 is the least restrictive means to achieve that interest—While state's interest in protecting maternal health becomes compelling at beginning of second trimester, this interest can justify only a regulation of the manner in which abortions are performed—Furthermore, evidence demonstrates that HB 5's ban does not, as a factual matter, advance an interest in protecting maternal health because abortion after 15 weeks is safe, and significantly safer than carrying a pregnancy to term—HB 5 does not further state's interest in maternal health, but instead undermines that interest—State's asserted interest in preventing fetal pain does not justify HB 5's ban—State's asserted interest is not materially distinct from governmental interest in protecting potential life, which does not become compelling until after viability—Accordingly, as a matter of law, protecting potential life cannot justify banning abortion prior to viability—Even if law permitted consideration of state's asserted interest in preventing fetal pain, state's evidence did not show that HB 5 furthers that asserted interest at all or in the least restrictive manner—HB 5 is also likely unconstitutional on its face—Plaintiffs have shown that HB 5 would cause irreparable harm for which no adequate remedy at law is available—Plaintiffs do not have to show irreparable harm to themselves where plaintiffs have third-party standing to represent their patients' right to privacy, and have shown that HB 5 would cause patients to suffer irreparable harm—Temporary injunction will serve the public interest because HB 5 likely violates privacy clause of Florida Constitution—Court rejects argument that injunctive relief should be limited to plaintiffs in subject action—Appropriate bond for the temporary injunction is $5,000

PLANNED PARENTHOOD OF SOUTHWEST AND CENTRAL FLORIDA, on behalf of itself, its staff, and its patients, et al., Plaintiffs, v. STATE OF FLORIDA, et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Leon County. Case No. 2022 CA 912. July 5, 2022. John Cooper, Judge.

[NOTICE OF APPEAL FILED 7-5-2022 (Fla. 1DCA, Case No. 1D22-2034; Emergency Motion to Vacate Automatic Stay of Temporary Injunction denied July 21, 2022, 47 Fla. L. Weekly D1572e.]

ORDER GRANTING PLAINTIFFS' MOTION FOR AN EMERGENCY TEMPORARY INJUNCTION AND/OR A TEMPORARY INJUNCTION, ENTERING A TEMPORARY INJUNCTION, AND SETTING BOND

Plaintiffs Planned Parenthood of Southwest and Central Florida; Planned Parenthood of South, East and North Florida; Gainesville Woman Care, LLC d/b/a Bread and Roses Women's Health Center; A Woman's Choice of Jacksonville, Inc.; Indian Rocks Woman's Center, Inc. d/b/a Bread and Roses; St. Petersburg Woman's Health Center, Inc.; Tampa Woman's Health Center, Inc.; and Shelly Hsiao-Ying Tien, M.D., M.P.H. (collectively, "Plaintiffs"), have moved this Court for a temporary injunction against the enforcement of Ch. 2022-69, §§ 3-4, Laws of Fla. ("HB 5" or "the Act") (to be codified at §§ 390.011, 390.0111, Fla. Stat).

The Court held an evidentiary hearing on June 27, 2022, and the parties presented oral argument on June 30, 2022. Having considered the legal arguments and the evidentiary record, and for the reasons that follow, the Court grants Plaintiffs' Motion for an Emergency Temporary Injunction and/or a Temporary Injunction ("the Motion"), enjoins the enforcement of HB 5 as set forth below, and orders Plaintiffs to post a bond of $5,000.

OVERVIEW

In 1980, Florida amended its Constitution to add an explicit right of privacy that is not contained in the U.S. Constitution. Art. I, § 23, Fla. Const. (the "Privacy Clause") ("Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. . . ."). The Florida Supreme Court thereafter determined that this right to privacy is "clearly implicated in a woman's decision of whether or not to continue her pregnancy." *In re T.W.,* 551 So. 2d 1186 (Fla. 1989). The Florida Supreme Court also determined that women have a right, under the Privacy Clause, to decide whether to terminate a pregnancy at least until fetal viability, which is around the completion of the second trimester. *Id.* at 1194. In addition, the Florida Supreme Court has held that "[a]ny law that implicates the right of privacy is presumptively unconstitutional, and the burden falls on the State to prove both the existence of a compelling state interest and that the law serves that compelling state interest through the least restrictive means." *Gainesville Woman Care, LLC v. State,* 210 So. 3d 1243, 1256 (Fla. 2017) [42 Fla. L. Weekly S183a]. Here, the Act bans, with extremely limited exceptions, pre-viability abortions that were previously allowed under Florida law, thus imposing a burden on the State to justify that law.

The Court's analysis in this Order is not affected by the U.S. Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization,* No. 19-1392, slip op. (U.S. June 24, 2022) [29 Fla. L. Weekly Fed. S486a]. The right to privacy under the Florida Constitution is "much broader in scope" than any privacy right under the United States Constitution. *In re T.W.,* 551 So. 2d at 1192 (quotation and citation omitted). Concurring in part and dissenting in part in *In re T.W.,* Justice Grimes noted that, "[i]f the United States Supreme Court were to subsequently recede from *Roe v. Wade,* this would not diminish the abortion rights now provided by the privacy amendment of the Florida Constitution." 551 So. 2d at 1202 (Grimes, J., concurring in part and dissenting in part). And in 2003, the Florida Supreme Court wrote, "any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that there is

no express federal right of privacy clause." *N. Fla. Women's Health & Counseling Servs., Inc. v. State,* 866 So. 2d 612, 634 (Fla. 2003) [28 Fla. L. Weekly S549a] (emphasis omitted) (hereinafter, "*North Florida*"). Thus, the Florida Supreme Court has rejected the pre-*Dobbs* federal standard that required a plaintiff to prove that a regulation regarding abortion has placed a substantial obstacle in front of a woman seeking to assert her right to an abortion. *Id.* at 635-36. Accordingly, Plaintiffs in this case do not have a threshold requirement to show that the law imposes a significant restriction on the right to a pre-viability abortion.

HB 5 implicates the right to privacy and, as Defendants concede, is subject to a standard of review known as "strict scrutiny." Under *Gainesville,* 210 So. 3d 1243, any law that implicates the fundamental right of privacy is subject to strict scrutiny and presumed to be unconstitutional. In that situation, the burden is on the defendant to prove that the law in question advances a compelling state interest through the least restrictive means. *Id.* at 1256. Here, as set forth more fully below, the asserted interests identified by the State are not legally sufficient to justify HB 5's ban on abortions after 15 weeks, measured from the first day of a woman's last menstrual period ("LMP"). And, as set forth more fully below, the Court finds the testimony of Plaintiffs' witnesses to be more credible and to rebut that offered by the State's witnesses.

In short, the Court finds that Plaintiffs have demonstrated all of the required elements for a temporary injunction against HB 5.

PROCEDURAL BACKGROUND

l. Plaintiffs are six clinics that provide reproductive health care services across Florida, along with Dr. Shelly Hsiao-Ying Tien, a physician trained and board-certified in obstetrics and gynecology and maternal-fetal medicine who practices in Florida. *See generally* Compl.

2. On June 1, 2022, Plaintiffs filed a Complaint and the Motion, seeking, in part, a temporary injunction against HB 5 and the related definitions of Section 3(6) and 3(7). *See generally* Compl.; Mot. Plaintiffs named, as defendants, the State of Florida; the Florida Department of Health and its Secretary, Joseph Ladapo; the Florida Board of Medicine and its Chair, David Diamond; the Florida Board of Osteopathic Medicine and its Chair, Sandra Schwemmer; the Florida Board of Nursing and its Chair, Maggie Hansen; the Florida Agency for Health Care Administration and its Secretary, Simone Marstiller; and the State Attorneys for all 20 judicial circuits in Florida. Plaintiffs voluntarily dismissed the 20 State Attorneys from this suit without prejudice pursuant to a stipulation that this Court entered on June 17, 2022. The defendants who remain in this case are referred to herein as "the State."

3. The State filed a response to the Motion on June 20, 2022, and Plaintiffs filed a Reply on June 24, 2022. The parties also filed certain declarations and conducted certain depositions as noted in the Court's June 27, 2022 case management order.

4. On June 27, 2022, the Court held an evidentiary hearing at which counsel for Plaintiffs and counsel for the State appeared. The Court heard live testimony from three expert witnesses, and the parties consented to the admission of written and deposition testimony from certain of those witnesses and an additional expert witness.

5. Specifically, Dr. Tien testified as an expert on behalf of Plaintiffs, both in Plaintiffs' case-in-chief and again in rebuttal to the State's evidence, and also provided fact testimony about the care she provides at one Plaintiff health center. Her sworn declaration dated May 27, 2022 and her curriculum vitae ("CV"), both of which were attached to the Motion, were admitted into evidence by consent of the parties. By consent of the parties, an additional expert witness for Plaintiffs, Dr. Antonia Biggs, Associate Professor at the University of California, San Francisco in the Department of Obstetrics, Gynecology, and Reproductive Sciences, submitted rebuttal testimony via her sworn declaration (and attached CV) dated June 23, 2022, and the transcript of her June 24, 2022 deposition taken by the State in this case. The Court references and cites to the declarations provided by Dr. Tien and Dr. Biggs throughout this Order. The CVs for each of these witnesses are attached in the Appendix to this Order. [Editor's note: Appendix omitted.]

6. The State presented live testimony from two experts, Dr. Ingrid Skop, an obstetrician and gynecologist and Senior Fellow and Director of Medical Affairs at the Charlotte Lozier Institute, and Dr. Maureen Condic, Associate Professor of Neurobiology and Anatomy at the University of Utah. By consent of the parties, a sworn declaration from Dr. Skop dated June 21, 2022 (and attached CV), a sworn declaration from Dr. Condic dated June 22, 2022 (and attached CV), and the transcript from Plaintiffs' June 23, 2022 deposition of Dr. Skop in this case also were admitted into evidence. The Court cites to portions of that deposition transcript below. Also by consent of the parties, the three exhibits attached to the State's June 20 brief, and one exhibit attached to Dr. Skop's declaration, were also admitted into evidence.

7. On June 30, 2022, the Court heard argument from counsel on the Motion and issued a ruling from the bench, along with directions on factual findings and conclusions of law. The Court indicated at the end of the hearing that it intended to grant the injunction and set a bond of $5,000. At the Court's direction, Plaintiffs submitted a proposed order containing proposed findings of fact and conclusions of law. The State had until the morning of July 4, 2022, to respond to the proposed order. Based on these submissions and the Court's evaluation of the applicable law and the evidence, the Court enters the below findings of fact and conclusions of law.

FINDINGS OF FACT

I. HB 5's Provisions

8. On March 3, 2022, the Florida legislature passed House Bill 5, which prohibits the provision of abortions in Florida after fifteen weeks LMP. Fla. HB 5, § 4 (to be codified at § 390.0111(1), Fla. Stat.). Section 4 of HB 5 amends section 390.0111 to include the prohibition on abortions after fifteen weeks LMP. Fla. HB 5, § 4 (to be codified at § 390.011(1), Fla. Stat.). Section 3 of HB 5 amends section 390.01 l to provide definitions for Section 4's operative terms. Fla. HB 5, § 3 (to be codified at § 390.0111(6)-(7)), Fla. Stat.). Governor Ron DeSantis signed HB 5 on April 14, 2022, and it took effect on July 1, 2022. Fla. HB 5, § 8.

9. HB 5 contains two narrow exceptions. First, an abortion after 15 weeks LMP may be performed if "the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition," and either two physicians certify this conclusion "in [their] reasonable medical judgment" in writing, or a single physician certifies that the risks are "imminent" and "another physician is not available for consultation." Fla. HB 5, § 4 (to be codified at § 390.011(l)(a)-(b), Fla. Stat.).

10. Second, HB 5 permits an abortion after 15 weeks LMP when "[t]he fetus has not achieved viability under § 390.01112 and two physicians certify in writing that, in [their] reasonable medical judgement, the fetus has a fatal fetal abnormality." Fla. HB 5, § 4 (to be codified at § 390.0111(1)(c), Fla. Stat.). HB 5 defines "fatal fetal abnormality" to mean "a terminal condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb and will result in death upon birth or imminently thereafter." Fla. HB 5, § 3 (to be

codified at § 390.0111(6), Fla. Stat.).[1]

11. A violation of HB 5 by an abortion provider is a third-degree felony. Specifically, "any person" who "willfully performs" or "actively participates" in an abortion in violation of the law is subject to criminal penalties, including imprisonment of up to five years and monetary penalties up to $5,000 for a first offense. §§ 390.0111(10)(a), 775.082(8)(e), 775.083(1)(c), Fla. Stat.

12. Physicians and other health care professionals are subject to disciplinary action for violating HB 5, including but not limited to revocation of their licenses to practice medicine and administrative fines. §§ 390.0111(13), 390.018, 456.072(2), 458.331(2), 459.015(2), 464.018(2), Fla. Stat.

13. In addition, abortion clinics may be prevented from renewing their clinic licenses for violating HB 5. Fla. Admin. Code R. 59A-9.020.

14. Plaintiffs al currently provide abortions after 15 weeks LMP.

II. Abortions in Florida After 15 Weeks LMP

15. Abortion is the second most common reproductive intervention that physicians provide for women of reproductive age in the United States; only a Cesarean section is a more common procedure. Tien Decl. ¶ 17. Nearly one in four U.S. women will have an abortion. *Id.* (citing Guttmacher Inst., Induced Abortion in the United States (Sept. 2019), https.guttmacher.org/fact-sheet/induced-abortion-united-states).

16. Florida law not at issue in this litigation already prohibits abortion after fetal viability. § 390.01112, Fla. Stat.; *see also* ¶19. No pregnancy is viable at 15 weeks LMP, which is early in the second trimester and approximately two months before viability. Tien Decl. ¶ 19. A patient's due date is 40 weeks and 0 days LMP, and a pregnancy is considered full term at or after 37 weeks LMP. *Id.* The majority of abortions in Florida and throughout the country occur in the first trimester. *See* Tien Decl. ¶ 18; Hr'g Tr. (Rough) 41:17-18, 74:8-16 [Tien].[2]

17. The parties agree that most abortions in Florida occur prior to 15 weeks LMP. However, approximately 6.1% of the abortions reported in Florida in 2021 (or nearly 5,000 abortions) occurred in the second trimester. Tien Decl. ¶ 18; State's Resp., Ex. A (Fla. Agency for Health Care Admin., Reported Induced Terminations of Pregnancy (ITOP) by Reason, by Trimester, 2021—Year to Date (May 9, 2022), https://ahca.myflorida.com/mchq/central_services/training_support/docs/TrimesterByReason_202l.pdf. As Plaintiffs' expert Dr. Tien testified, patients seek abortion in the second trimester, including after 15 weeks LMP, for many reasons, as discussed below.

A. Dr. Tien's Qualifications.

18. Dr. Tien is a board-certified obstetrics and gynecology ("OB/GYN") physician and maternal-fetal medicine ("MFM") specialist. Tien Decl. ¶ 1; Hr g Tr. (Rough) 31:6-7. Maternal-fetal medicine is a subspeciality of OB/GYN focused on the care of women with high-risk pregnancies; MFM specialists undergo years of advanced training in addition to the training they received as OB/GYN physicians. Tien Decl. ¶ 9; *see* Hr'g Tr. (Rough) 32:17-24 [Tien]. After graduating from medical school, Dr. Tien was trained in a four-year residency in obstetrics and gynecology at Advocate Illinois Masonic Medical Center in Chicago, Illinois, and a three-year MFM fellowship at the University of Minnesota in Minneapolis. Tien Decl. ¶ 5; *see* Hr'g Tr. (Rough) 32:11-33:3 [Tien]. Dr. Tien has provided clinical care to pregnant patients for almost 15 years, including caring for patients with high-risk pregnancies and providing abortion and contraceptive care. Tien Decl. ¶¶ 5, 8,-9; *see* Hr'g Tr. (Rough) 33:4-35:13 [Tien].

19. Dr. Tien testified that after her fellowship in MFM at the University of Minnesota, she worked for five and a half years as an MFM specialist at NorthShore University Health System in Evanston, Illinois, which is affiliated with University of Chicago. Hr'g Tr. (Rough) 36:13-21 [Tien]. There, she provided prenatal care to high-risk pregnancies, delivered babies, and performed abortions. *Id.* at 36:19-37:1 [Tien]. She was an educator and trained medical students, residents, and fellows. *Id.* at 37:2-5 [Tien]. She testified that she has cared for thousands of patients, including patients who chose to terminate their pregnancies and patients who chose to continue their pregnancies. *Id.* at 37:6-13 [Tien].

20. Dr. Tien currently provides abortion care and other services at the Jacksonville clinic of Planned Parenthood of South, East and North Florida, including abortion care after 15 weeks LMP. *Id.* at 34:23-35:7 [Tien]. She also currently works as an MFM specialist at Genesis Maternal-Fetal Medicine in Tucson, Arizona, where she treats patients with high-risk pregnancies and has admitting privileges at four Tucson-area hospitals. *Id.* at 33:21-34:22 [Tien]. Dr. Tien previously provided abortion care at Planned Parenthood Southeast in Alabama and Trust Women in Oklahoma, until recent abortion restrictions took effect in those states. *Id.* at 35:8-13 [Tien]. Dr. Tien testified that she currently spends roughly 70% of her time providing abortion care and that she spends approximately 20-30% of her time providing abortion care after 15 weeks LMP. *Id.* at 35:17-36:2 [Tien].

21. The Court credits Dr. Tien's above-identified qualifications and finds her testimony in the areas of obstetrics and gynecology and MFM, including abortion care, to be persuasive.

B. Reasons Women Seek Abortions.

22. Patients terminate both wanted and unwanted pregnancies for many reasons. Tien Decl. ¶ 28. Those who decide to have an abortion consider many factors, including the health and well-being of their children and other family members; their financial ability to provide for a child or for a child in addition to their existing children; whether they are currently in a safe home environment; and their own health, including any pre-existing medical conditions that can make a pregnancy high risk or new medical conditions that arise directly from the pregnancy. *Id.*

23. The majority of women who obtain an abortion (approximately 60%) have had at least one child. *Id.* ¶ 29. Some patients with children are familiar with the enormous demands that parenting places on their time and resources, and decide to have an abortion based on what is best for them and their existing families. *Id.* Others are not ready to have children. *Id.* Some patients seek abortions because they decide they need to prioritize their education or economic or familial stability. *Id.* Some have elder care responsibilities. *Id.* Some are struggling with food or housing insecurity; homelessness; and/or alcohol, opioid, or other substance addictions, and decide not to become a parent while struggling with those challenges. *Id.* Some decide they do not have the emotional resources necessary to continue the pregnancy and become a parent. *Id.*

24. Other patients seek abortions because they have pre-existing medical conditions that make pregnancy risky for their own physical or mental health. *Id.* ¶ 29. For other patients, regardless of whether their pregnancies were planned or unintended, pregnancy itself creates new significant medical risks to their own health. *Id.* As a result of historical inequities to health care access and economic inequality, approximately 61% of patients seeking abortion care identify as Black, Indigenous, or women of color, and these same populations face disproportionately high rates of maternal mortality and comorbidities that increase the health risks associated with pregnancy. *Id.*

25. Patients also seek abortions after having experienced some form of violence. Some have experienced rape or incest, whether in the form of sexual abuse, sexual assault, gang rape, torture, or human

trafficking-sexual slavery; notably, the Act contains no exception for these women and children. Tien Decl. ¶ 30. Access to abortions in this context is just one element of helping survivors of sexual violence regain some semblance of their physical and emotional health. *Id.* Other patients live with intimate partner violence and do not want to continue a pregnancy or raise a child in an abusive environment, or further tie themselves to an abusive partner. *Id.* Patients who are unable to access safe abortion are more likely to stay with a perpetrator of violence. *Id.*

C. Reasons Abortions May Be Sought After 15 Weeks LMP

1. Delay in Identifying the Pregnancy

26. Dr. Tien explained that, because of the way pregnancy is dated, a missed period occurs at the earliest at 4.5 to 5 weeks LMP. Hr'g Tr. (Rough) 50:23-51:7 [Tien]; Tien Decl. ¶ 33. Some patients, especially those with irregular menstrual cycles or who do not experience pregnancy symptoms, may not suspect they are pregnant for weeks or months, or may experience bleeding early in pregnancy that they mistake for a period. Hr'g Tr. (Rough) 51:8-22 [Tien]; Tien Decl. if 33. Patients may be further delayed in confirming the pregnancy, researching and considering their options, contacting an abortion provider, and scheduling an appointment. Hr'g Tr. (Rough) 52:15-57:16 [Tien]; Tien Decl. ¶ 33.

2. Poverty and Financial Challenges

27. As Dr. Tien testified, many patients who seek abortions after 15 weeks LMP do so because they face difficulty in raising the necessary funds both for the procedure itself (as abortion is frequently not covered by insurance) as well as related expenses, including transportation and childcare. Hr'g Tr. (Rough) 53:7-22 [Tien]; Tien Decl. ¶ 34-35. Others have difficulty arranging time off from work or school, finding childcare, and arranging transportation. Hr'g Tr. (Rough) 53:7-22 [Tien]; Tien Decl. ¶ 34. The COVID-19 pandemic has increased these challenges. Hr'g Tr. (Rough) 54:6-19 [Tien]; Tien Decl. ¶ 34. These barriers are especially difficult for the approximately 75% of abortion patients nationwide who live under or near the poverty line. Hr'g Tr. (Rough) 53:23-54:3 [Tien]; Tien Decl. ¶ 34.

28. Dr. Tien testified that Florida's mandatory delay law, which recently went into effect, adds to these challenges. Hr'g Tr. (Rough) 55:6-11 [Tien]; Tien Decl. ¶ 36. This law requires patients to make two trips to the health center instead of one; the first is to sign state-mandated forms at least 24 hours before the abortion, and the second is to have the abortion procedure. Hr'g Tr. (Rough) 54:6-55:l [Tien]; Tien Decl. ¶ 36.

29. Dr. Tien testified that, in practice, this law can cause far more than a day's delay because many patients (and especially patients who have low incomes) are not able to make the trip to their abortion provider twice in close succession. Hr'g Tr. (Rough) 55:15-25 [Tien]; Tien Decl. ¶ 36. Many abortion patients are delayed in accessing care because of the need to find two appointments that accommodate their work schedules, because they cannot afford to take two days off from work in close proximity, or because doing so would jeopardize their jobs—especially if the patient does not want to share the reason for the time-off request. Hr'g Tr. (Rough) 55:6-25 [Tien]; Tien Decl,.¶ 37. Patients may need to delay an appointment by a week or several weeks for these reasons. Hr'g Tr. (Rough) 55:6-11 [Tien]; Tien Decl. ¶ 37. Other patients cannot arrange childcare for multiple days or cannot do so without compromising the confidentiality of their pregnancy and abortion decision. Hr'g Tr. (Rough) 55:6-25 [Tien]; Tien Decl. ¶ 37.

30. For these reasons, it is not surprising that patients seeking second-trimester abortions are more likely to have low incomes, more likely to report difficulty financing the abortion, and more likely to rely on financial assistance to pay for the procedure. Tien Decl. ¶ 39; *see* Hr'g Tr. (Rough) 53:7-25 [Tien]. Women who are most likely to be delayed in abortion until after 15 weeks LMP are those already facing the challenges of poverty or near-poverty, food insecurity, and economic instability. Tien Decl. ¶ 39.

3. Intimate Partner Violence

31. Dr. Tien also testified that patients experiencing intimate partner violence are often delayed in seeking abortions. Hr'g Tr. (Rough) 56:21-25 [Tien]; Tien Decl. ¶ 40. lt is common for women experiencing intimate partner violence to seek abortions. Tien Decl. ¶ 40. This is due to a number of factors, including that abusers frequently sabotage a partner's ability to use contraception, leading to more unintended pregnancies; that pregnancy is often a time of escalating violence; and that a person experiencing intimate partner violence may not wish to be further tethered to an abusive partner or to bring a child, or an additional child, into an abusive household. *Id.*; *see* Hr'g Tr. (Rough) 56:5-20 [Tien].

32. Dr. Tien testified that, in many abusive relationships, the abuser exerts control over every aspect of their partner's life. Hr'g Tr. (Rough) 56:5-20 [Tien]; Tien Decl. ¶¶ 40-41. Such abusive partners may try to control the patient's reproductive decisions. Hr'g Tr. (Rough) 56:5-10 [Tien]; Tien Decl. ¶¶ 40-41. The abuser's control can complicate a patient's ability to raise funds for the procedure and to schedule multiple appointments. Hr'g Tr. (Rough) 56:5-20 [Tien]; Tien Decl. ¶ 41. Often such patients must wait for a day that their abusive partner will be out of town or otherwise occupied. Hr'g Tr. (Rough) 56:11-17 [Tien]; Tien Decl. ¶ 41. With Florida's two-trip requirement, patients must be able to find two such days when they can attempt to elude an abusive partner. Hr'g Tr. (Rough) 56:11-17 [Tien]; Tien Decl. ¶ 41. The combined effect of these factors can significantly delay abortion access, causing patients in abusive relationships to be disproportionately likely to obtain an abortion after 15 weeks. Hr'g Tr. (Rough) 56:1-25 [Tien]; Tien Decl. ¶ 42.

4. Young Patients

33. Adolescent patients are also disproportionately likely to need abortions after 15 weeks, as they may be more likely to have irregular periods or less knowledgeable about reproductive biology and less likely to be able to access abortion services promptly once they have made a decision. Hr'g Tr. (Rough) 57:22-58:5 [Tien].

5. Substance Abuse

34. Patients struggling with substance abuse disorders face multiple challenges that can cause a delay in obtaining an abortion until after 15 weeks LMP. Hr'g Tr. 57:6-16 [Tien]. Such patients may be addressing their own medical conditions, or they may be trying to admit themselves to a rehab program to improve their lives, which can impede timely access to care. *Id.* Patients who are struggling with substance abuse are also more likely to be living in poverty or even be homeless, making it more difficult to make a clinical appointment and obtain care. *Id.*

6. Changed Life Circumstances

35. Other patients, including women who initially intended to carry their pregnancies to term, may decide to terminate a pregnancy because their life circumstances change: they lose a job, they break up with a partner, or a family member becomes ill.

7. Health Conditions Caused or Exacerbated by Pregnancy

36. Dr. Tien testified that other patients experience health conditions that are caused or exacerbated by pregnancy and often develop after 15 weeks LMP. Tien Decl. ¶ 43; Hr'g Tr. (Rough) 58:15-61:3, 67:8-10 [Tien]. Pregnancy is a stress test for human physiology, impacting multiple organ systems, such as the heart, cardiovascular system, and kidneys. Tien Decl. ¶ 43. And the hormones produced during pregnancy make a woman more insulin resistant, making it more difficult to maintain blood glucose levels at a stable level. *Id.*

Patients with autoimmune disorders such as lupus can experience exacerbation of their disease, as manifested by worsening hypertension and kidney disease. *Id.* Patients with preexisting decreased cardiac function can rapidly decompensate and lose additional heart function. *Id.* Pregnancy can also exacerbate mental health conditions. For instance, women with pre-existing mood disorders, like depression or anxiety, may experience a worsening of symptoms during pregnancy. *Id.* These risks disproportionately impact people with low incomes, who experience more comorbidities such as obesity, hypertension, and diabetes. *Id.* ¶ 45. A legacy of distrust of the healthcare system can deter people from seeking preventative health services and further compound medical comorbidities associated with poverty. *Id.*

8. Diagnoses of Serious Fetal Conditions

37. Many patients who have planned and celebrated their pregnancy with the intention of welcoming a child into their family may learn as the pregnancy progresses of a serious fetal condition, which can be genetic or structural (such as complex brain or heart defects). Tien Decl. ¶ 46; *see* Hr'g Tr. (Rough) 61:12-15 [Tien]. Definitive diagnosis of genetic fetal conditions requires amniocentesis, which can only be performed at 15 weeks LMP or beyond, or chorionic villi sampling ("CVS"), which can be performed between 10 and 13 weeks LMP; however, many patients in rural or resource-limited areas do not have access to a subspecialist to provide CVS. Tien Decl. ¶ 46. For some genetic conditions, it can take several weeks for the results of either an amniocentesis or CVS to return, further delaying the patient's decision-making regarding these fetal conditions. *Id.* Structural fetal conditions may not be identified until an anatomical ultrasound survey, which occurs between 18 and 22 weeks LMP. *Id.*; Hr'g Tr. (Rough) 60:22-61:24 [Tien].

38. At least some of these serious fetal conditions do not fit squarely within the Act's very limited exceptions. Hr'g Tr. (Rough) 68:4-25 [Tien]. As Dr. Tien explained, many conditions may not be fatal but can have profound and lasting implications for the patient, the family, and the neonate if the pregnancy is carried to term. Hr'g Tr.(Rough) 68:10-13 [Tien].

39. Florida's reporting indicates that in 2021, at least 757 Florida abortions took place because of a serious fetal anomaly and that 484 of those took place in the second trimester. Tien Decl. ¶ 47; *see* State's Resp., Ex. A (Fla. Agency for Health Care Admin., Reported Induced Terminations of Pregnancy (ITOP) by Reason, by Trimester, 2021—Year to Date (May 9, 2022), https://ahca.myflorida.com/mchq/central_services/training_support/docs/TrimesterByReason_2021.pdf. However, Florida's state-required, web-based abortion reporting system, which records patients' reasons for termination, has limitations, as it allows for the selection of only one reason for having an abortion. *Id.* Patients frequently have multiple reasons for seeking an abortion, and their own health or a fetal condition may be only one of many considerations. *Id.* Therefore, the reported numbers are likely an under-representation of the instances in which these factors drive or help drive a patient's decision to have an abortion. *Id.*

40. Patients faced with a diagnosis of a fetal condition also need time to make the right decisions for themselves and their families, based on information from their prenatal care providers and from multiple sources with knowledge about the fetal anomaly at issue, discussion with family and other support systems, and consultation with their clergy, social workers, or other resources. Tien Decl. ¶ 48; *see* Hr'g Tr. 63:10-2l.

9. Pregnancy Complications

41. Patients also may seek abortions later in pregnancy because their health is threatened by their ongoing pregnancy. Tien Decl. ¶ 55. In many cases, even patients with significant pregnancy-related health issues may not satisfy the Act's exception to prevent a "serious risk of substantial and irreversible physical impairment of a major bodily function . . . other than a psychological condition." *Id.*; *see* HB 5, § 4 (to be codified at § 390.0111(1), Fla. Stat.). Many disease processes present as a spectrum, and the Act would seem to require a physician to delay intervention until it is clear the patient is at serious risk of substantial and permanent harm or death. Tien Decl. ¶ 55; Hr'g Tr. (Rough) 68:21-70:9 [Tien]. Dr Tien testified that this result is antithetical to quality patient care. *Id.*

42. As an example, some patients experience chronic bleeding throughout their pregnancies that can escalate at any point, requiring active intervention and treatment. Tien Decl. ¶ 56; *see* Hr'g Tr. (Rough) 68:25-69:11 [Tien]. For patients who do not respond to initial treatments, it is the standard of care, depending on the gestational age, to perform an abortion to protect the patient's life and health. Tien Decl. ¶ 56; *see* Hr'g Tr. (Rough) 69:4-11 [Tien]. Like many maternal health issues, bleeding can progress in unpredictable ways; having to assess at what stage a deteriorating patient's condition qualifies for the life or health exception—at risk of a prosecutor or jury disagreeing with that assessment—places physicians in an impossible situation. Tien Decl. ¶ 56; *see* Hr'g Tr. (Rough) 69:17-24 [Tien].

D. Likelihood Women Will Seek Earlier Abortions Under HB 5

43. Nearly 5,000 patients obtained abortion care in Florida in the second trimester in Florida in 2021. Tien Decl. ¶ 18; *see* State's Resp., Ex. A (Fla. Agency for Health Care Admin., Reported Induced Terminations of Pregnancy (ITOP) by Reason, by Trimester, 2021—Year to Date (May 9, 2022), https://ahca.myflorida.com/mchq/central_services/training_support/docs/TrimesterByReason_2021.pdf. The Court credits the testimony of Dr. Tien and finds, based on the evidence, that under HB 5, many of these patients would be unable to obtain abortions in Florida prior to 15 weeks LMP and therefore (unless they fell into one of HB 5's narrow exceptions) would be unable to obtain abortions through the medical system in Florida at all. Poverty, substance addiction, intimate partner violence, post-15-week diagnoses, and the other factors identified above that can delay patients in obtaining an abortion will not disappear simply because the law has changed. Hr'g Tr. (Rough) 58:6-14 [Tien]. In other words, the Court finds that HB 5 will not simply encourage all women seeking abortions to obtain them prior to 15 weeks.

44. The Court also credits the testimony of Dr. Tien regarding the limited options available to patients who would be barred from obtaining an abortion under HB 5. She explained that some patients may attempt to travel long distances to obtain care in another state in which such care is still available, Hr'g Tr. (Rough) 64:22, 67:18-24 [Tien], which will result in further delays in accessing an abortion. But doing so would impose substantial economic and logistical burdens, and simply would not be possible for many patients, 75% of whom are poor or have low incomes. *Id.* at 53:23-54:5 [Tien]. Some patients may decide to end their pregnancies on their own, outside the medical system. *Id.* at 66:23-67:3 [Tien]. Others will be prevented from obtaining abortion care entirely and thus will be forced to continue their pregnancies and have children against their will. *Id.* at 66:23-67:3 [Tien].

III. Abortion and Maternal Health

45. The State contends that HB 5 furthers a compelling state interest in protecting maternal health. State's Resp. at 18-20. The parties presented extensive evidence on the safety of abortion services at and after 15 weeks LMP. The Court makes the following findings concerning the safety of abortion. In doing so, it finds the testimony of Plaintiffs' experts, Dr. Tien and Dr. Biggs, more persuasive than the testimony of the State's expert, Dr. Skop.

46. As detailed more fully below, Dr. Skop's testimony failed to show that abortion is unsafe after 15 weeks LMP or that HB 5 would improve maternal health. The State presented no other evidence on abortion safety.

A. Safety of Abortion Procedures

47. Dr. Tien testified persuasively that, based on her experience and training, abortion is a very safe procedure and that serious complications are very rare, including when abortion is performed after 15 weeks LMP, regardless of the method of abortion that is used. Tien Decl. ¶ 27; *see also* Hr'g Tr. (Rough) 43:3-45:13 [Tien]. She further testified that the safety of abortion has been extensively studied and is well established, and that there is no dispute in mainstream medicine about the safety of abortion. *Id.* at 43:19-25, 45:14-47:19, 48:17-49:22 [Tien]. To the extent that abortion, like all medical procedures, has risks, there is no evidence in the record that the risks of abortion have increased since the Privacy Clause was added to the Florida Constitution in 1980.

48. Dr. Tien testified that there are two methods of abortion commonly used in the United States: medication abortion and procedural abortion. Tien Decl. ¶ 20; Hr'g Tr. (Rough) 41:23-42:2 [Tien]. Medication abortion using a two-pill regimen is performed only in early pregnancy, prior to 11 weeks LMP, and involves the use of a two-drug medication regimen to induce a process similar to early miscarriage. Tien Decl. ¶ 21; Hr'g Tr. (Rough) 41:23-41:25 [Tien]. At the gestational age relevant here—after 15 weeks LMP—medication abortion is not performed, and procedural abortion is the only generally-available option. Tien Decl. ¶ 20; Hr'g Tr. (Rough) 41:23-42:6 [Tien]. Procedural abortion is sometimes referred to as a "surgical abortion" even though it involves no incisions, requires no operating room, and can be performed with no anesthesia or sedation. Tien Decl. ¶ 20; Hr'g Tr. (Rough) 42:7-12 [Tien]. It is performed by dilating (opening) the cervix and then using either aspiration (suction) alone, or after approximately 14 to 16 weeks in pregnancy, a combination of suction and instruments, to evacuate the contents of the uterus. Tien Decl. ¶ 20; Hr'g Tr. (Rough) 229:22-230:2 [Tien]. When instruments are used, the procedure is known as a dilation and evacuation ("D&E") procedure. Tien Decl. ¶ 22.

49. Dr. Tien testified that serious complications from legal abortion are extremely rare, occurring in less than 0.5% of cases. *Id.* at 44:1-7, 45:16-46:8 [Tien]; Tien Decl. ¶¶ 26-27 (citing Ushma D. Upadhyay et al., Incidence of Emergency Department Visits and Complications After Abortion, 125 Obstetrics & Gynecology 175, 178-79 tbl. 3 (2015)).

50. The Court accepts Dr. Tien's testimony that the risk of serious complications from abortion increases as a pregnancy progresses. Hr'g Tr. (Rough) 89:7-11 [Tien]; Tien Decl. ¶ 27. However, the Court also credits Dr. Tien's testimony that, even after 15 weeks LMP, the risk of serious complications from abortions remains less than 0.5%. Hr'g Tr. (Rough) 44:1-7 [Tien]. By contrast, every pregnancy-related complication is more common among women whose pregnancy results in a live birth than among women who have abortions. Tien Decl. ¶ 26.

51. Patients who seek abortions are pregnant, which itself carries risks. *Id.* ¶ 25. For pregnant patients, having an abortion is safer than carrying a pregnancy to term. *Id.*

52. The mortality rate from abortion procedures is 0.6 to 0.7 per 100,000 procedures. Hr'g Tr. (Rough) 44:8-17 [Tien]; Tien Decl. ¶ 25. Mortality rates are approximately 12 to 14 times higher for women undergoing childbirth than for women having abortions. Hr'g Tr. (Rough) 45:2-13 [Tien]; Tien Decl. ¶ 25. Dr. Tien further testified that maternal mortality rates are not only much higher than those for abortion, but that the maternal mortality rates for childbirth also show significant racial disparities—the most recent mortality rates, from 2020, show approximately 19 deaths per 100,000 live births for white women, and 55 deaths per 100,000 live births for Black women. Hr'g Tr. (Rough) 44:23-45:1 [Tien]; Tien Decl. ¶ 25. These maternal mortality rates have continued to increase in the last 10 to 20 years, while the mortality rate associated with abortion has not. Hr'g Tr. (Rough) 44:21-23 [Tien]; Tien Decl. ¶ 25. The Court credits this testimony.

53. Dr. Tien further testified that the mortality risk from abortion is extremely low compared to other outpatient procedures, such as a colonoscopy, plastic surgery, or certain dental procedures. Hr'g Tr. (Rough) 47:20-48:7 [Tien]; Tien Decl. ¶ 23.

54. The Court finds that Dr. Tien's testimony as to the safety of abortion, including when performed after 15 weeks, based on her training and extensive clinical experience in the OB/GYN and MFM fields, is persuasive. In addition, and separately, the literature that Dr. Tien relied upon in formulating her opinions is credible, robust, supports her opinions, and is widely accepted in the scientific community. Hr'g Tr. (Rough) 43:19-25, 45:14-47:19 [Tien] (discussing studies and data supporting opinion as to the safety of abortion and explaining indicia of reliability). The Court therefore accords significant weight to Dr. Tien's testimony.

55. Dr. Tien's opinion on abortion safety differs from Dr. Skop's opinion. Dr. Skop has been an OB/GYN for 30 years, but she has never performed an abortion. *Id.* at 199:10-17 [Skop]. Until April 1, 2022, Dr. Skop was in private practice with a group for almost 26 years, but none of the physicians in that group performed abortions. Skop Dep. Tr. 14:7-11, 19:8-13, 22:3-4. She has never recommended an abortion to any of her patients. Hr'g Tr. (Rough) 199:18-20 [Skop]. She has never performed intrauterine fetal surgery. *Id.* at 200:7-16 [Skop].

56. Dr. Skop is a full-time, salaried senior fellow at the Charlotte Lozier Institute ("CLI"), a pro-life research institution. *Id.* at 179:20-21, 201:5-20 [Skop].

57. Dr. Skop testified that, based on her experience, she has "not found any medical reasons that women must have" an abortion, and that she thinks abortion "is used for social indications." *Id.* at 204:12-15 [Skop]. She disputes scientific findings that abortion is safer than childbirth based on her belief that the data is "compromised." *Id.* at 191:15-18 [Skop].

58. Dr. Skop conceded that her views on abortion safety are "inconsistent with the findings of [a] number of medical associations." *Id.* at 204:21-25. These institutions include mainstream medical associations in the U.S., such as the American College of Obstetricians and Gynecologists ("ACOG"), the American Psychological Association ("APA"), the National Academies of Sciences, Engineering, and Medicine ("NASEM"), the American Medical Association ("AMA"), as well as U.S. governmental agencies, such as the Centers for Disease Control and Prevention ("CDC"). *Id* at 205:4-9, 207:16-25, 208:2-25, 209:2-8, 210:10-22, 212:6-20. Dr. Skop maintains that all these institutions have a "pro choice" bias. *Id.* at 205:1-3. However, Dr. Skop acknowledged that she reads and relies on ACOG for other information, and she conceded that the organization provides useful information on topics other than abortion. *Id.* at 206:6-9.

59. Dr. Skop testified that D&E abortion—*i.e.*, a procedural abortion method used in the second trimester—is unsafe, referencing a 20-year-old study as support for her position. *Id.* at 219:17-25, 220:1-7; Skop Decl. ¶ 24. However, the study Dr. Skop referenced showed only that mortality rates increased as a pregnancy progressed; those rates remained lower than maternal mortality rates are today, and Dr. Skop agreed that the study showed that mortality rates associated with abortion declined over time. Skop Dep. Tr. 154:1-16 (referencing Linda A. Bartlett, et al., *Risk Factors for Legal Induced*

Abortion-Related Mortality in the United States, Tables 1 and 2). In her testimony at the hearing, Dr. Skop could not point to any current data to support the conclusion that D&E abortions are not safe. Hr'g Tr. (Rough) 220:16-221:21 [Skop].

60. Dr. Skop also testified that the mortality risk from D&E rises with gestational age. Skop Decl. at 5-6. However, she conceded that this opinion rested on one study from 1981, which "reflects 1970s data," and that she largely did not know "the specific details" of how the D&E procedure has evolved since 1981. Skop Dep. Tr. 110:17-111:16, 113:15-20. She further acknowledged that she did not know "how accurate the mortality data" used in the 1981 study was. *Id.* at 118:8-13.

61. Dr. Skop testified that the abortion mortality rate of 0.7 percent per 100,000 procedures reported in a NASEM study was inaccurate because she believes all existing data on abortion mortality in the U.S. are inaccurate, due to pressure on abortion providers to undercount mortality. Skop Dep. Tr. 86:10-23, 172:25-175:9. However, she also testified that she thought "the data on colonoscopy, dental procedures, plastic surgery, [and] tonsillectomy" in the same study were "likely to be more accurate. . . than the data related to abortion." *Id.* at 173:20-24.

62. Dr. Skop maintained that the complication rate in the United States for D&E abortions is much higher than studies consistently report, but she could point to no data to support that belief. Skop Dep. Tr. 92:1-2. She testified that she believes the United States has poor data on complications from abortions because the United States does not mandate the reporting of complications. *Id.* at 76:12-78:5. Dr. Tien, however, testified that reporting on pregnancy-related complications is more robust than reporting in other areas of medicine, and that the literature showing low rates of complications from abortions rests on scientifically sound CDC data. *Id.* at 231:15-24, 233:12-235:23 [Tien]. The Court credits this testimony of Dr. Tien over Dr. Skop's conflicting testimony.

63. Dr. Skop testified that there is "good data"—which she did not specify—that D&E procedures cause placental abruption in future pregnancies, which leads to premature delivery and could lead to hemorrhage. *Id.* at 197:11-14 [Skop]. She also testified that later-term abortions can damage the cervix "as the uterus enlarges and the pressure inside increases that can cause a woman to go into preterm labor." *Id.* at 198:1-3 [Skop]. She also testified that the ACOG "reports the second trimester abortion risks of hemorrhage . . . are 3.3 percent" and risks of "0.5 percent [for] uterine perforation." Skop Decl. at 4.

64. The Court does not credit Dr. Skop's opinions on these points. Dr. Skop admitted that her statement in her declaration regarding ACOG's data on the abortion risks of hemorrhage and uterine perforation was inaccurate, and that ACOG instead reported the risks of hemorrhage at 0.1 to 0.6 percent, and uterine perforation at 0.2 to 0.5 percent. Skop Dep. Tr. 68:21-69:5, 70:6-22, 71:20-23. Dr. Skop also stated that the risk of abortion complications "is far higher than ACOG reports," but pointed to no evidence for this claim. *Id.* at 71:1-3.

65. Further, the Court found Dr. Skop's testimony to be unsupported, such as when she asserted that she had "no doubt" that abortion can create complications in future pregnancies yet also said that "at this time we don't have the ability to detect those complications to prove that that is happening." Hr'g Tr. (Rough) 198:8-13 [Skop]. Dr. Skop also testified that she believed a NASEM study undercounted the risks of D&E-related hemorrhage requiring transfusion because, "based on [her] clinical experience and what [she] ha[s] seen, [she] think[s] the rates are higher." Skop Dep. Tr. 90:16-92:1. But she admitted that "there may not be a study that documents" her belief that the risks are higher than the NASEM study's reported risks. Skop Dep. Tr. 90:16-92:1.

66. By contrast, Dr. Tien testified persuasively that the risks from abortion that Dr. Skop identified either do not exist or are less serious than Dr. Skop suggests. Hr'g Tr. (Rough) 231:1-11 [Tien]. For example, while Dr. Skop testified that an abortion procedure that involves sharp uterine curettage could theoretically cause placental abruption in a future pregnancy, *id.* at 197:2-14 [Skop], she does not provide abortion care, and Dr. Tien, who does provide abortion care, testified that sharp curettage is not used in contemporary abortion practice, *id.* at 233:8-11 [Tien]. As to Dr. Skop's assertion that abortion procedures can damage the cervix, Dr. Tien testified that these concerns are not supported. Before performing a procedural abortion, it is standard procedure to ensure that the cervix is adequately dilated using gentle cervical ripening and dilation techniques. *Id.* at 232:7-16 [Tien]. And Dr. Tien testified that, although there is a weak association between abortion and a subsequent premature birth, other risk factors for premature birth, such as multiple gestation, poverty, and prior pregnancies carried to term, present much higher risks for premature birth. *Id.* at 232:17-233:2 [Tien].

67. Dr. Skop also repeatedly contended that abortion providers are not regulated or are not regulated adequately. *Id.* at 211:24-25, 212:1-5 [Skop]. But Dr. Tien testified that abortion facilities in Florida must be licensed and inspected by a Florida state agency to maintain licensure. *Id.* at 226:18-23 [Tien]. Florida law also requires reporting of abortion complications; if the agency has a concern that an abortion facility is unsafe, it can revoke the facility's license. *Id.* at 227:3-10 [Tien]. An abortion provider's medical license also can be revoked if abortion patients treated by that provider experience an excessive number of complications; this is true for physicians in other areas of medicine as well. *Id.* at 228:1-11 [Tien].

68. Overall, Dr. Skop has no experience in performing abortions; admitted that her testimony on the risks of certain abortion complications was inaccurate and overstated, or based on data from decades ago; admitted that her views on abortion safety are out of step with mainstream medical organizations; and provided no credible scientific basis for her disagreement with recognized high-level medical organizations in the United States. The Court thus does not find Dr. Skop as credible on the risks of abortion complications and quality of abortion care as Dr. Tien, who has significant experience in performing abortions and the other qualifications set forth above.

B. Abortion and Mental Health

69. Dr. Skop also testified that abortion has a negative effect on the mental health of the woman who obtains the abortion. Hr'g Tr. (Rough) 193:11-14. However, Dr. Skop acknowledged that she has "no formal training in mental health counseling outside of [her] time in medical school," *id.* at 199:21-24, and she testified that she would not refer to herself as an expert in mental health, *id.* at 200:3-4.

70. By contrast, Plaintiffs' rebuttal expert, Dr. Antonia Biggs, is a social psychologist and researcher working in the Department of Obstetrics, Gynecology, and Reproductive Sciences within the Advancing New Standards in Reproductive Health program at the University of California, San Francisco. Declaration of Antonia Biggs ("Biggs Decl.") ¶ 1. She has conducted research on the association between abortion and mental health; has worked extensively in this field, both nationally and internationally, for over 20 years; and has 84 peer-reviewed publications and three book chapters. *Id.* Given her expertise on abortion and mental health, and Dr. Skop's comparative lack of expertise, the Court credits Dr. Biggs' declaration and adopts and incorporates it into this Order. *See* Appendix.

71. In her declaration, Dr. Biggs discusses evidence establishing that abortion does not result in negative mental health outcomes. Biggs Decl. ¶ 9. Dr. Biggs provided a thorough and persuasive

analysis of the scientific literature on this point She cited, *inter alia,* the Turnaway Study, with which she was involved as a researcher. *Id.* ¶ 20. The Turnaway Study is "the largest study of women denied a wanted abortion, most of whom were beyond the first trimester of pregnancy, and the only one that follows women denied an abortion in the United States over time to track their mental, physical, and financial health and well-being." *Id.* ¶ 21. It has resulted in the publication of over fifty peer-reviewed articles and a book. *Id.* ¶ 20. NASEM has noted that the Turnaway Study was "designed to address many of the limitations of other studies" and "contributes unique insight into the consequences of receiving a desired abortion versus being denied the procedure and carrying the pregnancy to term." *Id.*

72. The Turnaway Study concluded that abortion is not associated with negative mental health outcomes, including abortions beyond the first trimester. *Id.* ¶ 22. Specifically, it concluded that abortion does not cause or increase a patient's risk of experiencing anxiety, depression, dysphoria, or posttraumatic stress symptoms or disorders, nor does it result in substance use disorders. *Id.* ¶ 24.

73. Rather, the Turnaway Study demonstrated that the denial of a desired abortion can negatively impact a patient's mental health and well-being. *Id.* ¶ 136. It showed that the denial of a desired abortion negatively impacts the mental health, socioeconomic status, and aspirations for the future of the patient in the short and long-term. *Id.* Patients denied an abortion are more likely to be pushed below the poverty line, raise children alone, receive public assistance, and be unable to afford basic living needs, such as food, housing, and transportation. *Id.* They are less likely to make and achieve aspirational life plans, such as pursuing education, and to be able to exit an abusive relationship. *Id.* ¶ 37. Dr. Biggs concluded, based on her research, that HB 5 will not benefit the mental health of women who are denied abortions after 15 weeks LMP. *Id.* ¶ 38. Dr. Skop critiqued the Turnaway Study's participation rate, *id.* at 216:44-8, but the Court credits Dr. Biggs' explanation that the Turnaway Study's participation rate is within the expected range for a five-year study and similar to other prospective studies of this type, Biggs Decl. ¶ 23.

74. The Court finds the conclusions of this study to be instructive in its analysis of whether HB 5 benefits the mental health of patients seeking abortion after 15 weeks LMP. Based on the depth of Dr. Biggs' expertise and the quality of the evidence cited, the Court finds her declaration to be precise and persuasive and considers it the best evidence in this case regarding mental health and abortion. As such, the Court gives Dr. Biggs' opinion substantial weight.

C. The Act's Effect on Maternal Health

75. Dr. Skop's opinion that abortion is unsafe after 15 weeks LMP is contrary to the view of major professional organizations and is not supported by sound scientific evidence. Her opinion that HB 5 would benefit the mental health of patients seeking abortion after 15 weeks LMP is also unconvincing. Plaintiffs presented substantial, persuasive evidence to the contrary. Thus, the Court finds that the State's claimed interest in protecting maternal health is not furthered by HB 5's ban on abortion after 15 weeks LMP.

76. Moreover, the Court finds that HB 5 will not actually cause all the women it targets to obtain their abortions earlier. Instead, the evidence shows that HB 5 will delay some patients in obtaining abortions because they are forced to travel out of state to access care, Hr'g Tr. (Rough) 67:18-68:2; will result in others attempting abortions outside the medical system, *id.* at 67:1-3; and will result in still others being forced to continue their pregnancies to term and give birth against their will, *id.* at 67:8-17, even though that is the medically riskier course. The Court credits Dr. Tien's testimony that, for these additional reasons, HB 5 is likely to undermine rather than advance maternal health. *Id.* at 67:4-70:9.

IV. Abortion and Fetal Pain

77. The State contends that HB 5's ban on abortions after 15 weeks LMP furthers a state interest in preventing fetal pain. State's Resp. at 20-22. The Court makes the following findings on fetal pain. In doing so, it credits the testimony of Plaintiffs' expert Dr. Tien based on her extensive experience as a medical doctor in the areas of maternal-fetal medicine, obstetrics, and gynecology, and gives the testimony of the State's expert, Dr. Maureen Condic, who is not a medical doctor and whose opinion runs contrary to credible and scientifically supported evidence, little to no weight.

78. Dr. Condic's opinions regarding a fetus's ability to feel pain before 24 weeks LMP are not properly supported, and thus her testimony fails to establish that fetal pain perception is possible during the periods of gestation (after 15 weeks LMP) at issue here.[3] The State presents no evidence, other than Dr. Condic's declaration and live testimony, to try to establish that fetal pain perception exists during the gestational period in which HB 5 would ban abortions. Accordingly, the State fails to establish that HB 5 advances any interest the State may have in preventing fetal pain.

79. Dr. Tien, who (unlike Dr. Condic) has clinical experience with patients, testified that if a fetus could feel pain, it would be relevant to her role as an MFM specialist providing care to patients with high-risk pregnancies and that it would inform every discussion with these patients. Hr'g Tr. (Rough) 238:5-15 [Tien].

80. Dr. Tien credibly explained that perception of pain requires several components: the development of receptors to receive information from the external environment; neurologically developed pathways to deliver information between the spinal cord and portions of the brain; and a high level of cortical processing to interpret that information. *Id.* at 238:12-239:9 [Tien].

81. Dr. Tien testified that while the receptors that absorb environmental stimuli may be developed earlier in pregnancy, the "basic foundation building blocks" necessary for fetal pain perception are not in place until 24 to 26 weeks LMP. *Id.* at 90:5-91:11, 238:12-239:9 [Tien].

82. Dr. Tien also testified that as an MFM specialist, part of her role is to diagnose fetal structural defects, counsel patients on the findings, and coordinate the care team involved in intrauterine fetal surgery. *Id.* at 239:13-240:1 [Tien]. The care team for intrauterine fetal surgery also includes the required pediatric subspecialist(s) and an anesthesiologist. *Id.* at 241:4-242:7, 243:15-21 [Tien]. The purpose of anesthesia and analgesia used during intrauterine surgery is not to treat fetal pain, however, so the anesthesiologist does not act directly on the fetus (such as by delivering medication to the fetus by IV). *Id.* at 243:22-244:22 [Tien]. Instead, anesthesia and analgesia are used to maximize uterine relaxation, as a paralytic, to blunt fetal physiological responses (such as a drop in heart rate), and/or to monitor the maternal-fetal unit. *Id.* at II, 242:4-243:21 [Tien].

83. Moreover, Dr. Tien testified that when intrauterine procedures are performed on the fetus that do not involve an incision into the uterus (that is, those that do not constitute surgery as the term is commonly understood), these procedures do not require anesthesia or analgesia, even though the procedure involves interventions to the fetus, and it is the standard of care not to provide such anesthesia unless it is specifically indicated for some reason other than pain (for example, to relax the uterus for the procedure). *Id.* at 242:20-243:9 [Tien]. The Court finds that such practices by physicians charged with providing care to women with high-risk pregnancies belie Dr. Condic's contention about fetal pain perception during the period of gestation affected by HB 5.

84. Dr. Condic is an "animal biologist" who "does not work on humans." Hr'g Tr. (Rough) 145:4-5 [Condic]. Dr. Condic has never provided clinical care to either adults or babies. *Id.* at 145:22-24 [Condic]. Like Dr. Skop, Dr. Condic is affiliated with CLI. *Id.* at

163:4-11 [Condic].

85. Dr. Condic testified that pain "has many different dimensions," the simplest of which, known as "nociceptive pain," is the ability to detect and respond to a potentially damaging or noxious stimulus. *Id.* at 120:20-121:8 [Condic]. She testified that circuitry responsible for nociceptive pain is in place between 10 to 12 weeks LMP. *Id.* at 121:3-8 [Condic]. Dr. Condic testified that the fetus develops the circuitry capable of supporting a conscious awareness of pain between 14 to 20 weeks LMP. *Id.* at 121:9-25 [Condic]. She provided a range of dates because, in her view, one cannot "set an absolute point for every individual where certain neurodevelopmental events will occur." *Id.* at 128:17-20 [Condic].

86. According to Dr. Condic's testimony—which the Court does not accept as more credible than Dr. Tien's—a fetus could feel and appreciate pain at 14 weeks LMP, which is before the 15-week LMP point after which HB 5 prohibits abortions. *See Id.* at 121:9-25 [Condic]. Therefore, while the Court does not find Dr. Condic's testimony that a fetus can experience conscious awareness of pain before 15 weeks LMP to be credible or supported by the evidence, even if it were, her testimony that such pain could exist *before* 15 weeks LMP does not support the State's contention that avoiding pain is a valid reason to reduce the abortion cut-off from viability to after 15 weeks LMP.

87. Dr. Condic acknowledged that there is a difference between "nociception" and the conscious perception of pain. *Id.* at 146:13-16 [Condic]. She testified that it is "generally [accepted]" that neural connections between the thalamus and the cortex do not develop until 24 to 26 weeks LMP. *Id.* at 147:7-10 [Condic]. Dr. Condic agreed that if the cortex were necessary to have a conscious awareness of pain, pain would not be possible until about 24 weeks LMP. *Id.* at 151:22-152:3, 151:12-17 [Condic].

88. Dr. Condic conceded that, at a September 2020 deposition in another case involving abortion restrictions, she testified that, even at 18 weeks LMP (three weeks after HB'5 cutoff), it is difficult to make a clear, unambiguous case that a fetus has the circuitry in place capable of having a conscious awareness of pain. *Id.* at 148:16-150:1; 152:10-25 [Condic]. Dr. Condic further admitted that her opinions of fetal consciousness and self-awareness stem from "extrapolating . . . quite a bit." *Id.* at 127:23-25 [Condic].

89. Dr. Condic conceded that three leading authorities in obstetrics and gynecology and maternal-fetal medicine—ACOG, the Royal College of Obstetricians and Gynecologists, and the Society of Maternal-Fetal Medicine—all disagree with her view about the earliest point in gestation at which a fetus might be consciously aware of pain. *Id.* at 166:15-21.

90. For these reasons, the Court accepts Dr. Tien's testimony as credible and persuasive based on her experience as an MFM specialist, including her first-hand knowledge of fetal surgery and intrauterine fetal procedures. In contrast, the Court gives no weight to Dr. Condic's opinions because Dr. Condic has no clinical experience with humans and conceded that her estimation of when fetal pain perception occurs differs from the "generally [accepted]" view among mainstream medical organizations. *Id.* at 147:7-10 [Condic].

91. The Court finds that the scientific evidence supports the conclusion that, due to the lack of the necessary pathways, the earliest point at which a fetus could have the necessary components—or building blocks—to feel pain is 24-26 weeks LMP.[4] The Court finds that an asserted interest in preventing fetal pain is not supported by the most persuasive evidence in this case and thus does not support HB 5's ban on abortion after 15 weeks LMP.

V. Effects on Plaintiffs IF HB 5 Is in Effect

92. The Court credits Dr. Tien's testimony that HB 5 directly impedes and interferes with the patient-physician relationship. Hr'g Tr. (Rough) 70:15-16 [Tien]. She testified that physicians have a duty to provide evidence-based and compassionate care, including counseling patients on all their options. *Id.* at 70:16-24 [Tien]. The Court finds that HB 5 would force abortion providers in this state to stop providing abortions past 15 weeks, even when that is contrary to their good-faith medical judgment and their patients' needs and wishes, unless one of the Act's limited exceptions applies.

93. With respect to those exceptions, the Court credits Dr. Tien's testimony that waiting until a patient's life is at risk, or until the patient deteriorates to the point that an abortion is needed to prevent substantial, irreversible physical impairment of a major bodily function, is antithetical to the provision of good medical care. *Id.* at 68:21-70:9 [Tien]. Dr. Tien testified that healthcare providers who are not aware of the nuances of the law may not intervene even when one of the narrow exceptions to HB 5 applies, for fear of fines, loss of their license, or imprisonment, and the Court finds that her testimony on this point was credible. *Id.* at 69:17-24 [Tien].

94. Plaintiffs and the State have stipulated as follows: "All Plaintiff facilities perform abortions after 15 weeks. If any Plaintiff facility performed such an abortion with HB 5 in effect, the facility and/or its employees would be subject to enforcement as provided in Florida law." Case Mgmt. Order, June 27, 2022, at ¶ 5. The Court finds that Dr. Tien also would be subject to the enforcement provisions of HB 5, including imprisonment, if HB 5 were in effect and she provided an abortion in Florida after 15 weeks LMP that did not fall within HB 5's narrow exceptions.

CONCLUSIONS OF LAW

I. Standing

95. The Court concludes that, under the applicable caselaw, Plaintiffs have third-party standing to bring this suit on behalf of their actual and potential patients.

96. This conclusion is consistent with the Florida Supreme Court's prior decisions reaching the merits of similar claims brought by abortion clinics and physicians, seeking relief on behalf of their patients. *See generally Gainesville Woman Care, LLC v. State,* 210 So. 3d 1243 (Fla. 2017) [42 Fla. L. Weekly S183a] ("*Gainesville*") (suit filed by abortion provider and an abortion advocacy group); *State v. Presidential Women's Ctr.,* 937 So. 2d 114 (Fla. 2006) [31 Fla. L. Weekly S210a] (suit filed by two abortion clinics and a doctor who performs abortions); *see also State v. N. Fla. Women's Health & Counseling Servs., Inc.,* 852 So. 2d 254, 259-60 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D419b] ("reject[ing] the state's contention that" physician lacked standing to raise the rights of pregnant minor patients), *rev'd on the merits,* 866 So. 2d 612 (Fla. 2003) [28 Fla. L. Weekly S549a]; *accord Feminist Women's Health Ctr. v. Burgess,* 651 S.E.2d 36, 38-39 (Ga. 2007) ("Virtually every state court considering the issue has similarly held that abortion providers have standing to raise the constitutional rights of their patients," and collecting cases).

97. In all events, Plaintiffs satisfy the three-part inquiry for third-party standing.

98. Florida applies the federal standard for third-party standing, which requires a showing that (1) the plaintiff has suffered an injury in fact giving him or her a sufficiently concrete interest in the dispute; (2) the plaintiff has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests. *Alterra Healthcare Corp. v. Estate of Shelley,* 827 So. 2d 936, 941-42 (Fla. 2002) [27 Fla. L. Weekly S735a].

99. As to the first prong, the Court concludes that Plaintiffs have shown they will suffer an injury in fact arising from HB 5, giving them a sufficiently concrete interest in this dispute. HB 5 will force Plaintiffs either to stop providing abortions after 15 weeks LMP, or to face criminal prosecution, license revocation, and other penalties. *See State v. Benitez,* 395 So. 2d 514, 517 (Fla. 1981) ("A party subject to

criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries."); *N. Fla. Women's Health & Counseling Servs., Inc.,* 852 So. 2d at 259 (physicians had third-party standing to challenge an abortion law because they were subject to license revocation and sanctions for violating the law); *cf. Craig v. Boren,* 429 U.S. 190, 196-97 (1976) (where law impairs third party's constitutional rights by directly imposing "legal duties and disabilities" on someone else, the party subject to those duties and penalties is "the obvious claimant").

100. The Court is not persuaded by the State's argument that Plaintiffs lack standing because they have indicated they will comply with HB 5 if it is in effect and thus will not be subjected to its penalties. State's Resp. at 6 & n.7. Coerced compliance is still an injury in fact. *See Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 508 (1972); *see also MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 119, 129 (2007) [20 Fla. L. Weekly Fed. S27a] (standing exists even where plaintiffs intend to comply with a law where "the threat-eliminating behavior was effectively coerced" by the threat of prosecution). *San Diego Cnty. Gun Rights Comm. v. Reno,* 98 F.3d 1121 (9th Cir. 1996), cited by the State, does not apply here. Unlike Plaintiffs, who currently offer services that HB 5 will prohibit, the plaintiffs in *San Diego Cnty. Gun Rights Comm.* "merely assert[ed] that they wish[ed] and intend[ed] to engage in activities prohibited by' " the law at issue. 98 F.3d at 1127. And as Dr. Tien testified, HB 5 would directly interfere with her relationships with her patients because the law would force her to stop providing abortions past 15 weeks (unless one of the Act's limited exceptions applies), even when doing so would be contrary to her good-faith medical judgment and her patients' needs and wishes. Hr'g Tr. 68:22-69:17, 70:15-71:1 [Tien]; Tien Decl. ¶¶ 57, 61. In addition, and also as Dr. Tien testified, HB 5 would create a real risk that healthcare providers, in fear of the potential loss of their licenses and potential criminal penalties, will struggle to evaluate whether one of HB 5's limited exceptions applies and whether they can intervene to provide abortion care covered by one of those exceptions after 15 weeks. Hr'g Tr. 69:17-70:9 [Tien]; Tien Decl. ¶¶ 56, 60-61.

101. The State conceded the second prong of the standing inquiry—"that Plaintiffs have a sufficiently close relation to their patients for the purposes of third-party standing, State's Resp. at 5 n.6—and the Court agrees. *See* Hr'g Tr. (Rough) 70:15-71:1 (Dr. Tien testifying about the importance and closeness of the relationship between a patient considering an abortion and her healthcare provider). "The closeness of the relationship [between abortion provider and pregnant person seeking abortion care] is patent . . . . A woman cannot safely secure an abortion without the aid of a physician . . . ." *Singleton v. Wulff,* 428 U.S. 106, 117 (1976).

102. Finally, as to the third prong of the third-party standing inquiry, the Court concludes that Plaintiffs' patients would face a hindrance to suing to protect their own interests. The Court follows the many courts that have held that the time-limited nature of pregnancy, when compared to how long litigation can take, is an obstacle to the ability of pregnant women to sue to protect their own interests. *See Powers v. Ohio,* 499 U.S. 400, 410-11 (1991); *Singleton,* 428 U.S. at 116-17; *Feminist Women's Health Ctr.,* 651 S.E.2d at 39; *N.M. Right to Choose/NARAL v. Johnson,* 975 P.2d 841, 847 (N.M. 1998); *Pro-Choice Miss. v. Fordice,* 716 So. 2d 645, 663-64, 665 (Miss. 1998); *N. Fla. Women's Health & Counseling Servs., Inc.,* 852 So. 2d at 259. None of the cases the State cites in which pregnant women did litigate challenges to abortion laws, *see* State's Resp. at 6-7, involved challenges to time-limited abortion bans, *see In re T.W.,* 551 So. 2d 1186 (parental consent for minor abortion); *Renee B. v. Fla. Agency for Health Care Admin.,* 790 So. 2d 1036 (Fla. 2001) [26 Fla. L. Weekly S487a] (class action on exclusion of medically necessary abortions from Medicaid coverage); *Burton v. State,* 49 So. 3d 263, 264 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1842b] (non-abortion case involving involuntary confinement of a pregnant person). Thus, none of these cases suggest that pregnant patients would *not* face challenges in bringing individual lawsuits against HB 5.

103. Moreover, the Court is not persuaded by the suggestion that individual abortion patients (most of whom, according to the credible testimony of Dr. Tien, face difficult circumstances, including poverty, Hr'g Tr. (Rough) 52:12-58:14, would be able to litigate the complex matters at issue and in this case individually and on a compressed timeframe (*i.e.,* after 15 weeks LMP but before fetal viability). Those unable to secure relief in time will be forced to remain pregnant and give birth against their will.

104. Because Plaintiffs have standing, the Court will turn to the merits of their request for temporary relief.

II. Temporary Injunction Factors

A. Standard

105. To obtain a temporary injunction, Plaintiffs must demonstrate: "(1) a substantial likelihood of success on the merits, (2) the unavailability of an adequate remedy at law, (3) irreparable harm absent the entry of an injunction, and (4) that the injunction would serve the public interest" *Fla. Dep't of Health v. Florigrown, LLC,* 317 So. 3d 1101, 1110 (Fla. 2021) [46 Fla. L. Weekly S175a]; *see also Liberty Couns. v. Fla. Bar Bd. of Governors,* 12 So. 3d 183, 186 n.7 (Fla. 2009) [34 Fla. L. Weekly S347a]; *St. John's Inv. Mgmt. Co. v. Albaneze,* 22 So. 3d 728, 731 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D2354a].

B. Substantial Likelihood of Success on the Merits

106. Plaintiffs have a substantial likelihood of success on the merits of their claim that HB 5 violates the right to privacy contained in the Florida Constitution.

107. The Privacy Clause of the Florida Constitution expressly grants Floridians a right to privacy. Art. I, § 23, Fla. Const ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."). This right of privacy protects the "fundamental right of self-determination," which is defined as "an individual's control over [and] the autonomy of the intimacies of personal identity" and "a physical and psychological zone within which an individual has the right to be free from intrusion or coercion . . . by government . . . ." *In re Guardianship of Browning,* 568 So. 2d 4, 9-10 (Fla. 1990) (internal quotation marks omitted).

108. The Florida Supreme Court has held that the right conferred by the Privacy Clause is broader than any right to privacy the U.S. Constitution affords, and thus that the Florida right to privacy cannot be compared to the federal right. *Gainesville,* 210 So. 3d at 1253; *In re T.W.,* 551 So. 2d 1186, 1191-92 (Fla. 1989); *Winfield v. Div. of Pari-Mutuel Wagering,* 477 So. 2d 544, 548 (Fla. 1985).

109. This Court must follow the Florida Supreme Court's precedents on the right to privacy as those precedents currently exist, not as they might exist in the future. *See, e.g., Ellis v. State,* 703 So. 2d 1186, 1187 (Fla. 3d DCA 1997) [23 Fla. L. Weekly D65b] ("[W]hen confronted with binding precedent, trial judges are obliged to follow that precedent even if they might wish to decide the case differently."); *see also Scott v. Trotti,* 283 So. 3d 340, 343-45 (Fla. 1st DCA 2018) [43 Fla. L. Weekly D1691c] (finding reversible error in the circuit court's entry of injunction based on disregard of "binding precedent . . . [it] was obligated to follow").

110. The Florida Supreme Court has held that the Privacy Clause guarantees women the right to abortion prior to viability. Striking down a law that restricted minors' access to abortion in *In re T.W.,* the Supreme Court explained that the Privacy Clause "is clearly implicated in a woman's decision of whether or not to continue her pregnancy." 551 So. 2d at 1192. The Privacy Clause "embodies the

principle that few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental." *Id.* (internal citations and quotation marks omitted).

111. In several decisions since *In re T.W.,* the Supreme Court has reaffirmed that the Florida Constitution preserves for women the fundamental right to decide whether to end their pregnancies. *Gainesville,* 210 So. 3d at 1254 (the Privacy Clause "encompasses a woman's right to choose to end her pregnancy"); *North Florida,* 866 So. 2d at 621 ("[A] woman has a reasonable expectation of privacy in deciding whether to continue her pregnancy" that is protected by the Privacy Clause); *Renee B.,* 790 So. 2d at 1040 ("The right of privacy in the Florida Constitution protects a woman's right to choose an abortion."); *Jones v. State,* 640 So. 2d 1084, 1086 (Fla. 1994) (the Privacy Clause's "right to be let alone protects adults from government intrusion into matters related to marriage, contraception, and abortion"); *cf. In re Guardianship of Browning,* 568 So. 2d at 13 (the fundamental right of privacy "safeguard[s] an individual's right to chart his or her own medical course").

112. Accordingly, the Florida Supreme Court has instructed that "laws that place the State between a woman . . . and her choice to end her pregnancy clearly implicate the right of privacy," *Gainesville,* 210 So. 3d at 1254, and are "presumptively unconstitutional," *id.* at 1246.

113. HB 5 implicates the right to privacy by banning abortions after 15 weeks LMP. Thus, under *Gainesville,* HB 5 is presumptively unconstitutional.

114. Because HB 5 is presumptively unconstitutional, the burden shifts to the State to show that it survives strict scrutiny review, a point the State conceded during the evidentiary hearing. Hr'g Tr. (Rough) 22:8-21. To survive strict scrutiny, the State must demonstrate "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *In re T.W.,* 551 So. 2d at 1192 (quoting *Winfield v. Div. of Pari-Mutuel Wagering,* 477 So. 2d 544, 547 (Fla. 1985)); *see also North Florida,* 866 So. 2d at 620-22 (rejecting lower standard of scrutiny applicable under federal law).

115. The State does not dispute that 15 weeks LMP is prior to viability. Fifteen weeks LMP is approximately two months before the point in pregnancy at which fetal viability might occur. Hr'g Tr. (Rough) 50:5-11 [Tien].

116. The Court rejects the State's argument that HB 5 is not a ban but a regulation that encourages women to seek abortions earlier. State's Resp. at 19-20. HB 5 prohibits anyone who is seeking an abortion after 15 weeks LMP from obtaining one in Florida, unless they fall within the law's two limited exceptions. That is a ban on abortions after 15 weeks LMP. *See Isaacson v. Horne,* 716 F.3d 1213, 1226-27 (9th Cir. 2013) ("The availability of abortions earlier in pregnancy does not, however, alter the nature of the burden that [the ban] imposes on a woman once her pregnancy is at or after [the gestational cut-off] but prior to viability," in which case "the pregnant woman 'lacks all choice in the matter' of whether to carry her pregnancy to term." (citation omitted)). And, as detailed in its factual findings above, the Court credits Dr. Tien's testimony about the many reasons that patients may be unable to obtain abortions before 15 weeks LMP. Hr'g Tr. (Rough) 52:12-58:14 [Tien].

117. The State asserts that HB 5's ban on pre-viability abortion advances Florida's compelling interests in protecting maternal health and preventing fetal pain. State's Resp. at 18-22. The Court concludes that the State has not sustained its burden to prove that these interests justify HB 5's complete ban on abortion before viability, nor has it proven that HB 5 is the least restrictive means to achieve either interest.

118. "[T]he Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated." *In re T.W.,* 551 So. 2d at 1195 (citing *Winfield,* 477 So. 2d at 547). The Florida Supreme Court has recognized two compelling state interests that *could* justify state regulation of abortion—the interest in promoting maternal health and the interest in protecting potential life. *Id.* at 1193-94. However, the Court has also recognized that neither of these interests can support an outright *prohibition* on abortion before fetal viability. *Id.* HB 5 prohibits abortions between 15 weeks LMP and fetal viability.

119. The Florida Supreme Court has held that, although the State's interest in protecting maternal health becomes compelling at the beginning of the second trimester, *see In re T.W.,* 551 So. 2d at 1193, this interest can justify only a *regulation* of "the manner in which abortions are performed," provided the regulation is "the least intrusive [way] designed to safeguard the health of the mother." *Id.* This interest, however, cannot support a *ban* on abortion before viability, *id.,* but that is what HB 5 is.

120. Furthermore, the evidence demonstrates that HB 5's ban on abortions after 15 weeks LMP does not, as a factual matter, advance an interest in protecting maternal health because abortion after 15 weeks is safe, and is significantly safer than carrying a pregnancy to term.

121. As noted in its factual findings, the Court credits Dr. Tien's testimony that abortion is safe at all stages of pregnancy and is safer than carrying a pregnancy to term. Hr'g Tr. (Rough) 43:5-44:7 [Tien]; *cf. In re T.W.,* 551 So. 2d at 1193 (noting that, even as of 1989, based on "technological developments . . . the point [until] which abortions are safer than childbirth" had already been "extended" later into pregnancy than at the time *Roe* was decided).

122. As noted in its factual findings, the Court also credits Dr. Biggs' testimony that being denied a wanted abortion can have harmful effects on the woman's mental health. Biggs Decl. ¶ 36.

123. The State argues that HB 5 will advance an interest in maternal health by encouraging women to have abortions before 15 weeks LMP. State's Resp. at 19-20. Dr. Tien acknowledged that the risks of abortion increase with gestational age but testified that the overall risk of complications from abortion remains very low and that carrying a pregnancy to term is the medically riskier path. Hr'g Tr. (Rough) 44:8-45:6, 68:1-3 [Tien].

124. Furthermore, the State has not shown that HB 5 actually will encourage women to have earlier abortions. As discussed above in the Court's findings of fact, and as Dr. Tien testified, many patients seeking abortions after 15 weeks do so for reasons that would prevent them from simply obtaining abortions earlier. Even the State acknowledges that not all women seeking abortions after 15 weeks LMP would be able to obtain them earlier. *See* State's Resp. at 16-17 (asserting that patients "will *in most cases* have the option to schedule their abortion earlier" (emphasis added)). Thus, the Court concludes that HB 5 will lead to some women who would have obtained abortions after 15 weeks being required to carry their pregnancies to term instead. HB 5 would undermine maternal health for these women by subjecting them to the increased health risks presented by carrying their pregnancies to term.

125. Similarly, the evidence reflects that patients who are unable to obtain an abortion after 15 weeks in Florida may be forced to travel significant distances—including travel in excess of 1,000 miles, round-trip—to access those services out-of-state. Hr'g Tr. (Rough) 64:22-65:10 [Tien]. Arranging and paying for such travel takes time (for those patients who are able to do so at all). The evidence shows that while abortion is an extremely safe procedure at and after 15 weeks, unnecessary delays in access to abortion can increase the risk of the procedure. Accordingly, subjecting patients seeking abortions

after 15 weeks to delayed care in other states disserves the State's asserted interest in maternal health and encouraging earlier abortions; patients delayed by their efforts to access care in distant states would be subject to greater risk than if they were able to obtain such services earlier in Florida. The Court concludes that HB 5 does not further the State's interest in maternal health, but instead undermines that interest.

126. Moreover, the State did not present evidence showing that a complete ban on pre-viability abortion is the least restrictive means of protecting maternal health. There are ways to encourage earlier abortions that are far less restrictive than a complete ban—the State, for instance, could provide information on abortion or other resources to women in Florida to make it easier to get abortions earlier. Thus, HB 5 is not the least restrictive means for achieving the State's asserted interest in maternal health.

127. The State's asserted interest in preventing fetal pain also does not justify HB 5's ban on abortion before viability. At the outset, the Court concludes that the State's asserted interest, which, in its own words, is "protecting children in utero," State's Resp. at 18, is not materially distinct from the governmental interest in protecting potential life. Although the State contests this, it does not explain how these interests are distinct. *Id.* at 21. The Florida Supreme Court has held that the State's interest in protecting potential life does not become compelling until *after* viability. *In re T.W.,* 551 So. 2d at 1193. Until that point, and not before, the interests of the pregnant person and the fetus are "inextricably intertwined." *Id.* Accordingly, as a matter of law, protecting potential life cannot justify banning abortion prior to viability. *Id.* at 1193 & n.6 ("Restrictions to protect the state's interest in the potentiality of life . . . also may be imposed, but only after viability"); *Burton v. State,* 49 So. 3d 263, 266 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D1842b] (holding that "[o]nly after the threshold determination of viability has been made may the court weigh the state's compelling interest" in protecting the fetus against patient's constitutional rights). The Court is not persuaded by the State's claim that *In re T.W.*'s holding on the interest in protecting potential life was *dictum. See* State's Resp. at 21-22. The Florida Supreme Court reaffirmed this holding from *In re T.W.* in *Krischer v. McIver,* 697 So. 2d 97, 102 (Fla. 1997) [22 Fla. L. Weekly S443a] ("[S]tate's interest in prohibiting abortion is compelling after fetus reaches viability" (citing *In re T.W.,* 551 So. 2d at 1194)); *see also N. Fla. Women's Health,* 866 So. 2d at 636 (describing the lead opinion as "the majority opinion of the Court and . . . binding precedent")

128. Although the Court does not believe the existing law permits consideration of the State's asserted interest in preventing fetal pain before fetal viability, the Court also, and as a separate basis for its conclusion, is not persuaded by the State's evidence that HB 5 furthers this asserted interest at all or in the least restrictive manner. As Dr. Tien testified (and as the Court finds above), a fetus cannot feel pain at 15 weeks LMP because the neural connections necessary for a conscious experience of pain do not develop until at least 24-26 weeks LMP. Hr'g Tr. (Rough) 91:3-11 [Tien]. The Court is not persuaded by Dr. Condic's testimony to the contrary. As set forth in the Court's factual findings, Dr. Condic admits that mainstream medical organizations including ACOG, the Royal College of Obstetricians and Gynecologists, and the Society for Maternal-Fetal Medicine, disagree with her opinion that cortical connections are not necessary for the conscious experience of pain. *Id.* at 166:15-21 [Condic]. Other courts have rejected Dr. Condic's views as outside the mainstream and therefore concluded they deserve little weight. *See Whole Woman's Health All. v. Rokita,* 553 F. Supp. 3d 500, 581 (S.D. Ind. 2021) (describing Dr. Condic's opinions on fetal pain as a " 'fringe view' within the medical community"); *EMW Women's Surgical Ctr. v. Meier,* 373 F. Supp. 3d 807, 822-23 (W.D. Ky. 2019) (rejecting contention that fetal pain is possible before 24 weeks as contrary to the consensus of the medical community).

129. The Court further notes that Dr. Condic testified that a fetus can feel pain *before* 15 weeks LMP. *Id.* at 120:20-121:8. Accordingly, even if the Court did find Dr. Condic's testimony persuasive on this point (which it does not), that testimony would lead to the conclusion that HB 5's 15-week ban is underinclusive. The State's apparent disagreement with its own expert on this point further supports the Court's decision not to credit Dr. Condic's opinions on fetal pain.

130. Further, the State did not present any evidence that a ban on pre-viability abortion is the least restrictive means of preventing fetal pain. The Court, moreover, is persuaded that a complete ban is *not* the least restrictive means. Other States have sought to address the same asserted interest in protecting against fetal pain by passing restrictions on the method of abortion, rather than categorically banning it. *See, e.g., Bernard v. Individual Members of Ind. Med. Licensing Bd.,* 392 F.Supp.3d 935, 942-45 (S.D. Ind. 2019); *EMW Women's Surgical Center,* 373 F. Supp. 3d at 812-13, 822-23. The Court does not offer an opinion on whether these restrictions would be constitutional under Florida law. But the Court concludes that HB 5's ban on abortions outright beginning at 15 weeks LMP is not the least restrictive means. The law thus likely violates the Florida Constitution.

131. The Court further concludes that HB 5 is likely unconstitutional on its face. The Court rejects the State's argument that HB 5 is not facially unconstitutional because it would still allow women to get abortions before 15 weeks LMP. A statute is facially unconstitutional if "no set of circumstances exists in which the statute can be constitutionally applied." *Abdool v. Bondi,* 141 So. 3d 529, 538 (Fla. 2014) [39 Fla. L. Weekly S421a]; *accord Cashatt v. State,* 873 So. 2d 430, 434 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D1026b]. HB 5 does not prohibit abortions prior to 15 weeks LMP, and thus does not apply to women seeking or obtaining abortions prior to 15 weeks LMP, as the State agrees. However, as to the women to whom HB 5 *does* apply—those women seeking or obtaining abortions beginning at 15 weeks yet before viability,[5] and as to whom HB 5's exceptions do not apply—there is no set of circumstances in which HB 5 can constitutionally be applied. In other words, without HB 5, women in Florida can obtain abortions for any reason up until fetal viability. With HB 5, women in Florida are unable to obtain an abortion between 15 weeks LMP and fetal viability unless one of HB 5's narrow exceptions applies.

132. Moreover, the State's argument that Plaintiffs cannot show HB 5 is facially unconstitutional is inconsistent with the Florida Supreme Court's decisions in *In re T.W.* and *North Florida.* In both those cases, the Supreme Court held the abortion statutes at issue there were facially unconstitutional even though those statutes would not have prevented all abortions in Florida. *In re T.W.,* 551 So. 2d at 551 So. 2d at 1193-95; *North Florida,* 866 So. 2d at 640. The State's reliance on *State v. Gainesville Woman Care, LLC,* 278 So. 3d 216 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D1983a], is also misplaced because unlike HB 5, the law at issue there applied to all abortions performed at all stages of gestation. 278 So. 3d at 217-18 (law required 24 hours to pass between time patient informed of nature and risks of abortion and abortion performed). The First DCA did not hold that a plaintiff must show that a law like HB 5, which applies only to women seeking abortions after 15 weeks, violates the constitutional rights of women who are not pregnant or who do not seek abortions after 15 weeks LMP.

133. Thus, HB 5's ban on abortion prior to viability likely violates the right to privacy under the Florida Constitution because it implicates that right and likely cannot survive strict scrutiny. The Court will now consider the remaining temporary injunction factors.

C. Adequate Remedy at Law and Irreparable Harm

134. Plaintiffs have shown that HB 5 would cause irreparable harm for which no adequate remedy is available at law. As explained, HB 5 likely will violate the right to privacy in the Florida Constitution, and the threatened or actual loss of constitutional rights, even temporarily, is *per se* irreparable harm. *Gainesville,* 210 So. 3d at 1263-64 ("presum[ing] irreparable harm when certain fundamental rights are violated," including right to privacy, and collecting cases); *Fla. Dep't of Health v. Florigrown, LLC,* 320 So. 3d 195, 200 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2182b] ("[T]he law recognizes that a continuing constitutional violation, in and of itself, constitutes irreparable harm."), *quashed on other grounds,* 317 So. 3d 1101 (Fla. 2021) [46 Fla. L. Weekly S175a]; *Bd. of Cty. Comm'rs, Santa Rosa Cty. v. Home Builders Ass'n of W. Fla., Inc.,* 325 So. 3d 981, 985 (Fla. lst DCA 2021) [46 Fla. L. Weekly D1705a] (same).

135. The Court rejects the State's argument that Plaintiffs cannot establish irreparable harm based on HB 5's harm to their patients' constitutional right to privacy. As explained, Plaintiffs have third-party standing to represent their patients' right to privacy in this case and have shown that HB 5 would cause their patients to suffer irreparable harm. Plaintiffs thus do not have to show irreparable harm to themselves. *See, e.g., Gainesville,* 210 So. 3d at 1264 (temporary injunction warranted based on irreparable harm to "women seeking to terminate their pregnancies in Florida" in challenge brought by abortion provider and non-profit organization).

136. Plaintiffs also have shown that HB 5 will cause them to suffer irreparable harm without an adequate remedy at law because Plaintiffs currently provide abortions after 15 weeks LMP, and HB 5 will force them to stop doing so in likely violation of the Florida Constitution. *See Planned Parenthood of Wis., Inc. v. Van Hollen,* 738 F.3d 786, 795-96 (7th Cir. 2013) (abortion providers irreparably harmed by abortion restrictions that, absent preliminary injunction, would cause "disruption of the services" the clinics provide). In concluding that Plaintiffs will be irreparably harmed, the Court credits Dr. Tien's testimony that forcing abortion providers to stop providing abortions between 15 weeks LMP and fetal viability, as HB 5 does, will "directly impede[ ] and interfere[ ] on the physician-patient relationship." Hr'g Tr. (Rough) 70:11-16 [Tien]; *see also id.* 70:17-71:1 [Tien]. Plaintiffs cannot remedy this harm to their ability to provide healthcare to their patients through monetary damages or any other procedure available under Florida law.

137. The Court also rejects the State's argument that Plaintiffs cannot show irreparable harm because they purportedly waited too long to file this action. *See* State's Resp. at 13-15. Plaintiffs filed this action a month before HB 5 is set to take effect and have litigated their Motion before the law's effective date.

138. Thus, Plaintiffs have shown HB 5 will cause irreparable harm for which no adequate remedy is available at law.

D. Public Interest

139. The Court concludes that a temporary injunction of HB 5 will serve the public interest, because HB 5 likely violates the Privacy Clause of the Florida Constitution. Enjoining a law that would "impose" upon Floridians' privacy rights "in violation of the Florida Constitution [ ]would serve the public interest." *Gainesville,* 210 So. 3d at 1264; *accord Green,* 323 So. 3d at 254-55 (public interest factor satisfied when Plaintiffs demonstrate likelihood of success in showing the law is unconstitutional). The State argues that an injunction would not be in the public interest because HB 5 "promotes public health and welfare by protecting maternal health and children in utero." State's Resp. at 23. For the same reasons the Court concluded these asserted interests are legally insufficient and factually unsupported, the Court also concludes that these claimed interests do not overcome the public interest in preventing a likely violation of Floridians' constitutional rights.

III. Scope of Relief and Bond

140. The Court is not persuaded by the State's argument that this Court should limit any injunctive relief to these Plaintiffs, rather than enter a statewide injunction. State's Resp. at 23-24. As explained, HB 5 likely is facially unconstitutional, and under existing law, there is likely no set of circumstances in which the State can constitutionally apply it. This conclusion applies to any clinic or doctor in Florida, not just those named as plaintiffs in this suit, and the Court does not believe the law requires every affected person to sue to prevent a violation of the Florida Constitution. In addition, a statewide temporary injunction is consistent with the temporary injunctions the Florida Supreme Court and others have entered against other abortion restrictions. *See Gainesville,* 210 So. 3d at 1264-65 (affirming trial court temporary injunction of abortion restriction "barring the application of the law in its entirety" on "all Florida women"). Accordingly, the injunction the Court orders, below, applies throughout the State of Florida.

141. The Court determines that an appropriate bond for this temporary injunction is $5,000. Fla. R. Civ. P. l.610(b); *see AOT, Inc. v. Hampshire Mgmt. Co.,* 653 So. 2d 476,478 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D920c] (amount of injunction bond is within the court's discretion). Although the purpose of an injunction bond is to "secure[ ] the enjoined party against any damages it may incur if the injunction turns out to have been wrongfully entered," *AOT, Inc.,* 653 So. 2d at 478, the State did not present evidence of anticipated damages. The Court is not persuaded by the State's argument that the bond must be $1 million, to account for the "more than $874 million" in lost tax revenue the temporary injunction will allegedly cause the State. State's Resp. at 25. Moreover, under the law, HB 5 is subject to a strict scrutiny analysis and a rebuttable presumption of unconstitutionality, and the Court believes its injunction complies with the law as it currently exists in Florida. *See Montville v. Mobile Med. Indus., Inc.,* 855 So. 2d 212, 216 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D2213a] (in setting bond, court is "permitted to consider [other] factors," such as "the adverse party's chances of overturning the temporary injunction"). Accordingly, the Court holds that a $5,000 bond in this case is reasonable.

INJUNCTION & BOND ORDER

For an these reasons, it is hereby ORDERED and ADJUDGED that:

Plaintiffs' Motion is GRANTED. Defendants State of Florida, Florida Department of Health, Joseph Ladapo, M.D., in his official capacity as Florida Secretary of Health, Florida Board of Medicine, David Diamond, M.D., in his official capacity as Chair of the Florida Board of Medicine, Chair of Florida Board of Osteopathic Medicine, Sandra Schwemmer, D.O., in her official capacity as Chair of the Florida Board of Osteopathic Medicine, Florida Board of Nursing, Maggie Hansen, M.H.Sc., R.N., in her official capacity as Chair of the Florida Board of Nursing, Florida Agency for Health Care Administration, Simone Marstiller, J.D., in her official capacity as Secretary of the Florida Agency for Health Care Administration, and their officers, agents, servants, employees, appointees, or successors, as well as those in active concert or participation with any of them, are hereby temporarily enjoined from enforcement or threatened enforcement, operation, and execution, in any manner, of Section 4 of 2022-69, Laws of Florida (HB 5) and the related definitions in Section 3(6) and 3(7) of HB 5, in all their applications statewide, until further order of the Court. Defendants are also enjoined from filing or pursuing any future suit or prosecution that seeks to enforce HB 5 against conduct that takes place while this injunction is in effect.

Pursuant to Florida Rule of Civil Procedure 1.610(b), Plaintiffs are jointly ordered, within seven (7) days from the date of this Order, to post a bond in the amount of $5,000 as a condition for the temporary injunction remaining in effect.

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[1]Florida law separately bans abortions after fetal viability. § 390.01112, Fla. Stat. That law is not at issue in this case.

[2]"Hr'g Tr. (Rough)" refers to the court reporter's rough draft of the transcript for the June 27, 2022, evidentiary hearing in this case. A final transcript was not yet available at the time this Order was entered.

[3]Dr. Condic also testified about "when life begins." Hr'g Tr. 115:17-22. The Court finds evidence about when life begins irrelevant to the question of HB 5's constitutionality under controlling law.

[4]Existing Florida !aw bans abortion after fetal viability. §§ 390.011(1), 390.01112, Fla. Stat.

[5]Florida law already prohibits abortions at and after fetal viability, which is defined as "the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures." §§ 390.011(13), 390.01112, Fla. Stat.; *see also* §§ 390.011 (6), (12)(c), 390.0111(1), Fla. Stat. (prohibiting abortion in third trimester). Plaintiffs are not challenging Florida's ban on abortion after viability nor the third-trimester ban. Mot. at 6.)

* * *

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COUNTY COURTS

Landlord-tenant—Eviction—Where defendant occupies property under contract for sale, plaintiff is not entitled to bring action for possession under Florida Residential Landlord Tenant Act

CONDON BOGGS, Plaintiff, v. RANDALL RAY BOGGS, et al., Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2021-CC-006389, Division CC-F. April 19, 2022. James A. Ruth, Judge. Counsel: Condon Boggs, Pro se, Jacksonville, Plaintiff. Annie York Rodriguez, Jacksonville Area Legal Aid, Inc., Jacksonville, for Defendant.

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS MATTER came before the court for an evidentiary hearing on April 12, 2022, upon the Defendant's Motion to Dismiss Amended Complaint for Eviction for Lack of Subject Matter Jurisdiction and Failure to State a Claim. The Plaintiff appeared via Zoom, *pro se,* and the Defendant RANDALL RAY BOGGS appeared with counsel via Zoom. After hearing argument of Counsel for the Defendant and testimony of the Parties, and the Court being otherwise advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, CONDON BOGGS, and Defendant, RANDALL RAY BOGGS, entered into an agreement for Defendant to purchase real property from Plaintiff on February 1, 2016.

2. The real property that was the subject of the Agreement is located at 351 Celery Avenue South, Jacksonville, Duval County, Florida.

3. Plaintiff filed a residential eviction action pursuant to Chapter 83 Part II of the Florida Statutes to attempt to recover possession of the subject property from Defendant.

4. The Agreement between the parties constitutes a contract for deed wherein the Plaintiff admitted the Defendant paid a $2,500.00 down payment to purchase the subject property and paid well in excess of 12 monthly payments since the inception of the contract, until the Plaintiff refused to accept any money from the Defendant after the filing of this cause of action.

5. Defendant was not renting the dwelling unit from Plaintiff.

CONCLUSIONS OF LAW

A. §83.42(2), Fla. Stat. specifically excludes application where a Defendant occupies the dwelling unit and property under a contract of sale.

B. The Agreement at issue is a Contract for Sale, not a residential lease.

C. When there is no rental agreement, and no landlord and tenant relationship exists between the Parties, a Plaintiff is not entitled to bring an action for possession pursuant to Chapter 83, Part II.

D. The Plaintiff has failed to state a cause of action for eviction because Plaintiff is not a landlord and Defendant is not a tenant as defined by Florida Statute Section 83.43, and therefore, Defendant is not subject to the Florida Residential Landlord Tenant Act.

E. The Defendant is the prevailing party in this action and the Court reserves jurisdiction to determine entitlement and amount of attorney's fees and costs.

It is therefore:

ORDERED AND ADJUDGED that the Motion to Dismiss is hereby **GRANTED** and the Amended Complaint filed in this case is dismissed with prejudice.

* * *

DIRECT GENERAL INSURANCE COMPANY, Plaintiff, v. ZAIDA MATTSON, Defendant. County Court, 6th Judicial Circuit in and for Pasco County. Case No. 51-2021-CC-001946WS, Division O. June 4, 2022. Joseph Justice, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Defendant.

ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND DEFENDAT'S MOTION TO STRIKE

THIS MATTER having come before the Court for hearing on both Plaintiffs Motion for Summary Judgment and Defendant's Motion for Summary Judgment the Court having reviewed the pleadings and received argument finds as follows:

The Court finds the affidavit of the underwriter is based on inadmissible hearsay and grants Defendant's Motion to Strike the affidavit. In addition to the failure of the affidavit, the Court finds that there is a genuine issue of material fact as to whether Defendant made any material misrepresentations in her insurance application, and as to whether Plaintiff suffered any adverse consequences as a result. Therefore, Plaintiff's Motion for Summary Judgment is Denied.

While the ultimate issue of whether Plaintiff was entitled to rescind the policy based on a misrepresentation is an unresolved question of fact, it does appear to be an undisputed fact that Plaintiff's refund check did not return Defendant to the status quo, and the record contains no dispute or counter affidavit by Plaintiff as to this issue. As such the Court grants Defendant's Motion for Summary Judgment. It is therefore

ORDERED AND ADJUDGED: Defendant's Motion to Strike is **Granted,** Plaintiff's Motion for Summary Judgment is **Denied**, and Defendant's Motion for Summary Judgment is **Granted.**

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Motion to dismiss medical provider's action for PIP benefits based on county court order entered in declaratory action brought by insurer against insured is denied—Dismissal of action is not appropriate where provider who was assignee of PIP benefits was not party to declaratory action—Moreover, motion to dismiss was untimely under mandated case management plan

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., d/b/a ADVENTHEALTH ORLANDO, a/a/o Ferdinand Flores, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2020-SC-055481-O. May 19, 2022. Eric H. DuBois, Judge. Counsel: David B. Alexander, Bradford Cederberg, P.A., Orlando, for Plaintiff. Cara F. Morehouse, Savage Villoch Law, PLLC, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY, TO ABATE; GRANTING PLAINTIFF'S AMENDED MOTION TO COMPEL DEPOSITION OF DEFENDANT'S CORPORATE REPRESENTATIVE; GRANTING PLAINTIFF'S MOTION TO COMPEL RESPONSE TO PLAINTIFF'S FIRST REQUEST TO PRODUCE TO DEFENDANT; GRANTING PLAINTIFF'S MOTION TO COMPEL VERIFIED ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT; AND GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S DISCOVERY

THIS MATTER having come before this Honorable Court on 1.) Defendant's Motion to Dismiss Or, Alternatively, To Abate and Incorporated Memorandum of Law (COS 12/28/2020); 2.) Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS

6/2/2021); 3.) Plaintiff's Motion to Compel Response to Plaintiff's First Request to Produce to Defendant (COS 6/2/2021); 4.) Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant (COS 6/2/2021); and 5.) Defendant's Motion for Extension of Time to Respond to Plaintiff's Discovery (COS 1/21/2021), and this Honorable Court having heard arguments of counsel on April 27, 2022, reviewed the Court file and authority filed by the parties, and being otherwise fully advised in the premises, finds as follows,

1. This is a breach of contract action arising out of a motor vehicle collision that occurred on July 6, 2020.

2. The Plaintiff in this matter is ADVENTIST HEALTH SYSTEM/SUNBELT, INC. d/b/a ADVENTHEALTH ORLANDO, as assignee of Ferdinand Flores.

3. The Plaintiff provided emergency medical services and care to Ferdinand Flores on July 6, 2020 immediately following the July 6, 2020 automobile accident. Pursuant to the assignment of benefits executed in favor of Plaintiff, Plaintiff submitted its emergency medical services and care bill to the Defendant for payment. Defendant received Plaintiff's medical bill on July 17, 2020 and Defendant refused to pay Plaintiff's medical bill. Subsequently, Plaintiff sent Defendant a Notice of Intent to Initiate Litigation. Again, Defendant refused to pay Plaintiff's medical bill. Thereafter, Plaintiff filed Plaintiff's Complaint in the instant action seeking damages.

4. On December 28, 2020, Defendant in the instant action filed its Motion to Dismiss Or, Alternatively, To Abate and Incorporated Memorandum of Law.

5. It is Defendant's position that Plaintiff's Complaint in the instant action should be dismissed based upon the declaratory action of *Direct General Ins. Co. v. Flores*, Lake County Case No. 2020-CC-004215. It is Plaintiff's position that Plaintiff's Complaint in the instant action cannot be dismissed, and this matter must proceed forward to conclusion on its merits. This Court agrees entirely with Plaintiff's position and finds Defendant's position unpersuasive.

6. First, Defendant's Motion to Dismiss was untimely brought before the Court. Pursuant to the Court's Mandated Case Management Plan/Order in this matter, executed on November 3, 2021, Defendant was to have filed and brought before the Court any Motions to Dismiss within one hundred and twenty (120) days of November 3, 2021 or it is abandoned and denied. Defendant's Motion to Dismiss was filed on December 28, 2020, sixteen (16) months prior to the April 27, 2022 hearing and almost six (6) months after the Court executed its Mandated Case Management Plan/Order on November 3, 2021. Defendant failed to file a motion for extension of time to comply with the Court's Mandated Case Management Plan/Order. Considering Defendant's direct violation of the Court's Order, Defendant's Motion to Dismiss is deemed abandoned and denied.

7. Second, even if Defendant's Motion to Dismiss was not deemed abandoned and denied pursuant to the Court's Mandated Case Management Plan/Order, Defendant's Motion is denied entirely on its merits. The declaratory action relied upon by Defendant in support of its Motion to Dismiss is not controlling in the present matter. In *Direct General Ins. Co. v. Flores*, Lake County Case No. 2020-CC-004215, the Plaintiff, Direct General Insurance Company, brought a declaratory action against a single Defendant, Ferdinand Flores. Direct General Insurance Company filed its declaratory action on or about October 16, 2020, well after Plaintiff's medical bill that is the subject of the instant lawsuit was overdue pursuant to Fla. Stat. §627.736. At the time Direct General Insurance Company filed its complaint in the declaratory action relied upon it had direct knowledge of the overdue claim submitted by Plaintiff at issue in the instant matter. Notwithstanding same, Direct General Insurance Company failed to name Plaintiff as a party in the declaratory action and failed to serve Plaintiff in the instant action regarding the declaratory action.

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

9. Fla. Stat. §86.091 reads in its entirety as follows:

> Parties.—When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. ***No declaration shall prejudice the rights of persons not parties to the proceedings.*** In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard. If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard. *See Fla. Stat.* §*86.091* (emphasis added).

10. Considering Plaintiff in the instant matter is not a party in the matter of *Direct General Ins. Co. v. Flores*, Lake County Case No. 2020-CC-004215, "[n]o declaration shall prejudice the rights" of Plaintiff in the instant matter. *See Fla. Stat.* §*86.091*. Due process requires that a person's rights not be trampled upon. Defendant's position would require violation of due process rights and permit declarations to prejudice the rights of persons without their knowledge or notice. A party must "be given . . . a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him." *See VMD Fin. Services, Inc. v. CB Loan Purchase Assoc., LLC*, 68 So. 3d 997, 999 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1970a].

IT IS HEREBY ORDERED AND ADJUDGED that:

1) Defendant's Motion to Dismiss Or, Alternatively, To Abate (COS 12/28/2020) is hereby **DENIED**. This matter shall proceed forward on its merits. Defendant shall file an Answer to Plaintiff's Complaint within twenty (20) days from the date of this Order. Plaintiff shall have twenty (20) days from the filing of Defendant's Answer to file Plaintiff's Reply to Defendant's Answer.

2) Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS 6/2/2021) is **GRANTED**. The deposition of Defendant's Corporate Representative, pursuant to the Notice of Taking Deposition Duces Tecum attached to Plaintiff's Amended Motion to Compel the Deposition of Defendant's Corporate Representative Pursuant to Fla. R. Civ. P. 1.310(b)(6) (COS 6/2/2021), shall be coordinated within thirty (30) days from the date of this Order and shall occur within one hundred and twenty (120) days from the date of this Order.

3) Plaintiff's Motion to Compel Response to Plaintiff's First Request to Produce to Defendant (COS 6/2/2021) is **GRANTED**. Plaintiff's Motion to Compel Verified Answers to Plaintiff's First Set of Interrogatories to Defendant (COS 6/2/2021) is **GRANTED**. Defendant's Motion for Extension of Time to Respond to Plaintiff's Discovery (COS 1/21/2021) is **GRANTED**. Defendant shall respond to Plaintiff's First Request for Admissions to Defendant and Plaintiff's First Request to Produce to Defendant within forty-five (45) days from the date of this Order, or at least thirty (30) days prior to the deposition of Defendant's Corporate Representative occurring, whichever date is earlier. Defendant shall provide verified answers to Plaintiff's First Set of Interrogatories to Defendant within forty-five (45) days from the date of this Order, or at least thirty (30) days prior to the deposition of Defendant's Corporate Representative occurring, whichever date is earlier.

* * *

Landlord-tenant—Public housing—Eviction—Subsidized landlord that filed eviction complaint 60 days after having actual knowledge of lease violation waived right to evict tenant—Requirement that action be "instituted" within 45 days of knowledge of violation means that eviction complaint must be filed within 45 days to avoid waiver

POAH CUTLER MANOR, LLC, Plaintiff, v. ARTHEISHA L. AXEN, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-011149-CC-25, Section CG03. May 3, 2022. Patricia Marino Pedraza, Judge. Counsel: Brian C. Costa, Alvarez, Feltman, Da Silva & Costa, PL, Miami, for Plaintiff. Jeffrey M. Hearne, Legal Services of Greater Miami, Inc., Miami, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on Defendant's Motion to Dismiss, and after holding a hearing on May 2, 2022, the Court rules as follows:

Florida Statute § 83.56(5)(c) provides that subsidized landlords do not waive their right to evict by accepting rental subsidies, "however, waiver will occur if an action has not been instituted within 45 days after the landlord obtains actual knowledge of the noncompliance." Defendant asks this Court to dismiss the eviction complaint pursuant to Florida Statute § 83.56(5)(c) because Plaintiff failed to institute this action within 45 days after it obtained actual knowledge of the alleged lease violation.

The Court considered the following facts from the Complaint which are relevant to this Motion: Defendant and her children reside at a property which receives rental subsidies from HUD. On July 18, 2016, Plaintiff drafted a termination notice to Defendant. The notice alleges Ms. Axen violated her lease by engaging in criminal activity and references an arrest which occurred on June 29, 2016. At the latest, Plaintiff had actual knowledge of the alleged noncompliance when it drafted the notice on July 18, 2016. Plaintiff filed this eviction action on September 16, 2016—60 days after drafting the notice.

Before arguing on the merits, Plaintiff once again raised that Defendant failed to comply with § 83.60 because she failed to attach any "papers" to support her Motion to Determine Rent. The Court already rejected this argument during the hearing on the Motion to Determine Rent. The Third District Court of Appeal's opinion mandated this Court to conduct a hearing on the motion to determine rent, which it did, and Defendant complied with this Court's order to deposit rent.

Plaintiff argues it complied with § 83.56(5)(c) by serving the termination notice within 45 days of the noncompliance and the landlord does not waive the right to file an eviction complaint under paragraph (c) if it exercised the right to terminate the tenancy by serving a notice of termination within 45 days. Plaintiff asserts that the "waiver" discussed in subsection (5)(c) refers to the right to terminate and not to the right to file suit and that to find otherwise would be to deem 83.56(5)(c) to be a statute of limitations without identifying itself as same. Finally, Plaintiff argues that the restrictions placed on Plaintiff for conditions and waiting periods precedent to the filing of a lawsuit make it extremely difficult, and sometimes impossible, to file suit within 45 days, supporting that the subsection must refer to the termination of the tenancy.

The Court is unpersuaded by these arguments. Instituting an action means filing the eviction lawsuit with the court. This plain meaning is supported by the numerous cases cited in Defendant's Memorandum of Law, including *SP OV Apartments. v. Thomas*, 29 Fla. L. Weekly Supp. 33b (Duval Cty. 2020), and two previous decisions from this Court, *Miami-Dade Cnty. v. Smith*, 17 Fla. L. Weekly Supp. 719b (Miami-Dade Cty. 2010); *POAH Cutler Meadows LLC v. Hervas*, 17 Fla. L. Weekly Supp. 468b (Miami-Dade Cty. 2009). This interpretation of what it means to institute an action is consistent with Rule 1.050 of the Florida Rules of Civil Procedure which states that "[e]very action of a civil nature shall be deemed commenced when the complaint or petition is filed[.]"

Since Plaintiff filed its eviction complaint 60 days after obtaining actual knowledge of the alleged noncompliance, Plaintiff waived its right to evict Defendant. For the reasons set forth above, and as set forth on the record, it is

ORDERED AND ADJUDGED

The Motion to Dismiss is GRANTED. The eviction complaint is dismissed with prejudice.

* * *

Insurance—Personal injury protection—Attorney's fees—Amount

MED ADVANCED, CORP., Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001439-SP-21, Section HI01. March 8, 2022. Milena Abreu, Judge. Counsel: George Milev, The Evolution Law Group, P.A., Weston, for Plaintiff. Marcus Griggs, Coral Gables, for Defendant.

FINAL JUDGMENT AWARDING ATTORNEY'S FEES AND COSTS

THIS CAUSE having come before this Court on Plaintiff's Motion to Tax Attorney's Fees and Costs, the Court having reviewed the file and the Court Docket, including the Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees entered on 1/20/22, Plaintiff's Notice of Filing Affidavit of Plaintiff's Attorneys' Fees Expert on 1/31/22 and Plaintiff's 3/07/22 Certification of Plaintiff's Compliance and of Defendant's Non-Compliance with the 1/20/22 Court Order, hereby FINDS, ORDERS and ADJUDGES as follows:

1. Plaintiff's counsels are entitled to fees, costs and interest in accordance with Florida Statutes 627.428 and 627.736, the Notice of Settlement of the Underlying Claim filed on 1/19/22 with stipulation to Plaintiff's entitlement to reasonable attorney's fees and costs, pursuant to the Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees, pursuant to Plaintiff's Notice of Filing of Time Sheets, Costs and Hourly Rate Claims, and the Affidavit of Plaintiff's Attorney's Fees Expert, pursuant to Plaintiff's Certification of Plaintiff's Compliance and Defendant's Non-Compliance with the 1/20/22 Court Order, and pursuant to the relevant factors in *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), *Standard Guarantee Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), as well as the appropriate factors in the Statewide Uniform Guidelines for Taxation of Costs.

2. Plaintiff's counsel Kelly Arias reasonably expended 6.8 hours.

3. The reasonable hourly rate for attorney Kelly Arias is $525.00/hour as previously awarded by this Court.

4. Thus the reasonable reimbursement for attorney Kelly Arias is 6.8 hours at $525.00/hour = $3,570.00

5. Plaintiff's counsel George Milev reasonably expended 84.8 hours.

6. The reasonable hourly rate for attorney George Milev is $525.00/hour as previously awarded by this Court.

7. Thus the reasonable reimbursement for attorney George Milev is 84.8 hours at $525.00/hour = $44,520.00

8. Plaintiff is entitled to recover the expert witness fees of attorney Cris Boyar based upon the holding and reasoning contained in the cases *Stokus v. Phillips,* 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985), and that attorney Boyar reasonably expended 4.1 hours. The Court finds that a rate of $600.00/hour is a reasonable hourly rate for the services of Mr. Boyar per his Affidavit filed with the Court and as previously awarded by this Court. Thus, the total award for Mr. Boyar is 4.1 hours at $600.00/hour = $2,460.00.

9. Therefore, Plaintiff's counsel, The Evolution Law Group P.A. and its attorneys recover from the Defendant the following:

a. Reasonable attorney's fees in the amount of $48,090.00

b. Reasonable costs in the amount of $125.00

c. Expert witness fees for attorney Cris Boyar in the amount of $2,460.00

d. For a total sum of $50,675.00 together with post-judgment interest at the rate of 4.25% per annum until payment in full of the judgment for which let execution issue forthwith.

* * *

Insurance—Personal injury protection—Attorney's fees—Provider is entitled to attorney's fees and costs where insurer issued check for penalty, postage, and interest to incorrect law firm and re-issued check to correct firm only after medical provider filed suit

BRIAN M. SILVER, D.C., P.A., a/a/o Jhon Johnotan, Plaintiff, v. UNITED AUTO INS. CO., Defendant. County Court. 11th Judicial Circuit in and for Miami-Dade County. Case No. 2016-017138-SP-23, Section ND01. May 20, 2022. Myriam Lehr, Judge. Counsel: Robert B. Goldman, Florida Advocates, Dania Beach, for Plaintiff. Catherine Ribetti, for Defendant.

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

THIS CAUSE came before the Court on May 10, 2022 upon Plaintiff's Motion to Tax Attorney's Fees and Costs (Entitlement Only), and the Court having considered the motion, having heard argument of counsel, having considered the exhibits and caselaw filed by the parties and having considered the Affidavit of Christopher M. Tuccitto, Esq., and being otherwise fully advised, it is hereby

ORDERED that Plaintiff's Motion is GRANTED, for the following reasons:

In response to a demand letter for Personal Injury Protection ("PIP") benefits, penalty, postage and interest, United Automobile Insurance Company ("United Auto") issued checks, of which the checks for penalty, postage and interest were made payable to the incorrect law firm. After unsuccessful attempts to have United Auto re-issue the checks for penalty, postage and interest to the correct law firm (which included letters and a telephone conversation with the United Auto adjuster), on October 12, 2016, Plaintiff filed a Complaint to Enforce Settlement Agreement & Breach of Contract. On October 17, 2016, United Auto provided the re-issued checks for penalty, postage and interest, made payable to the correct law firm. On February 6, 2022, this Court entered an Agreed Final Judgment in Favor of the Plaintiff.

In *Magnetic Imaging Sys., I, Ltd. v. Prudential Prop. & Cas. Ins. Co.*, 847 So.2d 987 (Fla. 3rd DCA 2003) [28 Fla. L. Weekly D 679a], where the insurer tendered payment of interest due on late-paid benefits after the Plaintiff had filed suit, the Third District Court of Appeal held that the tender of payment after suit had been filed entitled Plaintiff to a fee award. As stated by the Court:

> [i]n any dispute 'which leads to judgment against the insurer in favor of the insured, attorney's fees shall be awarded to the insured.' *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 684 (Fla. 2000) [25 Fla. L. Weekly S1103a]. As the Florida Supreme Court has explained, 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.' *Id.* at 684. Where an insurer makes payment of a claim after suit is filed, but before a judgment is rendered, such payment operates as a confession of judgment, entitling the insured to an attorney's fee award. *See id.* at 684-85. These general principles apply not only to disputes between insurers and their insureds, but also to disputes between insurers and those like Magnetic, to whom PIP benefits have been assigned.

847 So.2d at 989-90.

Accordingly, Plaintiff is entitled an award of attorney's fees and costs as a result of Defendant's having tendered payment of interest due after Plaintiff filed suit in this case.

* * *

Attorney's fees—Appellate—Amount—Reasonable hours expended and hourly rate

AKLIPSE ASSET MANAGEMENT, INC., et al., Plaintiffs, v. NATALIA SOLANGE FONT POMALES, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-025273-CC-26, Section SD04. May 8, 2022. Lawrence D. King, Judge. Counsel: Robert Wayne and Shawn Wayne, Law Office of Robert Wayne; and Bryan A. Dangler, The Power Law Firm, for Defendants.

ORDER AND FINAL JUDGMENT AWARDING APPELLATE ATTORNEY'S FEES AND COSTS

THIS CAUSE CAME to be heard during an evidentiary proceeding on May 5, 2022, upon Defendants' Motion for Award of Trial Court and Appellate Court Attorneys' Fees and Costs, and the Court having reviewed the entire court file, including the relevant time records and expert reports submitted, having heard uncontroverted testimony by both counsel and his expert, and being otherwise fully advised in the premises, finds as follows:

1. The issues for consideration by this Court are to determine the reasonable hours expended by Defendants' counsel, Bryan A. Dangler, Esq. ("Mr. Dangler"), for his appellate work in connection with this action, and at what hourly rate.

2. In support of his request, Mr. Dangler submitted an "Amended Affidavit of Attorney Fees and Costs of Appellate Counsel" ("Mr. Dangler's affidavit"), and an "Agreement for Legal Services" that was entered into between his office and the Defendants, NATALIA SOLANGE FONT POMALES and ANTHONY MARTINEZ ("Defendants") ("retainer agreement").

3. Mr. Dangler's affidavit states that he has been a member of the Florida Bar in good-standing for 8 years with his practice solely focused in the areas of consumer and landlord-tenant law at both the trial and appellate level. The time entries in his affidavit reflected a total time of 60.4 hours billed at an hourly rate of $395.00, together with $629.50 in taxable costs. No objections to the affidavit or any of its time or expense entries were raised or filed with the Court.

4. The retainer agreement also reflected an agreed hourly rate of $395.00 for all work performed in the appeal, as well as reimbursement of all costs and expenses incurred. No objections to the retainer agreement or its provisions were raised or filed with the Court.

5. During the hearing, Mr. Dangler provided uncontroverted testimony attesting to the reasonableness of the time he incurred for the appeal, that such time was commensurate with that of similar attorneys in similar locale and field, that none of the time he incurred

was duplicative, and that his hourly rate was reasonable given his prior experience, past successes, and years of practice.

6. Mr. Dangler's time and costs that he expended were also supported by an "Affidavit and Report" authored by qualified attorney fee expert, Mr. Brett A. Panter, Esq. ("Mr. Panter" or "fee expert") ("expert report"). In addition to his expert report, Mr. Panter provided uncontroverted expert testimony during the hearing in support of the reasonableness of Mr. Dangler's time and costs incurred in the appeal, given the amount and complexity of the issues that were presented in both the 43-page initial brief and supplemental brief, and the result he ultimately achieved. Mr. Panter's expert report and his testimony during the hearing affirmed the work and skill displayed by Mr. Dangler in undertaking the appeal and bringing it to a successful end within such a short amount of time, a factor he specifically stated should not be overlooked. He also affirmed Mr. Dangler's hourly rate as reasonable given his years of practice, experience, and success in prior appeals, in addition to the hourly rates of between $375.00 and $395.00 that Mr. Dangler has been awarded in prior matters.

7. The Court determines, sitting in its fact-finding capacity, that the reasonable hours expended by Mr. Dangler in the representation of the Defendants during the appeal are **60.4 hours**.

8. The Court further determines, sitting in its fact-finding capacity, that the reasonable hourly rate for the work performed by Mr. Dangler during the appeal is **$395.00**.

9. These findings are based upon all the competent substantial evidence and testimony presented to the Court, together with all the factors enumerated both in the Florida Bar Code of Ethics 4-1.5, and *Florida Patients Compensation Fund v. Rowe and Standard Guaranty Ins. Co. v. Quanstrom*, 472 So. 2d 1145 (Fla. 1985).

10. Accordingly, this Court finds that the reasonable hourly rate times the reasonable (respective) hours equals **$23,858.00**, which represents the "lodestar" for the attorney's fees to be awarded to Mr. Dangler in this matter.

11. The Court also finds that Mr. Dangler is entitled to prejudgment interest on the above "lodestar" fee at a rate of 4.25% per annum, or .000116438 per day, as determined by §55.03, Fla. Stat., from March 2, 2022 through May 6, 2022 (65 days), which equals **$180.56**.

12. The Court awards taxable costs in the amount of **$629.50**.

13. As for Defendants' fee expert, the Court finds $750.00 to be a reasonable hourly rate for the work performed by Mr. Panter, and that the 3.7 hours he incurred were reasonably expended, which equal **$2,775.00**.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that BRYAN A. DANGLER, ESQ., as appellate counsel for the Defendants, shall recover from the Plaintiff, AKLIPSE ASSET MANAGEMENT, INC. ("Judgment Debtor"), the following: **$23,858.00** for attorney's fees, **$629.50** for costs, **$180.56** for prejudgment interest, and **$2,775.00** for expert witness fees, for a **total sum of $27,443.06**, all of which shall bear post-judgment interest at the statutory rate from the date this Final Judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which amount let execution issue.

IT IS FURTHER ORDERED that the Judgment Debtor, whose mailing address is [Editor's note: address omitted], shall complete under oath, Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on Judgement Creditor, BRYAN A. DANGLER, ESQ. ("Judgment Creditor"), at The Power Law Firm [Editor's note: address omitted], within forty five (45) days from the date of this Final Judgment, unless the Final Judgment is satisfied or post-judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper and to compel the Judgment Debtor to complete the Form 1.977, including all required attachments, and to serve it on the Judgement Creditor.

IT IS FURTHER ORDERED that this Court reserves jurisdiction for purposes of enforcing this Final Judgment, including the award of any additional attorney's fees and costs that may be necessarily incurred to enforce this Final Judgment against the Judgment Debtor.

* * *

Attorney's fees—Mixed-fee retainer agreement with first 10 hours subject to fixed hourly rate and work in excess of 10 hours to be performed on contingent basis—Reasonable hourly rate—Hours expended—Multiplier of 1.5 for work performed on contingent basis

AKLIPSE ASSET MANAGEMENT, INC., et al., Plaintiffs, v. NATALIA SOLANGE FONT POMALES, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-025273-CC-26, Section SD04. May 8, 2022. Lawrence D. King, Judge. Counsel: Pro se, Plaintiff. Robert Wayne and Shawn Wayne, Law Office of Robert Wayne; and Bryan A. Dangler, The Power Law Firm, for Defendants.

FINAL JUDGMENT AWARDING ATTORNEY'S FEES AND COSTS FOR TRIAL COURT COUNSEL

THIS CAUSE having come before this Court on Defendants' Motion to Tax Attorney's Fees and Costs, and the Court having reviewed the file and the Court Docket, including the Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney's Fees entered on 3/2/2022, Defendants' Notice of Filing Fee Expert Report and Affidavit of Attorneys' Fees, as well as the Affidavit of Robert Wayne and the retainer agreement submitted into evidence, it is hereby ORDERED and ADJUDGED as follows:

1. Defendants counsel is entitled to fees, costs and interest in accordance with Florida Statutes and pursuant to the relevant factors in *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145 (Fla. 1985), *Standard Guarantee Ins. Co. v. Quanstrom,* 555 So. 2d 828 (Fla. 1990), as well as the appropriate factors in the Statewide Uniform Guidelines for Taxation of Costs.

2. Mr. Robert Wayne testified that he has been a member of the Florida Bar in good standing for 52 years, with a focus on real estate litigation and landlord-tenant law.

3. In support of his fee request, Mr. Wayne submitted a retainer agreement and affidavit reflecting the total time he incurred in the lower court proceedings.

4. Both the retainer agreement and affidavit reflect an hourly rate of $575.00, which Mr. Wayne testified was reduced from his standard hourly rate of $725.00.

5. The retainer agreement also reflected a mixed-fee arrangement, that is, fixed for the first 10 hours incurred, with any remainder that exceeded those 10 hours performed on a contingent basis.

6. Mr. Wayne's affidavit reflected a total time of 17.7 hours of work and services performed in the lower court proceedings.

7. Mr. Wayne testified as to the reasonableness of the time he incurred in the lower court, that such time was commensurate with that of similar attorneys in the locale and field and that none of the time he incurred was duplicative, and that his hourly rate was reasonable given his decades of prior experience and years of practice.

8. The Court was also provided with a detailed written report and analysis prepared by Mr. Wayne's qualified fee expert, Brett Panter, Esq., who also provided uncontroverted and unchallenged testimony as to the reasonableness of Mr. Wayne's hourly rate and time expended in the case, as well as his experience, efficiency, and diligence given the circumstances surrounding the matter.

9. Mr. Panter also testified that none of the time incurred by Mr. Wayne in the lower court proceedings was duplicative.

10. Importantly, Plaintiff did not rebut, negate, contradict, refute or challenge any of the written evidence submitted or testimony

provided by both Mr. Wayne and Mr. Panter.

11. The Court finds that a reasonable hourly rate for Mr. Wayne is $575.00

12. The Court also finds that the reasonable hours expended by Mr. Wayne is 17.7 hours.

13. Mr. Wayne is also seeking a 1.5 multiplier for all hours that exceeded the first 10 hours expended, and that he performed on a pure contingency basis.

14. Mr. Panter testified as to the *Quanstrom* factors. He also testified that he believed that a 1.5 multiplier was more than reasonable and appropriate for the 7.7 hours that were performed by Mr. Wayne on a pure contingency basis. Mr. Panter's reasoning for awarding a multiplier is also articulated in his filed report, analysis and affidavit.

15. The Court finds that a multiplier of 1.5 is appropriate for the 7.7 hours of work performed by Mr. Wayne on a pure contingent basis.

16. Accordingly, this Court finds that the reasonable hourly rate times the first 10 hours incurred by Mr. Wayne equals $5,750.00 and the reasonable hourly rate times the remaining 7.7 hours performed on a pure contingency basis, together with an enhancement of 1.5 equals $6,641.25 for a total sum of $12,391.25.

17. Defendants are entitled to recover the expert witness fees of attorney Brett Panter Esq. based upon the holding and reasoning contained in the cases *Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2nd DCA 1995) [20 Fla. L. Weekly D627c] and *Travieso v. Travieso,* 474 So. 2d 1184 (Fla. 1985), and that attorney Mr. Panter reasonably expended 4.1 hours. The Court finds that a rate of $750.00/hour is a reasonable hourly rate for the services of Mr. Panter per his testimony and affidavit filed with the Court. Thus, the total award for Mr. Panter is 4.1 hours at $750.00/hour, which equals $3,075.00

18. The Court finds that Mr. Wayne is entitled to pre-judgment interest. *See Quality Engineered Installation, Inc. v. Higley South, Inc., et. al.* 670 So.2d 929 (Fla. 1996) [21 Fla. L. Weekly S141a]. This was also stated and articulated in Mr. Panter's report, analysis and affidavit filed with the Court.

19. Pre-judgment interest accrues from the date of the vesting of entitlement to attorney's fees, which was entered on March 2, 2022, through the date of this order at the statutory rate of 4.25%. or .000116438 per day. Neither pre-judgment interest nor post-judgment interest needs to be pled under Florida law. *See, e.g., Mercedes-Benz of North America, Inc. v. Florescue & Andrews Invs., Inc.*, 653 So. 2d 1067, 1068 (Fla. 5th DCA 1995) [20 Fla. L. Weekly D896b] (noting "pre-judgment interest does not have to be pled"); *Napp v. Carman*, 576 So. 2d 361, 362 (Fla. 4th DCA 1991) (noting "post-judgment interest is governed by statute and need not be pled").

20. Therefore, Defendants' counsel, Robert Wayne Esq., of the Law Office of Robert Wayne shall recover from the Plaintiff Aklipse Asset Management Inc., the following:

a. Reasonable attorney's fees for Robert Wayne Esq., in the amount of **$12,391.25**

b. Pre-judgment interest in the amount of **$108.80**

d. Expert witness fees for Brett Panter, Esq. in the amount of **$3,075.00.**

For a total sum of $15,575.05 which shall be subject to post judgment interest at the statutory rate from the date this judgment is signed and adjusted quarterly in accordance with the interest rate in effect on the date as set by the Chief Financial Officer, for which let execution issue.

This Court reserves jurisdiction for purposes of enforcement of this Final Judgment, including the award of additional attorney's fees should it become necessary to expend additional time on the enforcement of this Final Judgment

IT IS ALSO ORDERED that the judgment debtor AKLIPSE ASSET MANAGEMENT INC, whose mailing address is [editor's note: address omitted] shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on judgment creditor ROBERT WAYNE ESQUIRE at the Law Office of Robert Wayne at [editor's note: address omitted] within 45 days from the date of this Final Judgment, unless the Final Judgment is satisfied or post judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper and to compel the judgment debtor to complete the 1.977 form, including all required attachments, and to serve it on the judgment creditor.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Where PIP policy provides that insurer will only pay 80% of properly billed reasonable charge, but in no event will pay more than 80% of schedule of maximum charges, insurer's payment of 80% of amount charged, rather than 80% of 200% of Medicare fee schedule, was proper—Further, where amount alleged to be owed is 59 cents, no benefits should be awarded under legal maxim of *de minimus non curat lex*

MIAMI MEDICAL GROUP, INC., Plaintiff, v. AUTO CLUB INSURANCE COMPANY OF FLORIDA, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2020-006731-SP-26, Section SD05. May 19, 2022. Michaelle Gonzalez-Paulson, Judge. Counsel: Mac Phillips, Michael Feldman, and Armando Brana, for Plaintiff. Scott E. Danner, Kirwan, Spellacy, Danner, Watkins, Brownstein, Fort Lauderdale, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO THE APPLICATION OF THE STATUTORY BILLED AMOUNT AND DEFENDANT'S CROSS MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on May 9, 2022, regarding the Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for same, and the Court having considered same, and being otherwise advised, the court hereby GRANTS the Defendant's Cross Motion for Partial Summary Judgment and DENIES the Plaintiff's Partial Motion for Summary Judgment:

ORDERED AND ADJUDGED

as follows:

1. Plaintiff brought this Personal Injury Protection ("PIP") action against the Defendant for purportedly underpaid PIP benefits.

2. At the hearing on May 9, 2022, as well as in its Motion, the Plaintiff admitted that the Defendant's policy properly incorporated the Schedule of Maximum charges set forth in 627.736(5)(a)1-5 (2019).

3. It is undisputed that this case involves a claim for Florida No-Fault ("PIP") benefits arising from a motor vehicle accident on May 22, 2019, involving Maria Magdalena Linares. Further, it is undisputed that the insured's policy provided $10,000 in PIP benefits subject to the terms and conditions of the insurance policy and Fla. Stat. §627.736. Moreover, there is no Med Pay coverage and the Defendant filed a certified copy of the policy and declarations page reflecting same.

4. Plaintiff submitted CPT Code 99213 in the amount of $160.00 for two dates of service. The Defendant approved this amount and paid 80% of same or $128.00. Plaintiff contends that Plaintiff's charges for CPT code 99213 should have been paid at 80% of 200% of the Medicare Part B Fee schedule rather than 80% of the amount that the Plaintiff billed for this CPT code. Thus the Plaintiff argues that the insurer should have paid $128.59 for this CPT code or a difference of .59 cents.

5. According to the binding case and statutory law, this Court agrees with the Defendant, that payment at 80% of the billed and submitted amount was the proper payment from the Defendant.

6. A plain reading of the Auto Club Insurance Company of Florida policy makes it abundantly clear that Auto Club will only pay 80% of "a properly billed reasonable charge" but the policy also states in no event will Auto Club pay more than 80% of the schedule of maximum charges.

7. The Florida Supreme Court stated that by its very nature, a limitation based on a schedule of maximum charges establishes a ceiling but not a floor. As a result, the Florida Supreme court determined that Fla. Stat. §627.736 (2019) does not preclude and insurer from using the separate statutory factors for determining the reasonableness of charges. *MRI Associates of Tampa, Inc. v. State Farm Mutual Automobile Insurance Company*, 334 So. 3d 577, 46 Fla. L. Weekly S379a (Fla. December 9, 2021).

8. The notice provision providing that "an insurer may limit payment" if the policy contains notice that "the insurer *may* limit payment pursuant to the schedule of charges" cannot be reconciled with the argument that an election to use the limitations of the schedule of maximum charges precludes an insurer's reliance on the other statutory factors for determining the reasonableness of reimbursements. The permissive nature of the statutory notice language does not in any way signal that the insurer will be so constrained by such an election. On the contrary, the language signals that the insurer is given an option that may be used in addition to other options that are authorized. *Id* at 17.

9. In Fla. Stat. §627.736(1)(a), the Legislature stated that PIP medical benefits must cover "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services.

10. Fla. Stat. §627.736(5)(a)(5) states that the No-Fault Act prohibits medical providers from billing an insured or insurance company more than a "reasonable charge," which the Act delineates according to both a fact-dependent inquiry and the schedule of maximum charges. Where the provider charges less than the scheduled maximum, the No-Fault Act neither excuses such charge from being otherwise reasonable, nor precludes an insurer from reimbursing 80% of the billed amount as a reasonable charge.

11. If a medical provider is prohibited by Fla. Stat. §627.736(5)(a)(5) from charging the insured or insurer more than a "reasonable charge" then an insurer is never statutorily obligated to pay more than 80% of the billed amount. Any other interpretation would be irreconcilable with Fla. Stat. §627.736 and Section (1)(a) and Section (5)(a).

12. The notice language echoes the underlying authorization to limit reimbursements under the schedule of maximum charges: "The insurer *may limit* reimbursement to 80 percent of the schedule of maximum charges." Given the full context of these provisions, a reasonable reading of the statutory text requires that reimbursement limitations based on the schedule of maximum charges be understood simply as an optional method of capping reimbursements rather than an exclusive method for determining reimbursement rates. By its very nature, a limitation based on a schedule of maximum charges establishes a ceiling but not a floor. *Id* at 17.

13. Moreover, the Auto Club policy provides clear and unambiguous notice that it will only pay 80% of a properly billed reasonable charge. Accordingly, when the Plaintiff billed CPT code 99213 and Auto Club limited the reimbursement at 80% of the Plaintiff "reasonable charge" or billed amount, it did so in compliance with the plain language of the No-Fault Act.

14. In support for its argument the Plaintiff relies on a plethora of decisions regarding the GEICO policy. Specifically, *GEICO Indemnity Company v. Accident & Injury Clinic, Inc. a/a/o Frank Irizarry*, 290 So. 3d 980 (Fla. 5th DCA 2019) [44 Fla. L. Weekly D3045b] and more recently, *Hands on Chiropractic PL a/a/o Justin Wick v. GEICO General Ins*. Co. Case No 5D20-2705 (Fla. 5th DCA September 10, 2021) [46 Fla. L. Weekly D2023a]. In each of the GEICO cases, GEICO paid 80% of the charges, which were billed at less than 200 percent of the Medicare Part B Fee Schedules. The medial providers argued that GEICO was required to pay 100% of any charges that were billed at less than 200% of the applicable Medicare Fee Schedule. The GEICO policy contains specific wording regarding bills submitted for less than the fee schedule. Specifically, the policy stated: "A charge submitted by a provider, for an amount less than the allowed amount above, ***shall*** be paid in the amount of the charge submitted."

15. The Auto Club policy does not contain any such wording and again specifically states that Auto Club will only pay 80% of "a properly billed reasonable charge" but the policy also states in no event will Auto Club pay more than 80% of the schedule of maximum charges.

16. GEICOs policy changed the permissive wording in the statute from "the insurer **may** pay" to the mandatory wording of "a provider . . . **shall** be paid," no such wording exists in the Auto Club policy of insurance.

17. The Defendant paid 80% of the amount submitted by the Plaintiff for CPY Code 99213. The amount submitted for his code was $160 and the insurer allowed this amount and paid 80% or $128.00. Plaintiff argued that the Defendant should have paid .59 cents more than the amount paid by the Defendant.

18. Defendant further argued that pursuant to *Precision Diagnostic, Inc. v. Progressive American Insurance, Co*., 330 So.3d 32 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2282d], no benefits should be awarded based upon the legal maxim "de minimis non curat lex".

19. The amount of .59 cents sought by the Plaintiff in the Motion for Partial Summary Judgment for CPT code 99213 is the first time the amount has been put forth by the Plaintiff for this CPT Code. The demand letter and subsequent Complaint, Amended Complaint and Second Amended Complaint all fail to identify this amount as the amount at issue for this CPT Code.

20. The Plaintiff's Partial Motion for Summary Judgment is the first notice provided by the Plaintiff that it specifically sought to recover .59 cents for CPT code 99213.

21. Plaintiff's demand letter does not state with specificity that it is seeking this amount for this CPT Code; rather there is a blanket, generic statement that the insurer owes $8,300.88, the ledger attached to the demand letter only provides that $160.00 was billed and does not indicate the amount sought by the Plaintiff for this or any other CPT code.

22. Therefore, the court is not persuaded by the argument that the Defendant should have included an affirmative defense of de minimis non curat lex when the amount at issue was not properly provided to the insurer in the pre-suit demand letter in compliance with Fla. Stat. 627.736(10).

23. The court finds that the Defendant's payment of $128.00 representing 80% of the amount submitted and billed by the Plaintiff as a reasonable charge was proper.

24. The Court further finds that Plaintiff did not provide any other persuasive argument as to why the $0.59 owed was not "a trifling amount" and therefore was "de minimus."

25. Therefore, it is ORDERED:

a. Plaintiff's Motion for Partial Summary Judgment is DENIED.

b. Defendant's Cross Motion for Partial Summary Judgment is GRANTED.

* * *

Insurance—Personal injury protection—Interest, penalty, and postage—Summary judgment granted in favor of medical provider where medical provider presented proof that it did not receive draft for interest, penalty, and postage that insurer admits it owes; and insurer's evidence regarding routine business practice of using automated document factory to mail drafts did not prove that draft was mailed, but instead proved that a draft that did not include the barcode required by the ADF system could not have been mailed

GR REHAB CENTER, INC., a/a/o Janesy Dominguez, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-006083-SP-24, Section MB01. March 3, 2022. Stephanie Silver, Judge. Counsel: Majid Vossoughi, Majid Vossoughi, P.A., Miami; and Walter A. Arguelles, Arguelles Legal, P.L., Miami, for Plaintiff. Rebeca Quintero, Law Office of Haydee De La Rosa-Tolgyesi, Coral Gables, for Defendant.

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

THIS CAUSE came before the Court on February 22, 2022 on Plaintiff's Motion for Final Summary Judgment.

The Court having reviewed Plaintiff's Motion for Final Summary Judgment, Defendant's Response in Opposition to Plaintiff's Motion for Final Summary Judgment, the affidavits filed by both parties, the entire Court file, the relevant legal authorities, and having heard argument from counsel and being otherwise sufficiently advised in the premises, hereby enters this Order Granting Plaintiff's Motion for Final Summary Judgment and Final Judgment in Favor of Plaintiff.

BACKGROUND & FACTUAL FINDINGS

On May 25, 2021 Plaintiff filed the instant breach of contract suit against Defendant for unpaid PIP interest, penalty, and postage pursuant to Fla. Stat. 627.736.

On August 9, 2021 Defendant served its Answer and Affirmative Defenses alleging that Defendant had "fully complied with its contractual obligations. . .by paying in accordance with the [PIP statute]".

On November 1, 2021 Plaintiff filed its Motion for Final Summary Judgment seeking entry of final judgment for unpaid interest, penalty, and postage pursuant to Fla. Stat. 627.736(4)(d) and Fla. Stat. 627.736(10)(c)-(d). Plaintiff also filed the Affidavit of Linda Barquero Urbina in support of its request for entry of final summary judgment.

Plaintiff's Motion for Final Summary Judgment alleges that in response to Plaintiff's pre-suit demand letter, Defendant acknowledged that it owed Plaintiff the following amounts:

(i) $303.11 for PIP benefits;

(ii) $5.43 plus $9.00 for statutory interest;

(iii) $31.75 for statutory penalty; and

(iv) $7.75 for statutory postage.

Plaintiff's Motion for Final Summary Judgment further alleges that, despite Defendant's acknowledgement as noted above, Defendant has nonetheless failed to make payment of $5.43 in additional interest, $31.75 for penalty, and $7.75 for postage (totaling $44.93)[1]. As such, Plaintiff's motion seeks entry of final judgment in its favor and against the Defendant in the amount of $44.93 for unpaid interest, penalty, and postage.

On December 3, 2021 Plaintiff's Motion for Final Summary Judgment was noticed for a hearing to occur on February 22, 2022.

On February 2, 2022, Defendant filed its Response in Opposition to Plaintiff's Motion for Final Summary Judgment ("Defendant's Response"). Defendant also filed the Affidavit(s) of Manuel Mesa and Donna Truslow in support of its Response.

Defendant's Response does not challenge that it owed Plaintiff $5.43 in additional interest, $31.75 for penalty, and $7.75 for postage (totaling $44.93) as acknowledged by Defendant in its response to Plaintiff's pre-suit demand letter. Instead, Defendant's Response alleges that it previously mailed a draft in the amount of $44.93 for payment of the interest, penalty, and postage to Plaintiff. In support of this allegation, Defendant relies upon the affidavit testimony of Mr. Mesa and Ms. Truslow.

THE RECORD EVIDENCE BEFORE THE COURT

Plaintiff's Affidavit of Linda Barquero Urbina

Plaintiff proffered the Affidavit of Linda Barquero Urbina in support of its Motion for Final Summary Judgment.

Ms. Barquero Urbina avers that:

(i) she is employed with Arguelles Legal, P.L. (counsel for Plaintiff's law firm) as the "Office Manager/Paralegal of the [PIP] Department" (¶ 2).

(ii) her duties include the review of "PIP Demand Responses" received from insurance carriers and that she has personal knowledge regarding same (¶¶ 1, 3);

(iii) on or about April 30, 2021 she personally reviewed Defendant's Demand Response dated April 29, 2021 (¶ 4); and

(iv) although she subsequently received checks from the Defendant, in separate mailings, for payment of $303.11 for PIP benefits and $9.00 for interest, Arguelles Legal, P.L. never received any checks for payment of additional interest, penalty, and postage totaling $44.93 (¶¶ 6, 7, 8).

This Court finds that in light of Ms. Barquero Urbina's job duties and responsibilities she is competent to testify as to the facts contained within her affidavit.

Defendant's Affidavit(s) of Manuel Mesa and Donna Truslow

In opposition to Plaintiff's Motion for Final Summary Judgment, Defendant did not present any direct evidence of mailing payment of $44.93 to the Plaintiff, such as envelopes, green cards, return receipts, signatures, tracking/delivery confirmations, or other proofs of mail.

Instead, Defendant has proffered the Affidavit(s) of Manuel Mesa and Donna Truslow which both attached draft # 223631570[2] in the amount of $44.93 dated April 29, 2021 payable to "Arguelles Legal PL Trust Account", and sought to prove Defendant mailed this draft by presenting evidence of its "routine practice" for mailing documents.[3]

Mr. Mesa authenticates various documents from the Defendant's claim file, including the $44.93 draft relied upon by Defendant (¶¶ 4, 12, 14), and avers that:

(i) he is employed by Defendant as a "claim representative" and/or litigation adjuster (¶ 2);

(ii) the $44.93 draft attached to his affidavit as Exhibit "F" was mailed pursuant to Defendant's "routine practice" (¶¶ 11, 12); and

(iii) nothing further is owed Plaintiff (¶ 13).

However, Mr. Mesa does not delineate or provide any evidence as to what the Defendant's "routine practice" for mailing is.

To establish its "routine practice" for mailing documents, Defendant relies upon the detailed Affidavit of Donna Truslow.

Ms. Truslow avers that:

(i) she is employed by Defendant as the "Output manager" at its "National Print and Mail Center" where she has worked for more than twenty (20) years (¶ 2); and

(ii) she has personal knowledge of the Defendant's "routine practice" as same concerns "printing, processing and mailing" of "policy documents and checks" (¶¶ 3, 4).

The Court finds that in light of Ms. Truslow's job duties and responsibilities the Defendant was permitted to present evidence of its "routine practice"[4] for mailing documents, as expressly authorized under Fla. Stat. 90.406.[5]

Ms. Truslow details the Defendant's "Automated Document Factory" (ADF) system (¶¶ 7, 8) and avers that:

(i) all documents mailed out by Defendant are first processed through Defendant's ADF system (¶ 8);

(ii) the ADF system is essentially a "workflow application" that converts electronic data for batches of documents to be printed (¶ 7);

(iii) the ADF system "adds *two-dimensional barcode* on each page of each document that will subsequently be 'read' by [Defendant's] insertion equipment" (¶ 7); and

(iv) the ADF system electronically generates all of Defendant's documents which are then printed on printers with controls that are capable of detecting print quality issues or errors so that a Print Operator can manually remedy the error (¶ 8).

Ms. Truslow next details the Defendant's "insertion process", which is the automated process by which printed documents are sorted, packed into envelopes, and mailed by the "Inserter" (¶¶ 9 through 15), and avers that:

(i) the "Inserter" is "an intelligent *barcode* reading insertion system", that "scans and 'reads' the barcode on each page of the document in each batch", and "uses *barcode* technology to accurately read, sort and package" documents for mailing (¶¶ 9, 10);

(ii) the Inserter "recognizes the sequencing numbers in the *barcode* and those numbers instruct the Inserter to place certain printed policy documents from a batch into separate envelopes which will be mailed to separate policy holders" (¶10);

(iii) "[t]he *barcode controls* which documents go in each envelope, as well as the sequence in which the documents are inserted into each envelope" (¶ 11);

(iv) the "*barcode*" is also utilized to both confirm a package is "complete" as well as "identify how much postage" is needed on each envelope so that same can be mailed (¶¶ 12, 15); and

(v) the "*barcodes*" also enable the Inserter to detect any discrepancies and/or errors in the sequencing of a document package (¶ 13).

LEGAL ANALYSIS

Florida has adopted the federal summary judgment standard within amended Fla. R. Civ. P. 1.510 (the "amended rule"). *See In re: Amendments to Florida Rule of Civil Procedure 1.510,* 317 So.3d 72 (Fla. 2021) [46 Fla. L. Weekly S95a].

Under the amended rule, summary judgment is no longer a "disfavored procedural shortcut" but rather "an integral part" of the Rules. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

The moving party is entitled to entry of summary judgment if it "shows that there is no genuine dispute as to any material fact[6] and [it] is entitled to judgment as a matter of law." *Fla. R. Civ. P. 1.510(a).*

The nonmoving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment". *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986). A "scintilla" of evidence is "insufficient" to avoid summary judgment and "if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted". *Id.* at 249-52.

Indeed, "summary judgment is not a dress rehearsal or practice run . . . a party must show what evidence it has" in support of its claim. *Steen v. Myers,* 486 F.3d 1017, 1022 (7th Cir. 2007); *see also Forsythe v. Ticor Title Ins. Co.,* Case No. 2:08 cv 337, Dist. Court, ND Indiana, June 28, 2010).

In the present case there is no dispute between the parties that once overdue PIP benefits are tendered in response to a pre-suit demand letter, the PIP statute requires an insurance carrier to make payment of interest, penalty, and postage.

Likewise, it is undisputed that Defendant owed Plaintiff $44.93 in additional interest, penalty, and postage as acknowledged by the Defendant in its response to Plaintiff's pre-suit demand letter.

The narrow issue for this Court's determination is whether Defendant made payment of $44.93 in additional interest ($5.43), penalty ($31.75), and postage ($7.75) owed to Plaintiff.

This Court finds that the Affidavit of Linda Barquero Urbina is sufficient to carry Plaintiff's burden of proof on summary judgment as same relates to the narrow issue before this Court. Clearly, in light of her job duties and responsibilities Ms. Barquero Urbina is competent to testify as to the PIP demand response received in the instant matter, as well as any drafts received by Plaintiff's counsel.

As previously noted, the Affidavit(s) of Manuel Mesa and Donna Truslow both attached a copy of draft # 223631570 in the amount of $44.93 dated April 29, 2021 to their respective affidavits in an effort to establish that same was mailed pursuant to the Defendant's "routine practice".

It is well-established that "[t]he fact that a document is drafted is insufficient in itself to establish that it was mailed". *Allen v. Wilmington Tr., N.A.,* 216 So.3d 685 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D691b]; *see also Edmonds v. U.S. Bank National Assoc.,* 215 So.3d 628 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D774a]; *First Protective Ins. Co. v. Ahern,* 278 So.3d 87 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D2126a].

The Affidavit of Donna Truslow provides evidence of Defendant's "routine practice" as same pertains to the mailing of documents and checks. Defendant seeks to establish, through Ms. Truslow's affidavit, that draft # 223631570 in the amount of $44.93 was in fact mailed pursuant to Defendant's "routine practice".

The sum and substance of Ms. Truslow's testimony is that every document, including checks, generated by the Defendant through its ADF system has a "*two-dimensional barcode*" added to each page of the document (¶ 7). As noted by Ms. Truslow, "[t]he *barcode controls* which documents go in each envelope, as well as the sequence in which the documents are inserted into each envelope" (¶ 11). It is these barcodes that allow Defendant's "Inserter" to place the documents into envelopes for mailing.

Accordingly, the undisputed record before this Court reflects that Defendant's process for mailing documents simply cannot function absent a "barcode" on the documents being mailed. The entire process is automated and for a document to be placed in an envelope and mailed it must have a barcode.

The undisputed record before this Court also reflects that the $44.93 draft Defendant alleges it mailed to Plaintiff does *not* have a "barcode" anywhere on the document. In light of Ms. Truslow's testimony pertaining to Defendant's "routine practice" for mailing documents, this draft could not have been mailed to the Plaintiff since it does not have a "barcode", the linchpin of Defendant's entire mailing process.[7]

In the present case, the evidence produced by Defendant in opposition to Plaintiff's Motion for Final Summary Judgment not only fails to create a material issue of fact as to whether Defendant in fact mailed the draft at issue, but also confirms that same was not mailed and, accordingly, Plaintiff is entitled to judgment as a matter of law.

This Court noted at the hearing that Ms. Truslow was the witness with the most knowledge of how the barcoding works. The Court rejects the Defendant's theory that the Plaintiff needs an expert. The Plaintiff does not need an expert—the Defendant's witness herself provides uncontroverted evidence that the barcode is required to mail this document. It was also uncontroverted that the check had not been cashed. Furthermore, it was uncontroveted that there was a conflict in the evidence as to the check numbers in this case. The Defendant's affidavits each state something different.

CONCLUSION

Based on this Court's analysis set forth above, as well as the reasons stated on the record at the hearing, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Final Summary Judgment is GRANTED.

IT IS ADJUDGED that Plaintiff, GR REHAB CENTER, INC., recover from Defendant, GEICO GENERAL INSURANCE COMPANY, the sum of $44.93 on principal and prejudgment interest in the sum of $1.55, that shall bear interest at the rate of 4.25% per year, for which let execution issue. Plaintiff's counsels are entitled to an award of

attorney's fees and costs associated with this action and the Court reserves jurisdiction to determine the amount of same.

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[1]The parties are in agreement, and there is no dispute, that the Defendant did in fact make payment of $303.11 for PIP benefits and $9.00 for interest as noted above.

[2]While likely a scrivener's error, the Court notes that the draft number averred to in Ms. Truslow's affidavit—"223637570"—does not match the draft attached to her affidavit. Mr. Mesa avers to the correct draft number—"223631570".

[3]It is undisputed between the parties that the $44.93 draft authenticated by Defendant was never cashed, negotiated, and/or deposited.

[4]Certain conclusory and unsupported statements within the affidavits of Manuel Mesa (¶ 12) and Donna Truslow (¶ 6) pertaining to the *actual mailing* of documents—as opposed to the *"routine practice" of mailing*—are inadmissible and plainly beyond the ambit of Fla. Stat. 90.406 since the affiants lack personal knowledge to testify regarding the *actual mailing* of the draft at issue in this case. *See Fla. R. Civ. P. 1.510(c)(4)* ("[a]n affidavit or declaration used to. . .oppose a motion must be made on *personal knowledge,* set out facts that would be admissible in evidence, and show that the affiant. . .is competent to testify on the matters stated"). The affiants' lack of personal knowledge regarding *actual mailing* is unsurprising given that Ms. Truslow avers the Defendant "processes an average of 450,000 to 550,000 documents [for mailing] each day" (¶ 7).

[5]*Fla. Stat. 90.406* provides:

> **Routine practice.**—Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

[6]A "material fact", for purposes of summary judgment, is a fact that is "essential to [the] resolution of the legal questions raised by the case". *Wells v. Wilkerson,* 391 So.2d 266 (Fla. 4th DCA 1980); *see also Nichols v. Tarsches,* 429 So.2d 409 (Fla. 3d DCA 1983).

[7]Notably, the $303.11 check for PIP benefits and $9.00 in interest that *were received* by the Plaintiff (attached to the Affidavit of Linda Barquero Urbina as Exhibit "B" and Exhibit "C"), *do have* barcodes on the face of the documents consistent with Defendant's routine mailing practice. These drafts were also dated April 29, 2021.

* * *

Criminal law—Driving under influence—Search and seizure—Vehicle stop—Tip—Deputy responding to tip regarding erratic driver had reasonable suspicion for traffic stop where deputy received contemporaneous updates on driving pattern from identified tipster following defendant's vehicle, deputy corroborated location of vehicle and description of vehicle and driver, and deputy observed erratic driving that caused him to take evasive action — Seizure— Curtilage— Residence driveway—Defendant had standing to raise expectation of privacy in driveway of vacation rental at which she was guest—Where driveway was unenclosed and visible from public street, deputy's entry into driveway was permissible pursuant to "implicit license" allowing public access to such open areas—Where deputy's interaction with defendant was restricted to driveway, and there is no evidence that defendant attempted to retreat to any enclosed area or to communicate to deputy that implicit license to be in driveway was revoked, deputy's entry into driveway was legal—Motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. ANGELA R. PEACHY, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2021 CT 014181 NC. May 11, 2022. Dana Moss, Judge.

ORDER DENYING MOTION TO SURPRESS

This matter came before the Court on the Defendant's Motion to Suppress. An evidentiary hearing was conducted on April 7, 2022, at which the parties stipulated to admitting into evidence Deputy Brenckle's body camera footage to be submitted to the Court at a later time. The Court reviewed the body camera footage and the 911 call in chambers. Having considered the evidence, testimony and arguments, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. On December 18, 2021, at approximately 10:13 p.m., Deputy Lowe, a three-year veteran with the Sarasota County Sheriff's Office, was dispatched to Zone 9 near Beneva Road and Wilkinson Road in Sarasota County to investigate the complaint of an erratic driver.

2. A motorist called 911 to report that he was following a black BMW SUV, which was unable to maintain its lane. The motorist described the driver as a white female wearing glasses.

3. The motorist provided his name, his phone number, the BMW's license plate and a continued description of the BMW's direction of travel and driving pattern. The motorist called out that the BMW ran a red light, continually swerved, looked like a "ping-pong ball" in the lane, drove up on the sidewalk, almost hit someone on the sidewalk, almost hit a mailbox, and sat through a green light.

4. The motorist followed the BMW for a distance until it arrived at a residential neighborhood on Mayflower Street. The motorist told the dispatcher lie assumed the BMW was "almost home" and he stopped following it as it turned onto Mayflower Street and ended the call.

5. Deputy Lowe, while receiving the updates from dispatch, entered Mayflower Street from the opposite direction and spotted a black SUV BMW driving 1 to 2 mph in the middle of the road heading toward Deputy Lowe's patrol car.

6. Deputy Lowe repositioned his car to hug the right side of the road to avoid a potential crash with the BMW. The BMW self-corrected as it approached the patrol car.

7. Deputy Lowe saw the BMW had a damaged passenger mirror dangling from a wire, and he confirm upon passing the BMW that the driver was a white female wearing glasses.

8. Deputy Lowe did a U-turn in the roadway and repositioned himself behind the BMW to initiate the traffic stop with his overhead lights.

9. The BMW did not immediately pull over when Deputy Lowe activated his lights but continued driving 1-2 mph past two or three houses before pulling into a circular private residential driveway where it came to a stop. The driveway was not gated and open to the public's view. [See photo in Defendant's motion to suppress].

10. Deputy Lowe parked his patrol car and walked onto the driveway to contact the driver [the Defendant], who was seated behind the wheel. It was estimated that the BMW parked approximately 25 feet from the public roadway.

11. Deputy Lowe could not remember if he confirmed the BWM's tag number before initiating the stop. However, Deputy Brenckle's body camera footage captured Deputy Brenckle and Deputy Lowe discussing that dispatch had forwarded the suspect tag number to the deputies.

12. Deputy Lowe tried to call back the motorist, but the call went to voicemail.

13. The video showed no traffic on Mayflower Street at that time of the night.

14. Deputy Lowe learned after the stop that the Defendant rented the BMW earlier in the day, she was on vacation, and she rented the home on Mayflower Street through Airbnb.

15. Deputy Brenckle responded after the BWM was stopped and conducted the DUI investigation and subsequent arrest of the Defendant.

Analysis

The Defendant seeks suppression of her arrest and the evidence gathered from the traffic stop alleging it was conducted in violation of the Fourth and Fourteenth Amendments of the U.S. Constitution. Specifically, the Defendant argued that the police entered her private driveway without consent, without a warrant and without probable cause.

Conversely, the State argued the deputy had reasonable suspicion to conduct a traffic stop and suppression is not warranted because the investigation and arrest were lawfully conducted.

The Court undertook a two-step analysis in reaching its conclusion that suppression is not warranted. First, the Court reviewed the legality of the deputy's decision to initiate the traffic stop. Then, the

Court examined the deputy's decision to enter the driveway to contact the Defendant. The Court found each of the deputy's decisions comport with the constitutional safeguards of the Fourth Amendment.

A. Basis for Stop

The decision to stop an automobile is reasonable when an officer has probable cause to believe that a traffic violation has occurred.[1] *Whren v. U.S.*, 517 U.S. 806, 808 116 S.Ct. 1769 (1996); *Holland v. State,* 696 So. 2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. However, the police "can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *State v. Teamer,* 151 So. 3d 421, 425 (Fla. 2014) [39 Fla. L. Weekly S478a] (quoting *United States v. Sokolow,* 490 U.S. 1, 7; 109 S.Ct. 1581 (1989)); *see also Davis v. State,* 695 So. 2d 836, 837 (Fla. 2d DCA 1997) [22 Fla. L. Weekly D1506a]. A stop may be justified in the absence of a traffic infraction when the vehicle is being operated in an unusual manner or there is a legitimate concern for the safety of the public. *Ndow v. State,* 864 So. 2d 1248, 1250 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D321a]; *see also Yanes v. State,* 877 So. 2d 25, 26-27 (Fla. 5th DCA 2004) [29 Fla. L. Weekly D1282a] (holding vehicle's abnormal movement in crossing fog line three times within one mile justified stop), *review denied,* 889 So. 2d 73 (Fla. 2004); *State v. Carrillo,* 506 So. 2d 495, 496 (Fla. 5th DCA 1987) (holding stop justified where vehicle weaved within lane more than five times over a quarter mile distance); *Esteen v. State,* 503 So. 2d 356, 357-58 (Fla. 5th DCA 1987) (stating a traffic stop was justified where vehicle was weaving within lane and moving slower than posted speed); *State v. Davidson,* 744 So. 2d 1180, 1181 (Fla. 2d DCA 1999) [24 Fla. L. Weekly D2511a] (concluding deputy's observations of appellant maintaining low speeds and continually drifting across line and jerking vehicle in opposite direction provided deputy with reasonable suspicion to conduct traffic stop where driving was consistent with an impaired driver); *Dep't of Highway Safety & Motor Vehicles v. DeShong,* 603 So. 2d 1349, 1352 (Fla. 2d DCA 1992) (recognizing "a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior").

The justification for a traffic stop must be grounded in reasonable suspicion predicated upon articulable and objective facts, but it need not come from the officer's personal observations. Instead, it may be developed from information provided by third parties. *State v. Webb,* 398 So. 2d 820 (Fla. 1981); *State v. Bullock,* 164 So. 3d 701 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D1024a]. When a stop is based on a 'tip,' courts must look to the quantity and quality of the information provided in the tip to determine if it is enough to establish reasonable suspicion. *Regalado v. State,* 25 So. 3d 600 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2571a]. To be reliable, the tip must provide a sufficient description of the subject and a sufficient assertion of illegal activity. *Cooks v. State,* 28 So. 3d 147 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D315c]. In deciding such matters, the court must look to the totality of the circumstances to see if the facts provided, when taken in light of the officer's knowledge and training, point to the commission or incipient commission of a crime. *See Domingues v. State,* 159 So. 3d 1019 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D736a].

Having reviewed the totality of the instant circumstances, the Court found reasonable suspicion existed for Deputy Lowe to conduct the traffic stop. Specifically, Deputy Lowe received contemporaneous updates provided by an identified motorist, who described a pattern of driving that created a legitimate concern for the safety of the public. In addition to the information from the motorist, Deputy Lowe corroborated the location of the vehicle on Mayflower Street, the description of the vehicle, the description of the driver, and he personally observed a driving pattern that caused Deputy Lowe to fear that an accident could happen if he did not hug the right side of the road. Under the above listed authority, the BMW's driving pattern alone provided law enforcement with a sufficient basis to conduct a brief investigatory stop to determine if the driver was ill, tired, or driving under the influence. For this reason, the Court concluded reasonable suspicion existed for Deputy Lowe to initiate the traffic stop.

B. Seizure in Private Driveway

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The State argued that it was permissible for Deputy Lowe to enter the driveway without a warrant or exception to the warrant because an unenclosed driveway is not a constitutionally protected area. To the contrary, the Defendant argued that the holding in *Florida v. Jardines,* 569 U.S. 1, 133 S.Ct. 1409 (2013) [24 Fla. L. Weekly Fed. S117a] changed the landscape of what constitutes constitutionally protected curtilage and, consequently, Deputy Lowe needed a warrant or exception to the warrant requirement before entering the driveway to investigate.

i. State's Argument

The State cited to *State v. Kennedy,* 953 So. 2d 655 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D850e] to support its position that the Defendant's Fourth Amendment rights were not violated when Deputy Lowe entered the private driveway to contact the Defendant. In *Kennedy,* drug task force agents went to a home suspected of manufacturing methamphetamines without a warrant and entered the front porch where an agent smelled anhydrous ammonia and ether, known ingredients to manufacture methamphetamine. Based upon the odors, the task force leader arrested Kennedy as soon as he opened the front door. Although 'no trespassing' signs may have been posted, the First District Court of Appeal held it was not a violation for agents to enter the porch without a warrant.

> As the state correctly argued, appellee's Fourth Amendment rights were not violated when law enforcement personnel crossed the unenclosed front yard to reach the front door. *See, e.g., United States v. Santana,* 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) (stating that the threshold of one's dwelling is a "public" place, as to which the owner has no expectation of privacy); *State v. Morsman,* 394 So.2d 408, 409 (Fla.1981) (stating that, "[u]nder Florida law it is clear that one does not harbor an expectation of privacy on a front porch . . .") (citations omitted); *Davis v. State,* 763 So.2d 519, 520-21 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1752a] (stating that law enforcement "presence on the porch did not invade any expectation of privacy . . .") (citations omitted); *Wysong v. State,* 614 So.2d 670, 671 (Fla. 4th DCA 1993) (stating that "[n]either thresholds nor [unfenced front yards] are within the scope of the Fourth Amendment") (citing *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). This is so regardless of whether the property was posted with "No Trespassing" signs. *Id* (quoting from *State v. Sarantopoulos,* 604 So.2d 551, 555 (Fla. 2d DCA 1992)).

Kennedy, 953 So. 2d at 657. Also, the State argued *United States v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134 (1987) as the controlling authority for deciding what constitutes constitutionally protected curtilage. The *Dunn* court established four factors to be consider: (1) the proximity of the area claimed to be curtilage to the home; (2) the nature of the uses to which the area is put; (3) whether the area is included within an enclosure surrounding the home; and (4) the steps the resident takes to protect the area from observation. *Dunn,* 480 U.S. at 301. Based upon these factors, the State maintained that Defendant's driveway was not protected curtilage.

ii Defendant's Argument

The Defendant argued she was in her driveway when Deputy Lowe approached and, per the holdings in *Jardines* and *Lange v. California,* 141 S.Ct. 2011 (2021) [28 Fla. L. Weekly Fed. S969a], the driveway is protected curtilage upon which law enforcement cannot enter to investigate a crime without a warrant or an exception to the warrant requirement.

Caselaw makes clear that the Fourth Amendment does not prohibit all investigations conducted on private property without a warrant or an exception to the warrant. Rather, the warrant requirement is triggered when law enforcement enters private property to investigate in an area where a resident would have a reasonable expectation of privacy. It is well settled that law enforcement officers may briefly enter private property without a warrant to seek consent for a continued encounter. The permission to briefly enter has been dubbed the 'implicit license.' *Jardines,* 133 S.Ct. at 1415. The scope of the license to enter is limited to a particular area and for a specific purpose. The *Jardines* case make clear, however, that there is no such license for law enforcement to enter the protected curtilage of a home to conduct a search without a warrant or an exception to the warrant.

In *Jardines,* the United States Supreme Court held that using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. *Id.* The *Jardines* court recognized that an officer may approach a home without a warrant in hopes of speaking to its occupants since that is "no more than any private citizen might do." *Id.* at 1416, *citing Kentucky v. King,* 563 U.S. 452, 131 S.Ct. 1849 (2011) [22 Fla. L. Weekly Fed. S979a]. This is an implicit license that typically permits visitors to approach a home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave. *Id.* As Justice Alito elaborated in the dissent,

> Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. See, *e.g., Robinson v. Virginia*, 47 Va.App. 533, 549-550, 625 S.E.2d 651, 659 (2006) (en banc); *United States v. Wells*, 648 F.3d 671, 679-680 (C.A.8 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the back yard); *State v. Harris*, 919 S.W.2d 619, 624 (Tenn.Crim.App.1995) ("Any substantial and unreasonable departure from an area where the public is impliedly invited exceeds the scope of the implied invitation . . ." (internal quotation marks and brackets omitted)); 1 W. LaFave, Search and Seizure § 2.3(c), p. 578 (2004) (hereinafter LaFave); *id.*, § 2.3(f), at 600-603 ("[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, **driveways**, porches), observations made from such vantage points are not covered by the Fourth Amendment" (footnotes omitted)). [emphasis added]

Id. at 1421.

In *Lange,* the Supreme Court held that an officer may make a warrantless entry into a home when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. *Lange,* 141 S.Ct. at 2016-17. The exigent-circumstances exception to the Fourth Amendment's warrant requirement may be used by the police to enter a home without a warrant to prevent the imminent destruction of evidence or to prevent a suspect's escape. *Id.* at 2017.

In the instant case, the Court began its analysis by accepting the Defendant's position that she had standing to raise an expectation of privacy in the driveway even though she stayed on the property as a guest. *See Minnesota v. Olson,* 495 U.S. 91, 98, 110 S.Ct. 1684 (1990) (holding that an overnight guest possessed a legitimate expectation of privacy and was thus entitled to the protection of the Fourth Amendment). For simplification, the Court will refer to the vacation rental as the Defendant's private property.

With that said, the Court turns to the facts of this case. We know that Deputy Lowe initiated the traffic stop on the public roadway, and the Defendant continued to drive until she pulled into her private driveway. The driveway was unenclosed and visible from the public street, as seen in the photo in the Defendant's motion to suppress. Under the *Dunn* factors, this Court considered there was no evidence suggesting steps were taken to protect the driveway from public observations. Equally there was no evidence to support that the Defendant's driveway was intimately connected to the house or used in a manner than the customary place where visitors could be expected to enter the property.

Based on this, the Court determined that Deputy Lowe's entry onto the driveway without a warrant or exception to the warrant was permissible pursuant to the 'implicit license' allowing the public access to such open areas. This license was conditioned upon Deputy Lowe restricting his movements to the place where visitors could naturally expect to go, i.e. the driveway. It was clear from the evidence herein that Deputy Lowe's interaction with the Defendant was confined to the driveway. There was no indication that the Defendant attempted to retreat to the privacy of the home, garage, or other enclosed areas. Moreover, there is no indication that the Defendant communicated directly or indirectly to Deputy Lowe that the implied license to be in the driveway was revoked. As such, the Court concluded, without needing to address the issue of exigent circumstances, that Deputy Lowe's entry onto the Defendant's driveway was lawful.

For the above stated reasons, it is ORDERED and ADJUDGED that the Defendant's motion to suppress is denied.

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[1]*See also* Florida's Stop and Frisk Law that allows law enforcement officers to temporarily detain a person under circumstances which reasonably indicate that the person has committed, is committing, or is about to commit a violation of Florida's criminal laws or the criminal ordinances of any municipality or county, for the purpose of ascertaining the identity of the person and investigating the circumstances surrounding the suspicion. § 901.151, *Fla. Stat.*

* * *

Insurance—Motion to transfer venue or to dismiss—Estoppel—Inconsistent litigation positions—Confession of error in previous appeals to same issue raised in current motion to dismiss or transfer venue—Even if estoppel did not apply, evidentiary weight of confessions supports denial of motion

PHYSICIANS GROUP, L.L.C., a/a/o Patricia Young, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, a Florida profit corporation, Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2021 SC 006089 NC. May 6, 2022. Maryann O. Boehm, Judge. Counsel: Nicholas A. Chiappetta, Marten | Chiappetta, Lake Worth, for Plaintiff. Teodora Siderova, Kubicki Draper, P.A., Tampa, for Defendant.

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

THIS MATTER, having come before the Court on defendant, United Automobile Ins. Co.'s, Motion to Dismiss Re: Improper Pursuant to Venue Selection Clause & Florida Statute 47.051, or in the Alternative, Motion to Transfer Venue, and the Court having been otherwise advised in the Premises, hereby states the follwing:

Background

1. This Court previously heard the same argument in *Physicians Group, LLC a/a/o Bethany Mauldin v. United Auto. Ins. Co.,* 2020 SC 002598 NC [30 Fla. L. Weekly Supp. 41a], and *Physicians Group, LLC a/a/o Amar Brown v. United Auto. Ins. Co.,* Case No.: 2020 SC 002596 NC.[1] The Court denied Defendant's request for dismissal but granted its request to transfer venue to Miami-Dade County ("Transfer Orders").

2. Plaintiff appealed the Transfers Orders. *See Physicians Group, LLC a/a/o Bethany Mauldin v. United Auto. Ins. Co.,* 2D22-0042 (Fla. 2nd DCA, LT. Case No.:2020 SC 002598 NC), and *Physicians Group, LLC a/a/o Amar Brown v. United Auto. Ins. Co.,* 2D22-0045 (Fla. 2nd DCA, LT. Case No.: 2020 SC 002596 NC).

3. During the pendency of the appeals Defendant confessed error, and stated "United Automobile Insurance Company . . . confesses error as to the instant appeal[s] and concedes that venue is proper because the cause of action accrued in Sarasota County because the breach of contract occurred in Sarasota County, since that is where the Plaintiff, the payee, resides."

4. On April 14, 2022, in this present case, Defendant brought forth before the Court the same motion and argument it confessed error to in the aforementioned appeals.

Findings of Fact

5. This Court finds in light of the Defendant's confessions of error, it is estopped from taking inconsistent positions in separate judicial proceedings. *See, e.g., Tyler-Fleming v. Swisher Intern., Inc./ Broadspire Kemper Ins. Group,* 120 So. 3d 160, 161 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1794a]; *Crawford Residences, LLC v. Banco Popular N.* Am., 88 So.3d 1017, 1020 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1260d]; *Brown & Brown, Inc. v. Sch. Bd. of Hamilton County,* 97 So.3d 918, 920 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2091a]. Furthermore, even if estoppel did not apply, the evidentiary weight of the confessions support a complete denial of Defendant's Motion to Dismiss Re: Improper Pursuant to Venue Selection Clause & Florida Statute 47.051, or in the Alternative, Motion to Transfer Venue.

Accordingly, its is hereby Ordered and Adjudged that Defendant's Motion to Dismiss Re: Improper Venue Pursuant to Venue Selection Clause & Florida Domestic Corporation Status via Fla. Stat. 47.051 is **DENIED**.

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[1]United also confessed error in *Physicians Group, LLC a/a/ o Carlos Donegan v. United Auto. Ins. Co.,* 2D22-0050 (Fla. 2nd DCA, LT. Case No.: 2020 SC 002823 NC).

* * *

Insurance—Automobile—Rescission of policy—Material misrepresentations—Failure to disclose household residents—No material misrepresentation occurred where unrebutted affidavit in support of summary judgment stated that insurer's agent was aware of the household members, and made the decision not to list them on application for insurance inasmuch as neither drove the insured vehicle

DIRECT GENERAL INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. NYDREKA WILLIAMS, Defendant/Counter-Plaintiff. NYDREKA WILLIAMS, Plaintiff/Counter-Defendant, v. DIRECT GENERAL INSURANCE COMPANY, Defendant/Counter-Plaintiff. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 20-CC-028749. June 12, 2022. Michael Bagge-Hernandez, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING DEFENDANT WILLIAMS' AMENDED MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER having come before the court on June 9, 2022 on Defendant Williams' Amended Motion for Final Summary Judgment. Timothy A. Patrick appeared for Defendant. No one appeared for Plaintiff. The court having reviewed the file, considered the motion, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action based upon Plaintiff's rescission of the Defendant William's policy of insurance based upon an alleged material misrepresentation by the Williams. Defendant Williams thereafter filed its own Declaratory action which was then consolidated into this action.

2. The only issue of this action is the alleged material misrepresentation, whereby the Defendant Williams, allegedly misrepresented that she resided with family members in the insurance application.

3. On March 16, 2022, this Court entered Order Granting Defendant Williams' Motion to Strike Affidavit of Rose Chrustic, an underwriter.

4. On March 28, 2022, Defendant Williams' filed its Amended Motion for Final Summary Judgment. Attached to said motion was an affidavit by Defendant Williams stating that it was Plaintiff's agent that made the decision not to list her family members on the application for insurance inasmuch as neither drove the insured vehicle.

5. On April 11, 2022, Defendant Williams filed a Notice of Hearing for June 9, 2022 at 3:00 pm for Defendant Williams' Amended Motion for Final Summary Judgment.

6. Plaintiff failed to file a response to Defendant Williams' Amended Motion for Final Summary Judgment. As such, the affidavit of Defendant Williams is unrebutted.

7. Defendant's agent had constructive knowledge of the undisclosed household member residing in the household. As such, there was no proof that a material misrepresentation had occurred. *Murphy Medical Center, Inc. (a/a/o Maria A. Avila) v. Victoria Select Ins. Co.*, 25 Fla. L. Weekly Supp. 193a (Fla. 13th Jud. Cir Ct., Hillsborough Cty., Case No. 15-CC-040027, April 10, 2017, Michael S. Williams, Judge). Based upon the Affidavit of Williams, it is clear that not only Direct had knowledge of the household members, but that Direct's agent made the decision not to list the household members on the application inasmuch as no one else drove William's insured vehicle.

8. Based upon the striking of the underwriter's affidavit, Defendant has no admissible evidence to contradict Defendant's affidavit, nor does Direct have any admissible evidence of the materiality of the alleged misrepresentation/omission.

9. Insurer failed to present admissible evidence of materiality of omissions. *See Affirmative Insurance Co. v. Bayview Medical & Rehab Center, Inc (a/a/o Felipe Posas)*, 16 Fla. L. Weekly Supp. 213c (Fla. 13th Jud. Cir. Ct., Hillsborough Cty. [Appellate]) January 15, 2009) citing to *GRG Transport Inc. v. Certain Underwriters at Lloyd's London,* 896 So.2d 922 (Fla. 3d DCA 2005 [30 Fla. L. Weekly D600a] (holding that affidavit of underwriter is required to opine regarding the increase of insurance premiums).

10. As such, Defendant Williams' Amended Motion for Final Summary Judgment is **HEREBY GRANTED**.

* * *

Insurance—Personal injury protection—Declaratory action—Complaint seeking declaration that insurer wrongfully changed CPT code is properly pled petition for declaratory action

CIELO SPORTS AND FAMILY CHIROPRACTIC CENTRE, LLC., a/a/o Nickolas Ponce, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 22-CC-009989. May 18, 2022. James Giardina, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

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

THIS MATTER having come before the court on May 12, 2022 on

Defendant's Motion to Dismiss and Motion for Protective Order. The court having reviewed the file, considered the motions, the arguments presented by counsel, applicable law, and being otherwise fully advised, finds,

1. Plaintiff filed this Declaratory action seeking a declaration that Defendant wrongfully changed Plaintiff's CPT code from 76499 to 76120 in violation of the subject policy and Florida law.

2. Defendant's Motion to Dismiss alleges that Plaintiff's Petition is essentially a cloaked breach of contract action and that Plaintiff is essentially seeking an impermissible advisory opinion.

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

4. Plaintiff has the right to choose its legal strategy and the right to pursue its chosen legal path. The Court finds that based upon the cited case law, Plaintiff has properly plead its Petition for Declaratory Judgment.

5. Defendant's Motion to Dismiss and Motion for Protective Order are **HEREBY DENIED**.

* * *

Insurance—Automobile—Windshield replacement—Discovery—Claims history—Evidence tampering—Motion in limine, motion to strike, motion for order to show cause, and motion to compel disclosure based on defendant's evidence tampering filed by plaintiff based on defendant's provision of only two of the four different claims history data compilations identified by defendant, defendant's expert, and defendant's counsel—Information before the court appears to indicate that defendant's claims history data compilation can be, and has been, easily manipulated, and raises questions as to whether the compilations have requisite indicia of reliability and trustworthiness to be admitted as a business record—Further discovery on issue is warranted and ruling on plaintiff's motions reserved pending defendant's service of the four identified data compilations, as well as affidavits explaining why the four spreadsheets were created and the criteria used

GLASSCO, INC., a/a/o G. Mercado, Plaintiff, v. GEICO GENERAL INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, County Civil Division. Case No. 16-CC-036152, Division M. December 17, 2021. Miriam Valkenburg, Judge. Counsel: Christopher P. Calkin and Mike N. Koulianos, The Law Offices of Christopher P. Calkin, P.A., Tampa; Anthony Prieto and Amy Sullivan, Morgan & Morgan, Tampa; and David M. Caldevilla, de la Parte & Gilbert, P.A., Tampa, for Plaintiff. Lindsey R. Trowell, Ariane J. Smith, and Chloe A. Orta, Smith, Gambrell & Russell, LLP, Jacksonville; and Mary Jo Smith, Law Offices of David S. Dougherty, Tampa, for Defendant.

ORDER ON PLAINTIFF'S EMERGENCY MOTION TO STRIKE, MOTION FOR ORDER TO SHOW CAUSE, AND MOTION TO COMPEL DISCLOSURE BASED UPON DEFENDANT'S EVIDENCE TAMPERING

THIS CAUSE came before the Court on October 27, 2021, concerning "Plaintiff's Emergency Motion in Limine, Motion to Strike, Motion for Order to Show Cause, and Motion to Compel Disclosure Based Upon Defendant's Evidence Tampering," filed on October 19, 2021. The Court, having considered the motion, Defendant's response in opposition, the arguments of counsel, and the record, and being otherwise advised in the premises, finds as follows:

1. This case involves a breach of contract action, seeking insurance benefits for a 2016 windshield replacement provided by Plaintiff on behalf of the Defendant's insured. Plaintiff submitted an invoice to Defendant and Defendant paid comprehensive collision insurance benefits in an amount less than the full invoiced amount, in reliance upon the Limit of Liability provision of the subject insurance policy. In this matter, it is the Defendant's burden to prove that it paid the prevailing competitive price described in the Limitation of Liability provision, and that the Plaintiff's invoiced amount exceeded the prevailing competitive price. *See, e.g., Gov't Employees Ins. Co. v. Superior Auto Glass of Tampa Bay, a.a.o. David Gilbo*, 28 Fla. L. Weekly Supp. 787a (Fla. 13th Jud. Cir. Ct. App. Div. Oct. 13, 2020); *Geico Gen'l Ins. Co. v. Superior Auto Glass of Tampa Bay a.a.o. Matthew Dick*, 28 Fla. L. Weekly Supp. 785a (Fla. 13th Jud. Cir. App. Div. Oct. 2, 2020). This matter was set for a two-day non-jury trial beginning October 27, 2021.

2. On August 30, 2021, before the Plaintiff's anticipated deposition duces tecum of Defendant's expert witness Dr. James McClave, Defendant's counsel sent an email message to Plaintiff's counsel with a "Workshare" link to an Excel spreadsheet containing **137,912 claims**, commonly referred to by Defendant as its "Claims History Data Spreadsheet," (hereinafter "Claims Spreadsheet"). The email message stated:

> In advance of the September 1, 2021 deposition of Dr. McClave in *Glassco aao G Mercado v. GEICO*, please find attached a copy of Dr. McClave's expert report, which also includes his CV and a copy of Dr. McClave's fee schedule.
>
> Additionally, we have produced Dr. McClave's production set and all materials Dr. McClave has used or relied upon in forming his opinions in this matter, which you and your office should be able to access via Workshare through the link that Ms. Hardwick provided in the previous email.

See, Defendant's Response and Opposition, Exhibit A (Oct. 22, 2021).

3. Plaintiff's counsel subsequently conducted Dr. McClave's deposition on September 1, 2021. During that deposition, Dr. McClave testified that he reviewed a spreadsheet containing **32,431 claims**, which he referred to as a "final analysis database" and that Plaintiff's counsel (i.e., Anthony T. Prieto, Esquire) had been given a "preliminary . . . previous version." *See*, Defendant's Response and Opposition, Exhibit B. This data set was less than one-third of the size of the data set originally provided on August 30, 2021. To date, neither Plaintiff's counsel nor the Court has been provided a spreadsheet containing 32,431 claims or any document or data referred to as a "final analysis database."

4. After being told Dr. McClave was using a different spreadsheet than what was provided before the deposition, Mr. Prieto inquired about the two different sets of data:

> **Mr. Prieto**: Okay. So just so that we're on the same page here, I was given via Workshare for today's deposition what has been labeled as the "Raw Data Spreadsheet" and the 137,000 claims, so we are—I mean I am looking at what was provided. Do you happen to have the raw data with you today, Doctor?
>
> **Dr. McClave**: I don't happen to have the raw data with me. I had just quickly sent a message to my staff asking them to provide it.

5. Additionally, Dr. McClave's expert report referred to another "dataset" of 5,457 windshield replacement transactions in the Orlando area. Notably, Dr. McClave's report does not reference "windshield replacement facilities" or "shops" in the Orlando area, but instead, references "claims transactions." To date, neither Plaintiff's counsel nor the Court has been provided a spreadsheet containing 5,457 claims.

6. The Court's "Uniform Order Setting Pre-Trial Conference and Non-Jury Trial" in this matter identified the discovery deadline as ten (10) days prior to the September 9, 2021 pretrial. conference

7. On September 9, 2021, the Court conducted the pretrial conference. At that hearing, Defendant's counsel offered to produce the Claims Spreadsheet on a USB "flash drive" to the Court. In response, Plaintiff's counsel made an *ore tenus* motion for Defendant to provide an identical flash drive to Plaintiff's counsel. Defendant's

counsel advised the Court that they had previously provided said information by "Workshare" link. In response, one of the Plaintiff's attorneys (Mike Koulianos, Esquire) advised that some of the Plaintiff's attorneys could not access that link. The following colloquy transpired:

> **[Plaintiff's counsel] Mr. Koulianos:** I have also requested a flash drive format of the data that [Dr.] McClave relied upon as it's being provided to the Court in that exact same format, and I contend that we're entitled to that format as well, a flash drive copy of all the data and materials and any reports that Mr. McClave, Dr. McClave, has generated and/or reviewed in this case in reliance upon rendering his opinion. [p. 60, line 5-12.]
>
> **[Defendant's counsel] Ms. Tobin:** As far as the flash drive, as I mentioned before, we specifically provided the data to plaintiff's counsel via Workshare. That is how we do it. We don't do it via a USB. I don't know if it's a security thing with GEICO. I cannot use a USB on this computer.
>
> The data was used in that deposition. Mr. Smith-Marin was present at that deposition. There was no issues in having the data then. Now Mr. Koulianos would like another copy in his preferred format. We can absolutely provide it via Workshare. [p. 61, line 13-24]
>
> **The Court:** why do you need it in that specific format? Did you have issues with opening it up?
>
> **Mr. Koulianos:** Yes. As we've explained to GEICO's counsel before, we have issues using Workshare. [p. 62, line 7-12]
>
> **Mr. Koulianos:** Moreover, GEICO is delivering a flash drive to Your Honor. So we are entitled to an exact copy of that. . . [p. 62, line 16-18]
>
> **The Court:** . . .Ms. Tobin, get a working thumb drive over. [p. 63, line 7]

Pretrial Conf. Transcript at p. 60-63.

8. Notwithstanding discovery and exhibit exchange deadlines expiring prior to the September 9, 2021, pretrial conference, over one month later on October 11, 2021, Defendant ultimately delivered a flash drive to Plaintiff's counsel and the Court containing one excel spreadsheet. Upon review, that excel spreadsheet contained **6,127 claims**. So, to date, the Defendant generated four different versions of the Claims Spreadsheet for this case; two of those claims spreadsheets have never been provided to Plaintiff's counsel or the Court.

9. Thereafter, on October 19, 2021, Plaintiff filed its "Emergency Motion to Strike, Motion for Order to Show Cause, and Motion to Compel Disclosure Based Upon Defendant's Evidence Tampering."

10. Promptly thereafter, by letter dated October 22, 2021, Defendant's counsel hand-delivered a check for payment of the disputed unpaid benefits plus interest, and thereby confessed judgment in the breach of contract action that has been pending since 2016. *See, e.g., Wollard v. Lloyds & Companies*, 439 So. 2d 217, 218 (Fla. 1983) (when insurance company has agreed to settle a disputed case, it has, in effect, declined to defend its position in the pending suit, and its payment of the claim is the functional equivalent of a confession of judgment or a verdict in favor of the insured); *Ivey v. Allstate Ins. Co*., 774 So. 2d 679, 684-85 (Fla. 2000) [25 Fla. L. Weekly S1103a] (where insurer pays claim after suit is filed but before judgment is rendered, payment constitutes functional equivalent of confession of judgment or verdict in favor of insured); *First Floridian Auto & Home Ins. Co. v. Myrick,* 969 So. 2d 1121, 1124 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2672a] ("Payment made after suit is filed operates as a confession of judgment.").

11. Despite the Defendant's confession of judgment, a final judgment has not been entered in this case, therefore this Court has continuing jurisdiction to decide the Plaintiff's "Emergency Motion to Strike, Motion for Order to Show Cause, and Motion to Compel Disclosure Based Upon Defendant's Evidence Tampering."

12. The Uniform Order Setting Pre-Trial Conference and Non-Jury Trial entered in this case identified the discovery deadline as ten (10) days prior to the September 9, 2021, pretrial conference, and also required that all evidence to be used at trial be exchanged and marked for identification five days prior to the pretrial conference.[1]

13. Defendant's October 11, 2021, production of the flash drive is inconsistent with the Plaintiff's ore tenus motion and the Court's oral ruling on that motion ordering the Defendant to produce all the records reviewed and considered by the expert including the data on the Workshare link.

14. As of October 11, 2021, Defendant, Defendant's expert, and Defendant's counsel have identified at least four different data compilations, **two** of which have never been provided to Plaintiff's counsel, with the latest production occurring more than 30 days after the discovery cutoff and trial exhibit exchange deadline. Those compilations are as follows:

- **137,912 claims**: produced by Workshare link on August 30, 2021 in advance of Defendant's expert's deposition, Dr. McClave.
- **32,420 claims**: referenced during Dr. McClave's deposition as the data he was using for purposes of providing deposition testimony; was never produced to Plaintiff's counsel.
- **6,127 claims**: produced by USB flash drive on October 11, 2021.
- **5,457 claims**: referenced in Dr. McClave's expert report; was never produced to Plaintiff's counsel.

15. In support of Defendant's Response in Opposition to Plaintiff's Motion, Defendant filed an affidavit of Chloe Orta, Esquire, an associate attorney with the law firm of Smith, Gambrell & Russel, LLP ("SGR"). *See* Defendant's Response in Opposition, Exhibit C. Ms. Orta's affidavit stated that it was her understanding that "Plaintiff's counsel sought a USB containing only the portion or excerpts of the 2016 GEICO Glass Claims History that would be offered into evidence." *Id.* In reliance upon that "understanding," Ms. Orta proceeded to reduce the amount of data to be provided to Plaintiff's counsel and the Court. Ms. Orta's affidavit identifies a process of "filtering" the Microsoft Excel data to an "excerpt of the transactions detailing windshield replacements performed by Non-Affiliate glass shops in the Orlando area." *Id.* Ms. Orta also identified an apparent "scrivener's error" causing all vehicle years to be identified with a calendar entry and year of "1905." *Id.*

16. It is important to note that Plaintiff's counsel did not, at any time, limit its request to production of a smaller subset or excerpt of the data relied upon by Defendant and Defendant's expert. Plaintiff's counsel requested, and is entitled to, all information relied upon by Dr. McClave relating to the claim at issue in this case, and his expert opinion.

17. Additionally, during the hearing on Plaintiff's Motion, Defendant's counsel stated that Defendant was "working toward a trial exhibit" as justification for producing data inconsistent with what was ordered during the September 9, 2021, pretrial conference. Defendant's counsel went on to state that Defendant remove Safelite shops, affiliate shops, and all non-affiliate shops not in the "Orlando Metro area, which . . . our expert believes, is the proper geographic region," that this data was removed because the "transaction at issue in this case took place in the Orlando Metro area," and that, after all that data was removed that Defendant and Defendant's counsel believed was appropriate there were"6,127 transactions" left on the spreadsheet.

18. As identified herein, the spreadsheet on USB flash drive (with 6,127 transactions), was one of *four* separate forms of the spreadsheet. Defense counsel's representations are inconsistent with the expert's testimony about the 32,430-claim spreadsheet, and the expert report which referenced a 5,457 claim spreadsheet.

19. It is undisputed that all of the Plaintiff's claims, including the single windshield replacement transaction that was the subject of this lawsuit, did not appear on the data that was loaded onto the USB flash drive that contained 6,127 claims transactions. Defendant's counsel attempts to justify the omission of the Plaintiff and Plaintiff's claims by arguing that the Plaintiff is "not in the Orlando market," and that Defendant defined the market based upon "the county in which the shop is located." This argument is also misplaced and inconsistent with the record. The Court did not issue any order granting any motion in limine, or any other motion, ordering or authorizing the Defendant to restrict, manipulate or segment its data from the original version(s) produced to the Defendant's expert. Moreover, Defendant's expert analysis conflicts with Defendant's representations because, among other things, the data spreadsheet allegedly analyzed by Defendant's expert is different than the data spreadsheet created and disseminated by Defendant's counsel on October 11, 2021.

20. It is clear that all of the data compilations were not provided by Defendant, and the Plaintiff had an incontrovertible right to possess that same data in a complete and timely manner prior to trial.

21. Finally, upon review of the Plaintiff's invoice at issue in this case, it is undisputed that Plaintiff performed a windshield replacement service on December 2, 2015, for a date of loss that occurred on November 29, 2015. It is a matter of record in this case that Defendant's corporate representative and expert witness reviewed and relied upon data for 2016 transactions. Defendant incorrectly labeled the subject invoice with a January 20, 2016, date of service in its Claims Spreadsheet data. Thus, the Plaintiff's claim was incorrectly represented as a 2016 transaction on the version of the Claims Spreadsheet containing approximately 137,000 transactions, instead of being presented as part of the Defendant's transaction data for 2015. In fact, the single invoice at issue in this case evidences that the 2016 data is irrelevant and inaccurate, because that invoice involves a 2015 loss and was erroneously was recorded as a 2016 transaction.

22. This Court has relied upon representations of Defendant regarding admissibility of Defendant's claims history data compilation as a business record. The information currently before the Court appears to indicate that the data can be, and has been, easily manipulated, causing the Court to question whether the compilations have the requisite indicia of reliability and trustworthiness. Thereby warranting further discovery into the issue.

Based upon the foregoing the Court reserves ruling on Plaintiff's Motion pending the parties' compliance with the following:

i. Within 15 days of the date of this Order, the Defendant shall serve upon Plaintiff's counsel and the Court a flash drive of the exact original form of each of the following four (4) spreadsheets:

1. Excel Spreadsheet containing 137,912 claims which was produced by Workshare link on August 30, 2021 in advance of Defendant's expert's deposition, Dr. McClave;

2. Excel Spreadsheet containing 32,420 claims referenced during Dr. McClave's deposition as the data he was using for purposes of providing deposition testimony which was never produced to Plaintiff's counsel;

3. Excel Spreadsheet containing 6,127 claims that was produced by USB flash drive on October 11, 2021;

4. Excel Spreadsheet containing 5,457 claims that was referenced in Dr. McClave's expert report which was never produced to Plaintiff's counsel;

5. Any other data and/or information relied upon by Defendant's expert Dr. McClave in generating his expert report.

ii. Within 15 days of the date of this Order, the Defendant shall file and serve the names, job titles, and contact information for all persons involved in: (1) creating the original form of Defendant's 2016 transaction data; (2) all four versions of the Defendant's transaction data as identified herein; and (3) the solicitation, transmission, and/or delivery of all four versions of the Defendant's transaction data.

iii. Within 15 days of the date of this Order, the Defendant shall file and serve affidavits of each person identified in subparagraph ii (above), explaining under oath why four (4) spreadsheets were created, including the criteria used to determine the following:

1. The "AIC Level" as reflected in Column "Q" of the spreadsheets. Specifically, Defendant is to provide the criteria it uses to determine whether any particular claim or claims fall into AIC Level "A", "B", "C", "D" or "E".

2. The "Zip Code" as reflected in Column "R" of the spreadsheets. Specifically, Defendant is to provide the criteria it uses to determine the "Zip Code" of a particular facility. Whether Defendant uses the zip code based off of a facility's invoice address, a facility's corporate address, a facility's registered agent's address, a facility's physical address, and if a facility has more than one address, how Defendant determines which of the multiple addresses will be used within the spreadsheet.

3. The "County" as reflected in Column "T" of the spreadsheets. Specifically, Defendant is to provide the criteria it uses to determine the "County" as represented in Column "T" of the spreadsheets and whether Defendant uses the "County" to reflect where the service was performed or the physical address of the facility performing the service is located, or the facility's invoice address, or the facility's corporate address, or the facility's registered agent's address, and if a facility has more than one address, how Defendant determines which of the multiple addresses will be used within the spreadsheet.

4. The "Insured Zip" as reflected in Column "V" of the spreadsheets. Specifically, Defendant is to provide the criteria it uses to determine the "Insured Zip" as represented in Column "V" of the spreadsheets.

5. The "Invoice Location" as reflected in Column "X" of the spreadsheets. Specifically, Defendant is to provide the criteria it uses to determine the "Invoice Location" as represented in Column "X" of the spreadsheets.

iv. To the extent, if any, that Defendant claims attorney client privilege or any other form of confidentiality with respect to any of the aforementioned information, the Defendant shall, within that same 15-day time period, file and serve a privilege log and provide the allegedly confidential information to this Court for an in camera inspection.

v. After completion of the foregoing requirements, the Plaintiff shall contact Judge Valkenburg's judicial assistant to schedule a status conference, for purposes of further consideration of the Plaintiff's Motion.

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[1]Defendant produced this data on October 11, 2021, over one month after the pretrial conference. Thus, even if the Defendant had truly intended the spreadsheet contained on the USB flash drive to be used as evidence, it was untimely.

* * *

Consumer law—Vehicle sales—Damages—Motor Vehicle Retail Sales Finance Act—Where finance company willfully violated MVRSFA by failing to ensure that contract or title for vehicle reflected that lien had been satisfied or released and to ensure that evidence of satisfaction was provided to buyers, buyers are entitled to judgment in amount of finance charge and to award of attorney's fees and costs—Uniform Commercial Code—Sales—Warranty of title—Where auto dealer and finance company jointly and severally breached warranty of title by failing to deliver free and clear vehicle title to buyers, award of special damages equal to current fair market value of vehicle is appropriate—Prevailing buyers are entitled to award of attorney's fees for breach of warranty of title under section 57.105(7) based on attorney's fees provision contained in retail installment contract

INGRID RAMIREZ, and JOSE SCHIFFINO, Individuals, Plaintiffs, v. RBA AUTO FINANCE, LLC, a Florida limited liability company, G.L. CARS, INC. d/b/a

CHECKERED FLAG AUTOMOTIVE, a Florida corporation, DRIVING LLC d/b/a "TOP GEAR AUTO GROUP" a Florida limited liability company, and HUDSON INSURANCE COMPANY, a Foreign Corporation, Defendants. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2021-CC-002021. May 10, 2022. Frank S. Castor, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hallandale, for Plaintiff. Donald N. Jacobson, Donald N. Jacobson, P.A., West Palm Beach, for GL Cars, Inc. and RBA Auto Finance, LLC, Defendants. Keith D. Silverstein, Keith D. Silverstein, P.A., Miami, for Driving LLC, Defendant. Sara Grover, McRae & Metcalf, Tampa, for Hudson Insurance Company, Defendant.

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DAMAGES AND ATTORNEY'S FEES AND COSTS

THIS CAUSE having come to be heard by the Court on April 29, 2022 at 10:00 a.m., on the PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DAMAGES AND ATTORNEY'S FEES AND COSTS filed on February 24, 2022 [D.E. No. 55] ("Motion"). Having heard the argument of Counsel, reviewed the record, relevant legal authority, and being otherwise fully advised in the premises, the Court makes the following findings and conclusions of law:

1. On August 20, 2021, this Court entered an Order striking the Defendant's pleadings and entered a default. [D.E. No. 38]

2. On February 24, 2022 Plaintiffs filed the Motion. [D.E. No. 55]

3. Subsequent thereto, Plaintiffs came to learn that counsel for Defendants RBA Auto Finance, LLC ("RBA") and G.L. Cars, Inc.("GL") (collectively the "Defendants"), Mr. Donald Nathan Jacobson, Esq., was suspended from the practice of law by emergency order of the Florida Supreme Court. [*See* D.E. No.58]

4. Plaintiffs promptly set a case management conference ("CMC") with the Court on March 18, 2022 which was properly noticed to all parties. [D.E. Nos. 53-54;56]

5. During the CMC, this Court ordered RBA and GL to obtain counsel within THIRTY (30) days of the rendition of the order ("Order"). [D.E. 59]

6. Plaintiffs provided notice of the Court's Order to the Defendants. [D.E. 61]

7. Defendants failed to obtain counsel within THIRTY (30) days of the Order. [*See* Docket, generally]

8. Plaintiffs properly noticed the instant Motion for hearing before the Court on April 29, 2022. [D.E. Nos. 67-68]

9. Joshua Feygin, Esq. of Joshua Feygin P.L.L.C. represented Plaintiffs at the hearing. Sara Grover, Esq. of McRae and Metcalf represented Defendant, Hudson Insurance Company. The remaining Defendants failed to appear despite being properly noticed.

10. Defendants have admitted the allegations in the Complaint by virtue of the default. *Bd. of Regents v. Stinson-Head, Inc.,* 504 So. 2d 1374 (Fla. Dist. Ct. App. 1987) *See also Robbins v. Thompson,* 291 So.2d 225, 226 (Fla. 4th DCA 1974)(stating that a default deprives the defendant of the right to contest the existence of plaintiff's claim and liability thereon). Alternatively, there are no disputed facts and Plaintiffs are entitled to summary judgment against Defendants. *See Duprey v. United Servs. Auto. Ass'n,* 254 So. 2d 57, 58 (Fla. 1st DCA 1971) (stating that it is proper for the trial judge to enter a summary judgment where the basic facts of a cause of action are clear and undisputed).

i. ***Motor Vehicle Retail Sales Finance Act Damages***

11. With respect to the Plaintiffs' damages for RBA's violation of the Florida Motor Vehicle Retail Sales Finance Act ("MVRSFA"), Fla. Stat. §520, *et. seq.*, pursuant to Fla. Stat. §520.12 (2) "[i]n the case of a willful violation of this part with respect to any retail installment sale, the [plaintiff] may recover from the person committing such violation . . . an amount equal to any finance charge."

12. A person violates the MVRSFA by failing to ensure that a contract or title to a vehicle reflects that a lien has been satisfied or released and ensuring that evidence of satisfaction is provided to a borrower in contravention of Fla. Stat. §520.07(8)(9).

13. The Court finds that at all times material hereto, RBA was engaged in the business of providing consumer loans to the public at large in Florida and knowledgeable of the requirements with respect to the extension of credit subject to the MVRSFA. Accordingly, the violations of the MVRSFA were willful in nature.

14. As set forth in the allegations of the well plead complaint, the attachments incorporated thereto, and the Plaintiffs' affidavit in support of the Motion, the disclosed finance charge was $7,472.09. Accordingly, Plaintiffs are entitled to judgment in the amount of $7,472.09 as and for their statutory damages for RBA's willful violation of the MVRSFA.

ii. ***Entitlement to Attorney's Fees for Violations of the MVRSFA***

15. With respect to the Plaintiffs' entitlement to the recovery of their attorney's fees and costs, pursuant to the MVRSFA, Fla. Stat. §520.12 (2) provides that "the [plaintiff] may recover from the person committing such violation . . . attorney's fees and costs incurred by the [plaintiff] to assert rights under this part." As the prevailing parties, Plaintiffs are entitled to their attorney's fees and costs related to asserting their rights under the MVRSFA against RBA.

iii. ***Breach of Warranty of Title Damages***

16. With respect to the Plaintiffs' damages for the Defendant's joint and several violations of the Warranty of Title, under Article 2 of the Uniform Commercial Code, a warranty of title is a part of any contract for the sale of goods:

> Warranty of title and against infringement; buyer's obligation against infringement.— (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that:
>
> (a) The title conveyed shall be good, and its transfer rightful; and
>
> (b) **The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge**.
>
> Fla. Stat. § 672.312 (emphasis added).

17. As set forth in the well plead allegations in the Complaint, Defendants have jointly and severally breached the warranty of title by failing to deliver free and clear title to the subject vehicle to the Plaintiffs. The undisputed facts show that Defendants violated the warranty of title as there was and to the present continues to be a "substantial cloud on the title" for the subject vehicle. *Maroone Chevrolet, Inc. v. Nordstrom,* 587 So. 2d 514, 517-18 (Fla. 4th DCA 1991).

18. Pursuant to Fla. Stat. §672.714(2) "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

19. Pursuant to Fla. Stat. §672.714(3) "In a proper case any incidental and consequential damages under the next section may also be recovered."

20. Fla. Stat. §672.715 provides: "(1) Incidental damages resulting from the seller's breach include [. . .] any other reasonable expense incident to the delay or other breach. (2) Consequential damages resulting from the seller's breach include: (a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise[.]"

21. As there is no market for a used vehicle without free and clear marketable title, an award of special damages equal to the current fair market value of the vehicle is appropriate.

22. Upon review of the Motion and the Plaintiffs' affidavit in support thereof, the Court finds that the Plaintiffs are entitled to judgment in the amount of $28,825.00 as and for damages for the Defendants' joint and several Breach of Warranty of Title.

iv. ***Entitlement to Attorney's Fees and Costs for Breach of Warranty of Title***

23. Pursuant to Fla. Stat. §57.105(7), when a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the Court may also allow reasonable attorney's fees to the other party when that party prevails in the action, whether as plaintiff or defendant, with respect to the contract.

24. Pursuant to the retail installment sales contract ("RISC") originated by GL and assigned to RBA for the subject vehicle, the holder of the RISC has the right to recover attorney's fees for any action taken to enforce the rights of the holder under the RISC upon default of Plaintiffs. Accordingly, by operation of law, Plaintiffs are entitled to their attorney's fees and costs from RBA and GL.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Plaintiffs' Motion is **GRANTED**, *in toto*;

2. Final Judgment is hereby entered in favor of INGRID RAMIREZ and JOSE SCHIFFINO whose address is C/o Joshua Feygin, PLLC, 1800 E. Hallandale Beach Blvd. #85293, Hallandale, FL 33009, in the amount of **$7,472.09** to bear interest at the statutory rate from this day forward, against Defendant, RBA AUTO FINANCE LLC, whose last known address is 722 Belvedere Road, FL 33405 as and for the Plaintiffs' statutory damages for RBA's violation of the Florida Motor Vehicle Retail Sales Finance Act, Fla. Stat. 502, *et. seq.* for which let execution issue;

3. The Court grants Plaintiffs entitlement to attorney fees and costs for RBA's violations of the MVRSFA pursuant to Fla. Stat. §520.12 (2) for which the Court reserves jurisdiction to determine the amount of same;

4. Final Judgment is hereby entered in favor of INGRID RAMIREZ and JOSE SCHIFFINO whose address is C/o Joshua Feygin, PLLC, 1800 E. Hallandale Beach Blvd. #85293, Hallandale, FL 33009, in the amount of **$28,825.00** plus prejudgment interest of **$1,791.83** for a total of **$30,616.83** to bear interest at the statutory rate from this day forward, against GL CARS INC whose last known address is 9718 Celtic Sea Land, Delray Beach, FL 33446 and RBA AUTO FINANCE LLC, whose last known address is 722 Belvedere Road, West Palm Beach, FL 33405, jointly and severally, as and for the Plaintiffs' damages for the Defendants' joint and several breach of Warranty of Title;

5. The Court grants Plaintiffs entitlement to attorney fees and costs for RBA and GLs' Breach of Warranty of Title pursuant to Fla. Stat. §57.105(7) for which the Court reserves jurisdiction to determine the amount of same;

6. This Final Judgment fully and finally resolves all claims for damages by, between, and amongst Plaintiffs and Defendant RBA AUTO FINANCE, LLC and Defendant GL CARS INC., however, this Court reserves jurisdiction to enforce the terms of this Final Judgment, determine the amount of reasonable attorney's fees and costs the Plaintiffs are entitled to recover from Defendant RBA AUTO FINANCE, LLC and Defendant GL CARS INC, and adjudicate the balance of the Plaintiffs' claims pending in this action against Defendants DRIVING LLC and HUDSON INSURANCE COMPANY;

7. Defendants RBA Auto Finance, LLC and G.L. Cars, Inc. shall complete under oath and submit to Plaintiffs' counsel a Form 1.977, Fact Information Sheet, including all required attachments within 45 days of the entry of this Order. Failure to obey this Order may be considered contempt of Court. **(PLAINTIFF SHALL MAIL COPY TO DEFENDANT AND FILE CERTIFICATE OF MAILING)**

* * *

Insurance—Attorney's fees—Proposal for settlement—Where medical provider had actual notice of insurer's proposal for settlement, it was not required that proposal be filed with court unless proposal was accepted or unless necessary to enforce settlement—Error in case number in email accompanying proposal for settlement sent to provider was trivial and did not alter effect of delivery of proposal—Proposal was not defective for failing to state case number and parties' names in body of proposal where number and names were specified at top of page—Fact that provider did not open email did not make notice of proposal ineffective—Insurer is entitled to award of fees and costs

ALLIANCE SPINE & JOINT II, INC., a/a/o Miriam Rodriguez, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE17018297, Division 50. April 27, 2022. Mardi Levey Cohen, Judge. Counsel: Samuel Yeboah, Yeboah Law Group, for Plaintiff. Julia Sturgill, Law Office of Leslie M. Goodman & Associates, Doral, for Defendant.

Order Granting Defendant's Renewed Motion for Entitlement to Attorney's Fees and Costs

THIS CAUSE came before the Court on April 13, 2022, on Defendant's Renewed Motion for Entitlement to Attorney's Fees & Costs, in which Infinity seeks trial and appellate attorneys' fees and costs pursuant to a Proposal for Settlement, pursuant to section 768.79, Florida Statutes, Florida Rule of Civil Procedure 1.442 and 1.525, and Florida Rule of Appellate Procedure 9.400. The Court having reviewed the Defendant's Motion and entire Court file; reviewed the relevant legal authorities; having heard arguments by the parties, and been sufficiently advised in the premises the Court thereby makes the following findings:

On June 21, 2019, Defendant served Plaintiff with a Proposal for Settlement ("PFS") pursuant to Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes AND more than 90 days after commencement of this action. *See* Fla. R. Civ. P. 1.442(b).

On October 10, 2019, this Court granted Final Summary Judgment in favor of Infinity and Final Judgment for Infinity on October 23, 2019. In the Final Judgment Order, this Court reserved jurisdiction to determine entitlement to and award of attorneys' fees.

On November 7, 2019, Plaintiff filed its Notice of Appeal to the Broward Circuit Court of the Seventeenth Judicial Circuit (Case No. CACE-20-000507). Thereafter on or about January 10, 2021, this case was transferred to the Fourth District Court of Appeal pursuant to Second Amended Administrative Order 2020-97-Gen.

On April 8, 2021, the Fourth District Court of Appeal affirmed (per curiam) the granting of Defendant's Motion for Summary Judgment (Case No. 4D21-427). The Fourth District Court of Appeal also conditionally granted Defendant's Motion for Appellate Attorney's Fees, upon the trial court's finding of entitlement pursuant to section 768.79. On April 30, 2021, the Fourth District Court of Appeal issued its Mandate.

The matter of entitlement to attorneys' fees was set for hearing on April 13, 2022 and after hearing arguments by the parties the Court granted Defendant's Renewed Motion for Entitlement to Attorney's Fees & Costs for trial court and appellate court attorney's fees and costs.

At the hearing, Plaintiff argued that the Defendant should not be entitled to attorney's fees and costs based on the expired proposal for settlement and made several arguments in opposition. Plaintiff argued that the Defendant failed to file a notice with the Court advising the court that a Proposal for Settlement was sent to the Plaintiff's counsel.

Defendant argued that there is no requirement that the Defendant file a notice of serving a PFS with the court. In fact, the only time any filing is required is when attempting to enforce the Proposal for Settlement. Fla. Stat. 768.79(3) and (8); Fla. R. Civ. P. 1.442 (d) and (i).

Moreover, Defendant cited to *McCoy v. R.J. Reynolds Tobacco Co*., 229 So. 3d 827 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2281a], which is a Fourth District Court of Appeal decision that stands for the proposition that the court will focus on whether there is "actual notice" of the Proposal for Settlement. In *McCoy*, the court stated that "The defendants had actual knowledge of the proposals for settlement and did not accept them." *Id*. The Court in *McCoy* stated:

> The focus of the statute is on **actual notice**—an offer of judgment is required to be "served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section." § 768.79(3), Fla. Stat. (2014). Echoing the requirements of the statute, Florida Rule of Civil Procedure 1.442(d) provides that an offer "shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

Id.

In this case, the Proposal for Settlement was e-mailed to Plaintiff's counsel on June 21, 2019. At the beginning of the hearing Plaintiff admitted that he received the Proposal for Settlement but explained that he was challenging the PFS claiming, for the very first time, that Defendant's PFS was deficient. In fact, Plaintiff filed a copy of the PFS email with the court during the hearing. The Notice of Filing submitted by the Plaintiff shows that the Defendant sent the Proposal for Settlement to the Plaintiff. Plaintiff did not accept the Proposal for Settlement within the 30 days and thus it was deemed rejected.

Plaintiff additionally argued that the PFS failed to meet the requirements of the rule and the statute as the email that was sent had a typo in the case number, both on the subject line and in the body of the email. Defendant argued that the Proposal for Settlement document which was attached to this email correctly identified the correct case number. Moreover, the email included the complete case name "Alliance Spine & Joint II, Inc aao Miriam Rodriguez v. Infinity Auto Insurance Company" in both the subject of the email as well as in the body of the email. The error was trivial and did not alter the effect of the PFS being sent to the Plaintiff.

Further, Plaintiff argued that the Proposal for Settlement itself was defective as the body of the Proposal for Settlement did not specifically state Plaintiff's name, Defendant's name, and also did not include the case number in the body of the Proposal for Settlement. Defendant argued that both the party names as well as the case number are clearly specified on the top of the page of the PFS and thus it was clear that the Proposal for Settlement was between ALLIANCE SPINE & JOINT, II, INC .a/a/o MIRIAM RODRIGUEZ as Plaintiff, and INFINITY AUTO INSURANCE COMPANY, as Defendant, and for the case number CASE NO.: COCE17018297.

Lastly, Plaintiff argued that he did not have actual notice of the Proposal for Settlement since he did not personally open the PFS email and it was "unread" until the day before the entitlement hearing, despite the fact that the email was sent to him via email on June 21, 2019. Again, during the hearing, Plaintiff filed a Notice of Filing the email that was submitted to the court, which demonstrates that the Plaintiff did in fact receive the email. Thus, the Plaintiff had actual notice of the PFS. Defendant argued that Plaintiff's failure to read its emails could not be held against the Defendant and should not be considered an argument as to why entitlement should not be granted in this matter. The email was sent to the proper entity and it should be presumed to have been received.

The Court was not persuaded by the Plaintiff's arguments above. The Court found at the hearing that there was no requirement for the Defendant to file a notice that the PFS was served with the court. Moreover, the court found that the Proposal for Settlement was sufficient as the parties and case number were clearly listed on the PFS and that the Plaintiff had actual notice of the PFS via email.

For the reasons stated above, it is hereby

ORDERED and ADJUDGED that Defendant's Renewed Motion for Entitlement to Attorney's Fees and Costs is **GRANTED.** Infinity shall be entitled to a reasonable award of fees and cost for trial and appellate proceedings in this matter. The parties shall attend mediation as to the amount of attorney fees and costs owed. The Court retains jurisdiction to determine the reasonable hourly rates and hours expended from the date of the Proposal for Settlement in the event that the parties are unable to work the issue out at mediation.

* * *

Creditors' rights—Garnishment—Exemptions—Fact that case is pending appeal is not grounds for avoiding writ of garnishment—Moreover, claim for exemption is not alternative process for seeking to stay execution of judgment

LAGO FUNDING CORP., Plaintiff, v. VATESHEA CURE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21050755, Division 53. May 8, 2022. Robert W. Lee, Judge.

Order Overruling Defendant's Claim of Exemption

This case came before the Court for consideration of the Defendant's Claim of Exemption.

Pending before the Court is Plaintiff's Continuing Writ of Garnishment. In response, the Defendant filed her Claim of Exemption. The sole grounds stated for the Claim of Exemption is that this "case was appealed with higher court—awaiting final decision." This is not grounds for avoiding a Writ of Garnishment—neither is it an alternative process for seeking to stay execution of a judgment.

As such, the Court finds the Defendant's Claim of Exemption to be facially insufficient, and no hearing is required. As a result, the Claim of Exemption is **OVERRULED**.

* * *

Arbitration—Confirmation of award—Judgment must be entered in accordance with arbitrator's decision where parties did not request trial de novo within deadline for such request

ELIAS HERNANDEZ, Plaintiff, v. 24 HOUR EMERGENCY TOWING, INC., Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21065605, Division 53. April 28, 2022. Robert W. Lee, Judge.

Final Judgment on Arbitrator's Decision in Favor of Defendant, 24-Hour Emergency Towing, Inc.

THIS CAUSE came before the Court for consideration of the notice of filing Arbitration Decision filed by the Arbitrator Ira Rainess, and the Court's having reviewed the docket, the entire Court file, and the relevant legal authorities; and having been sufficiently advised in the premises, the Court finds as follows:

This case was submitted to mandatory arbitration, as permitted by the rules and controlling case law. The arbitration hearing was held on March 16, 2022. On April 5, 2022, the arbitrator served his decision on the parties. Under Rule 1.820(h), Fla. R. Civ. P., any party objecting to the decision had 20 days to file (not merely serve) a request for trial de novo. The deadline was therefore April 25, 2022. The Court has confirmed with the Clerk of Courts that it is current with docketing and filing through that date. No party filed a request for trial de novo. As a result, the Court "must enforce the decision of the arbitrator and has no discretion to do otherwise" (emphasis added). *Bacon Family Partners, L.P. v. Apollo Condominium Ass'n*, 852 So.2d 882, 888 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1795a]. *See*

also Johnson v. Levine, 736 So.2d 1235, 1238 n.3 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D1456a]; *Klein v. J.L. Howard, Inc.*, 600 So.2d 511, 512 (Fla. 4th DCA 1992). Accordingly, the Court has this day unsealed the Arbitrator's decision, which is filed with the Clerk. A review of the decision reveals that the arbitrator thoroughly conducted "a hearing which provide[d] both parties the opportunity to present their respective positions." Rule 11.060(b)(2), Fla. R. Ct.-Appointed Arb. (2012). Accordingly, it is hereby

ADJUDGED THAT:

The Plaintiff, ELIAS HERNANDEZ, shall take nothing in this action, and the Defendant, 24-HOUR EMERGENCY TOWING, INC., shall go hence without day. The Court retains jurisdiction to determine any issues involving fees and costs.

The Case Management Conference set for May 6, 2022 is CANCELED.

The Pretrial Conference set for May 27, 2022 is CANCELED.

The Hearing set for May 31, 2022 is CANCELED.

* * *

Insurance—Personal injury protection—Coverage—Declaratory judgments—Imminent default declaratory judgment finding that there is no coverage for insured does not entitle insurer to dismissal or abatement of action for breach of contract brought by medical provider where provider was not party or co-defendant in declaratory action

FAMILY WELLNESS CHIROPRACTIC CENTER, INC., a/a/o Janella Bergan, Plaintiff, v. DIRECT GENERAL INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21055689, Division 82. April 18, 2022. Kal Evans, Judge. Counsel: Nicholas Marzuk, The Schiller Kessler Group, Fort Lauderdale, for Plaintiff. Stephen Strong, Tampa, for Defendant.

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

THIS CAUSE having come on to be heard before this Court on Defendant's (Direct General Insurance Company) Motion to Dismiss or, Alternatively, to Abate. After considering the filed motion, and argument from counsel at the hearing, the Court hereby finds and concludes as follows:

On September 24, 2021, Plaintiff filed the current action for overdue Personal Injury Protection (PIP) benefits under theory of breach of contract. In 2019, however, the Defendant, filed an action for Declaratory Judgment against the named insured (which is a different individual than the assignor in the present case) in Orange County's Civil Circuit Division (2019-CA-006134), hereinafter referred to "Circuit Case".

In the current action, the Defendant was served with the lawsuit on October 6, 2021, and filed its Motion to Dismiss, or in the Alternative to Abate on October 28, 2021. It was not until February 2022 that the Defendant attempted to set that Motion to Dismiss/Abate, which ultimately was set and heard on April 14, 2022.

At the hearing on April 14, 2022, The Court pointed out that the Circuit Case showed no record activity since January 2021 when Direct General Insurance Company had filed its second Amended Complaint.

Counsel for the Defendant acknowledged that the Circuit Case lists only one Defendant, the named insured, and that since it has been over fourteen (14) months since the Second Amended Complaint has been filed, that the Circuit Case is ready and will likely result in Default Judgement. Defense counsel at the hearing, albeit not the counsel working on the Circuit Case, did not have any additional information for This Court to consider or rely upon regarding the current status of the Circuit Case.

Defendant argued that the current case should be abated to determine the outcome of the Circuit Case which is meant to determine whether or not there is coverage for the named insured, even though it appears a Default Judgment was eminent.

Plaintiff argued that pursuant to *State Farm Mutual Automobile Insurance Company v. Jontaie Poon* (9th Judicial Circuit in and For Orange County [2016-CA-0010480-O]) (29 Fla. L. Weekly Supp. 88a) , a default declaratory judgment finding that insurer was not required to pay PIP benefits to insured or assignees because insured made false statement with intent to conceal or misrepresent material fact does not entitle insurer to summary judgment against medical provider where provider was not provided notice and opportunity to defend its interests before default was entered. Further, *State Farm v. Jontaie Poon* held that a default against insured cannot be enforced against provider who was either non-party or codefendant in action.

The Court was not persuaded by Defendant's argument and instead ruled consistently with the 9th Circuit in *State Farm v. Jontaie Poon* . The Court further explained that it was ruling in Plaintiff's favor based on the inactivity by Direct General Insurance Company in the Circuit Case from time the Second Amended Complaint was filed (January 2021) up until the time they were served with this action, up until the time this motion was filed, up until the time this motion was scheduled to be heard, and up until the time of the hearing. This Court reasoned that it is bound to certain timelines that the Circuit Case clearly is not bound to, and if it were to abate the current action, it would do so for an unknown amount of time.

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

1. The Defendant's Motion is DENIED WITHOUT PREJUDICE.

2. The Defendant shall Answer the Plaintiff's Complaint by Friday, April 22, and 12:00 pm.

* * *

Insurance—Attorney's fees—Insurer is not permitted to ignore order requiring filing of expert report with respect to attorney's fees and costs based on its belief that order is invalid

KEENON D. CARTER, Plaintiff, v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE20003171, Division 53. May 19, 2022. Robert W. Lee, Judge.

Order Granting Plaintiff's Motion for Rule to Show Cause

THIS CAUSE having come before this Court on Plaintiff's Motion for Rule to Show Cause and the Court having reviewed the pleadings; it is thereupon:

ORDERED and ADJUDGED:

1. Plaintiff's Motion for Rule to Show Cause is GRANTED.

2. The Court finds that, at a minimum, Defendant has been grossly indifferent to complying with this Court's Order Preliminary on Plaintiff's Motion for Attorney's Fees and Costs. The hearing demonstrated that the Defendant is clearly aware of the requirements of the Order, but has chosen to ignore it. Defendant's belief that it does not have to comply with the Court's Order is completely unacceptable. *See Florida Bar v. Rubin*, 549 So.2d 1000, 1002-03 (Fla. 1989) ("An attorney is not permitted to ignore and refuse to follow a court order based upon his personal belief in the invalidity of that order."). Further, the Defendant has not taken any action with this Court or an appellate court to challenge or stay its compliance with the Order.

3. Accordingly, Defendant has 10 days to file its Expert's Report with respect to Plaintiff's Attorney's Fees and Costs as specified in the Court's prior Order. Upon failure to do so, the Defendant Universal will have waived its right to have an expert as to Plaintiff's fees and costs, and Plaintiff shall thereupon advise the Court's Judicial Assistant that its Motion is ready for further proceedings without Defendant's having an expert.

* * *

Insurance—Property—Expert witnesses—Late disclosure—Insurer's motion for leave to file late expert witness disclosure is denied where insurer violated pretrial order setting deadline for expert witness disclosure, made misstatements denying having retained expert at deposition of its corporate representative, failed to name expert in response to interrogatories, and did not try to correct its error and designate expert until after discovery cutoff had occurred; and insured would be prejudiced by late disclosure

DIDRIANNE JEAN JACQUES, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE21013612, Division 53. April 26, 2022. Robert W. Lee, Judge.

Order Denying Defendant's Motion for Leave to File [Late] Expert Witness Disclosure Upon a Finding of Prejudice

This cause came before the Court on April 22, 2022 for hearing of the Defendant's Motion for Leave to File [Late] Expert Witness Disclosure.

This case is in a jury trial posture. An order setting pretrial deadlines was issued by the Court setting an expert witness disclosure deadline for both parties, with the Defendant's deadline being February 3, 2022. The Plaintiff timely filed its expert witness disclosure. The Defendant did not file a disclosure. However, four days later, on February 7, 2022, the Defendant filed an affidavit supporting its Motion for Summary Judgment which was executed by Selim Cerci, an engineer, an individual that had not been designated as the Defendant's expert.

Discovery cutoff under the pretrial order was March 25, 2022. The deposition of Defendant's corporate representative was held on March 16, 2022. Plaintiff's attorney attempted to question the corporate representative about Mr. Cerci's affidavit, an appropriate line of questioning in that this was the deposition of a designated corporate representative. (Prior to this point, Citizens had advised that another engineer would attend the property inspection, Rick Matta.) Defense counsel, however, objected to this line of questioning, asserting that Defendant had not designated an expert. Specifically, defense counsel stated, "there has been no expert retained, there has not been an expert disclosure filed in this case." (Depo. of Corp. Rep., p. 50, ll. 2-5.) Defense counsel now asserts that she was mistaken because of lack of access to her records during the deposition. However, although she could have corrected this alleged misstatement fairly quickly thereafter, she did not do so.

Two weeks later on April 1, 2022, after discovery cutoff, the parties appeared before the Court at 11:00 a.m. on a motion to extend the discovery deadline portion of the pretrial order, as some depositions had not yet been taken. At the hearing, it became apparent that the Defendant had still not filed an expert disclosure. This is all the more important because while the Plaintiff was aware of Mr. Cerci's potential involvement at the time it received the February 7, 2022 affidavit, the Defendant later disclaimed having an expert during the March 12, 2022 deposition of its own corporate representative. This is all the more striking because it was the Plaintiff's attorney that specifically brought up Mr. Cerci during the deposition, only to have her line of inquiry objected to on the grounds that Citizens had not designated an expert. Just a few minutes after the hearing, at 11:49 a.m., the Defendant finally filed its Notice of Expert Witness Disclosure, and simultaneously filed the Motion for Leave to File Expert Disclosure, the motion subject of the instant Order. Not surprisingly, Plaintiff has objected.

The parties filed their Joint Pretrial Stipulation three days later on April 4, 2022, which included the Defendant's expert, Mr. Cerci. The same day, however, the Plaintiff filed its lengthy response, objecting to Mr. Cerci's use as an expert. Plaintiff points out that in addition to other shortcomings in the Defendant's disclosure of its expert, Citizens previously failed to include Mr. Cerci in its Response to Plaintiff's Interrogatories when asked to name persons with knowledge of the issues raised by the pleadings, such Responses being submitted March 18, 2022, just two days after the corporate representative deposition, and at a time at which Citizens now concedes it did in fact intend to use Mr. Cerci as an expert.

The conduct of Citizens in this case violated the Court's Pretrial Order. Citizens also made misstatements at the corporate representative deposition, which led the Plaintiff to reasonably believe that Citizens would not have an expert, which Citizens could have promptly corrected but did not do so. Further, Citizens failed to properly respond to Plaintiff's Interrogatories, and it did not try to resolve the expert confusion that it had itself created until after discovery cutoff had occurred.

This is not a case in which the Plaintiff knew that its opposing party had an expert, but which the opposing party failed to properly disclose through mere neglect. Here, it was Plaintiff that explored this issue with Citizens, and Citizens responded affirmatively that no expert had been retained. Defendant could have quickly corrected its error, but it did not do so. And then, once discovery cutoff had occurred, and a joint pretrial stipulation deadline upon the parties, Citizens, to the Plaintiff's surprise, finally tried to correct its error and designate Mr. Cerci. To allow Citizens to now say it has Mr. Cerci as its expert will clearly result in prejudice to the Plaintiff. Discovery will have to reopen—not just for Mr. Cerci's deposition, but also a second deposition of the Defendant's corporate representative now to ask the questions that Plaintiff was entitled to ask, but was prevented from doing so. Unnecessary cost of additional litigation will also arise from motion practice that will have to address why Citizens left Mr. Cerci out of its response to the Plaintiff's Interrogatories. Additionally, the Plaintiff prepared for mediation with the belief that Citizens would not be having an expert in this case, and now the mediation (before a retired judge and lasting more than 2 hours) may well have to be reopened.

Accordingly, for all these reasons, the Defendant's Motion is DENIED upon a finding of prejudice.

* * *

Civil procedure—Default—Vacation—Due diligence—Where defendant filed motion to vacate default diligently, but motion failed to address judgment entered and made incorrect argument regarding service of process that was later abandoned; and defendant did not file amended motion making meritorious defense argument until 26 days after default was entered, defendant failed to exercise due diligence—Meritorious defense—Further, defendant has presented no sworn evidence to establish meritorious defense—Motion to vacate is denied

BLANCHE MARIE DUNCAN, Plaintiff, v. ROSE-VITA LABRANCE, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22000881, Division 53. April 26, 2022. Robert W. Lee, Judge.

Order Denying Defendant's Amended Motion to Set Aside Default

This cause came before the Court on April 18, 2022 for hearing of the Defendant's Amended Motion to Set Aside the Default.

A default was entered against the Defendant on February 2, 2022. At that time, no appearance or response appeared on the docket from the Defendant. Thereafter, the Plaintiff filed her Motion for Final Judgment by Default. The Court entered its Default Final Judgment on February 4, 2022. Three days later, the Defendant filed its Motion to Set Aside Default. The Motion claimed that due to "unanticipated circumstances," it had not filed its Motion to Quash claiming defective service. (The Motion did not however address the Judgment that had been entered, only the default.). The Defendant set its Motion for

hearing for February 23, 2022. The Court denied the Motion without prejudice for failure of the Defendant to specify or explain what was deficient about the service of process in this case.

Five days later, on February 28, 2022, the Defendant filed its Amended Motion to Vacate Default. The Amended Motion completely abandoned the argument that service should be quashed—the Defendant acknowledged in its Amended Motion and at the later hearing that it was mistaken about its service objection. Rather, and importantly, the Amended Motion relied solely on a new argument—that its "failure to respond to the lawsuit was due to mistake and excusable neglect, and upon learning of the default, acted diligently" (Amended Motion, par. 5). The Defendant further argued that it had a meritorious defense (Amended Motion, par. 7). The Defendant then filed its proposed unsworn and unverified Answer and Affirmative Defenses.

The Defendant waited more than another month to actually set its Motion for hearing. Finally, on April 8, 2022, the Defendant set its Motion for hearing for April 18, 2022. The parties appeared before the Court for hearing on April 18, the Plaintiff self-represented. Importantly, the Defendant once again based its argument solely on excusable neglect, due diligence, and a meritorious defense, the general analysis for moving to set aside a default. Therefore, the Court considers the Defendant's argument against the backdrop of the legal argument that was made and preserved in its filings and at the hearing.

In the Court's view, the focus on due diligence is how long a defendant takes to bring its argument to the Court once the defendant is aware of the default. So while the Defendant in this case did file its initial motion to vacate diligently, it failed to address the judgment entered, and its sole argument was incorrect and later abandoned by the Defendant. It wasn't until 26 days after the default was entered that the Defendant filed its Amended Motion addressing the issue of its alleged meritorious defense, which was not raised at all in its initial Motion. In the Court's view, this is simply not diligent. *Bayview Tower Condominium Ass'n, Inc. v. Schweizer*, 475 So.2d 982, 983 (Fla. 3d DCA 1985) (30-day delay too late); 32A Fla. Jur. 2d *Judgment & Decrees* § 287 (2003) (more than 20-day delay too late).

Coupled with taking an additional 49 days to bring the matter before the Court, the Defendant's actions in this case have been anything but diligent. There was no reason offered for the delay in filing the Amended Motion, which was purportedly based on a defense that Defendant was clearly aware of at the time of its initial motion.

Moving on to the issue of a meritorious defense, the Defendant has presented no sworn evidence to establish its defense. When a default judgment is being challenged, as opposed to merely the default itself, the meritorious defense must be shown by either a "verified answer, sworn motion, or affidavit, or by other competent evidence." Merely filing the proposed affirmative defense is insufficient. *Rodriguez v. Falcones*, 314 So.3d 469, 472-73 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2689b]. So even if the Defendant acted with due diligence in bringing its argument to the Court, it fails for lack of a meritorious defense. Accordingly, the Defendant's Motion is DENIED.

* * *

Insurance—Personal injury protection—Coverage—Collateral estoppel—Insurer is collaterally estopped from relitigating affirmative defense alleging that there is no coverage due to insured's use of vehicle for business purposes where insurer's assertion of same affirmative defense in case brought by different medical provider of same insureds resulted in ruling in favor of coverage—Insurer cannot argue that identity of parties required for collateral estoppel cannot be established where insurer failed to raise argument 20 days prior to summary judgment hearing—Moreover, addressing merits of argument, court concludes that two assignees of same insureds are identical parties for purposes of applying collateral estoppel based on alleged misrepresentation by insured

CARE MEDICAL CENTERS, a/a/o Rafael Dolande and Maria Guevara, Plantiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO19008231, Division 61. April 11, 2022. Jane D. Fishman, Judge. Counsel: Vincent Rutigliano, Rosenberg & Rosenberg, P.A., Hollywood, for Plaintiff. Rashad El-Amin, for Defendant.

Order on Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense based on Collateral Estoppel and Plaintiff's Motion for Summary Judgment Regarding Relatedness, Necessity and Reasonableness of the Underlying Medical Treatment

This cause having come before the Court on Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense based on Collateral Estoppel and Plaintiff's Motion for Summary Judgment Regarding Relatedness, Necessity and Reasonableness of the Underlying Medical Treatment, the Court having heard argument of the parties, and being otherwise advised in the premises it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defense based on Collateral Estoppel and Plaintiff's Motion for Summary Judgment Regarding Relatedness, Necessity and Reasonableness of the Underlying Medical Treatment is granted for the reasons set forth below.

Statement of Facts

The underlying facts pertaining to the accident which led to the instant treatment and coverage are not in dispute. Rafael Dolande and Maria Guevara, who are married, are both named insureds under the same insurance policy with the Defendant. Rafael Dolande and Maria Guevara were in the same car when they were involved in an automobile accident. Both, Rafael Dolande and Maria Guevara, received treatment from Care Medical Centers and Hallandale Beach Orthopedics. Said medical providers, after the treatment, submitted the bills for their treatment to the Defendant. The Defendant disclaimed coverage on all bills claiming that there was a material misrepresentation in that Maria Guevara had used a vehicle listed on the policy for business purposes. Suits were instituted by Care Medical Centers and Hallandale Beach Orthopedics as assignees of Rafael Dolande and Maria Guevara.

The Defendant, in this case, filed a single affirmative defense:

> 6. As and for its Affirmative Defense, Defendant states that the policy holder, Maria Guevara submitted material misrepresentations on the application for insurance. Specifically, policy holder, Maria Guevara signed a non-business use statement at the time of policy inception and/or represented that the vehicle listed on the application would not be used for commercial or business purposes. Notwithstanding, the policy holder, Maria Guevara used the vehicle for business purposes in violation of the insurance policy. Policy of insurance was rescinded and voided at the inception due to the material misrepresentation of the policy holder, Maria Guevara. No benefits are due and owing to the claimant, Rafael Dolande.

The Plaintiff sought summary judgment herein regarding the above noted defense based on collateral estoppel in that the foregoing defense was already litigated in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company,* COSO 19-008320. In *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company,* COSO 19-008320 the Defendant filed the same affirmative defense:

> 6. As and for its Affirmative Defense, Defendant states that the policy holder, Maria Guevara submitted material misrepresentations on the application for insurance. Specifically, policy holder, Maria Guevara signed a non-business use statement at the time of policy inception

and/or represented that the vehicle listed on the application would not be used for commercial or business purposes. Notwithstanding, the policy holder, Maria Guevara used the vehicle for business purposes in violation of the insurance policy. Policy of insurance was rescinded and voided at the inception due to the material misrepresentation of the policy holder, Maria Guevara. No benefits are due and owing to the claimant, Rafael Dolande.

Judge Gilman in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company* , COSO 19-008320, in addressing a motion for summary judgment entered an order which, in part, held that "coverage exists, [and] that the Defendant's affirmative defense is without basis and that the Defendant improperly voided and rescinded the subject insurance policy and that based on same said policy is reinstated in accordance with the original coverages." A final judgment was entered on September 15, 2021.

Memorandum of Law

The doctrine of collateral estoppel is intended to prevent repetitious litigation of what is essentially the same dispute. Once a party has had an opportunity to litigate a matter they should not be permitted to litigate it again to the harassment and vexation of his opponent. Collateral estoppel applies when five factors have been met:

(1) an identical issue must be presented in a prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate the issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. *Atria v. Hodor*, 790 So.2d 1229, 1230 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1929a].

See Provident Life & Accident Ins. Co. v. Genovese, 138 So. 3d 474, 477 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D442b].

The Court, based on a review of the Answer and Affirmative defenses in both this case and *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company,* COSO 19-008320, finds that both defenses are identical. Given the context of the defenses and the denial of coverage the Court finds that the defense asserted in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company* , COSO 19-008320 was a critical and necessary part of the prior determination. The Court, after reviewing the motion for summary judgment, docket and the hearing notice in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company,* COSO 19-008320, finds that the Defendant had a full and fair opportunity to litigate the issue. Given that the medical providers stand in the shoes of the insured and because the insured in question regarding coverage is identical in both cases the Court finds that the parties are identical. The Court, after reviewing the motion for summary judgment, docket, hearing notice for said motion and Judge Gilman's order in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company* , COSO 19-008320, finds that the issue was actually litigated.

The Court finds that the Plaintiff has established all elements of collateral estoppel with respect to the Defendant's affirmative defense, that the Plaintiff has demonstrated a prima facie case to the relief requested and that the Defendant should be estopped from re-litigating the asserted defense. Based on collateral estoppel the Court hereby adopts the ruling in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company* , COSO 19-008320 which, in part, found that "coverage exists, [and] that the Defendant's affirmative defense is without basis and that the Defendant improperly voided and rescinded the subject insurance policy and that based on same said policy is reinstated in accordance with the original coverages."

The Court finds that the Defendant did not file a response and their factual position to Plaintiff's motion, much less file such a response and factual position 20 days prior to the hearing date, as required by Florida Rule of Civil Procedure 1.510 and as such cannot argue against the positions taken by the Plaintiff. The Court further notes that approximately one hour before the hearing the Defendant sent the Court a copy of *United Automobile v. Millennium Radiology,* 2022 WL 107604, and attempted to argue that based on this case that an identity of parties did not exist. As a threshold, consideration of the case proffered by the Defendant, would require the Defendant to take a factual position that the identity of the parties in this case and *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company* , COSO 19-008320, were not identical. As previously noted, the Defendant did not file a response and factual position. As such the Defendant has not taken a position that is contrary to the Plaintiff's where this summary judgment is concerned. The Court is mindful of the Supreme Court's commentary on the new Florida Rule of Civil Procedure 1.510 (SC 20-1490) that the new rule was, in part, designed "to reduce gamesmanship and surprise and to allow for more deliberative consideration of summary judgment motions . . . [and] "that the nonmovant **must** respond with its supporting factual position at least 20 days before the hearing." Given the Defendant's failure to comply with the rule the Court will not consider the Defendant's argument in ruling on this case.

Notwithstanding the Defendant's failure to file a response with their factual position in response to the Plaintiff's motion, and even if the Court were to consider the Defendant's argument and proffered case, the Court finds that said argument and case are not applicable. The *Millenium* case did not deal with the same underlying predicate dealt with here. The court in *Millenium* addressed whether a medical provider can estop an insurance carrier from contesting the reasonableness of their charges to different assignors who were involved in different accidents under different insurance policies. The court in *Millenium* noted that the identify element did not fit because *Millenium* drew its identity from the individual assignors and the individual assignors were not same. The Court herein was tasked with determining if the Plaintiff can estop the Defendant from contesting coverage concerning an alleged material misrepresentation that occurred by the insured Maria Guevara in relationship to the Defendant's policy and underwriting. Since the plaintiff/medical provider in *Hallandale Beach Orthopedics, Inc. as assignee of Rafael Dolande v. United Automobile Insurance Company*, COSO 19-008320, and the Plaintiff/medical provider in this case both stand in the shoes of the same insured they are identical parties. The Court also notes there is no inherent conflict between an outcome where a reasonable charge to different patients from different accidents might be different but there would be an inherent conflict if the Court were to permit an outcome where two different finders of fact came to opposing positions regarding whether or not Maria Guevara's alleged actions constituted a material misrepresentation and whether coverage existed.

In addition, the requirement of identical parties does not necessarily always mean the parties are exactly the same or have the same "names." In *Zikofsky v. Mktg. 10, Inc.* , 904 So. 2d 520 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1343a] the Fourth district Court of Appeals addressed a situation where a corporation sued a business associate. The business associate lost said suit. *Id.* The business associate then sued certain shareholders of the corporation. *Id.* In this situation the Fourth District Court of Appeals found that the business associate should be estopped from suing the shareholders due to collateral estoppel. *Id.* In making the ruling the court in *Zikofsky* discussed *McGregor v. Provident Trust Co. of Philadelphia,* 119 Fla. 718, 162 So. 323 (1935) and stated:

> the supreme court recognized the general rule that in order for a person or corporation to be brought within [the doctrine of collateral estoppel],4 it is not necessary for him to have been a formal record party [in an earlier lawsuit]. His conduct may have been such as to give him the status of a party in actuality, and in such event the courts will not withhold from him the application of the rule because of the technical objection that he was not a party on the record.
>
> *Id*. at 328. The court explained that collateral estoppel can apply to those who, though not actually named in the prior lawsuit, are situated in such a way as to be considered a party "in the larger sense." *Id*. at 329.
>
> . . .
>
> We note that the broadened concept of parties in McGregor does not violate the mutuality of parties requirement of collateral estoppel, since both controlling parties and actual parties to the earlier judgment are bound by it.

See also West v. Kawasaki, 595 So.2d 92 (Fla. 3d DCA 1992) where the court found that Kenneth West should be estopped from suing Kawasaki Motors Manufacturing Corp and Nosa Inc. (motorcycle manufacturer and retailer) over a product liability action after having a judge in a prior suit against Kawasaki Motors Corp. (motorcycle distributor) enter an adverse summary judgment finding that there was no design or manufacturing defect. *See also Sanchez v. Martin,* 416 So.2d 15 (Fla. 3d DCA 1982) where the court found that Nieves Sanchez and Evelio Sanchez should be estopped from suing Martin for personal injuries after a prior action where Martin sued Nieves Sanchez for property damage resulted in a finding that Nieves Sanchez was 100% at fault for the accident.

Having addressed the collateral estoppel portion of Plaintiff's motion the Court turns to the rest of the motion and finds that based on the affidavits that were presented that the subject treatment was related and necessary and that the bills were reasonable. The Court further finds that the insurance policy adopts the fee schedule set forth in Florida Statute 627.736 so reasonableness is not an issue. The Defendant, during the hearing, also stated they were not contesting the relatedness, necessity and reasonableness of the subject treatment. The Court further takes judicial notice of the printouts from CMS.gov establishing the Medicare rate and after plugging said rates into the reimbursement formula determines that the Defendant owes benefits of $6,451.86 plus interest.

The Plaintiff is directed to submit a proposed Final Judgment consistent with this ruling.

* * *

Criminal law—Driving under the influence—Arrest—Probable cause

STATE OF FLORIDA, Plaintiff, v. BRIAN CHRISTOPHER INGRAM, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2018-CT-052560-AXXX-XX. October 7, 2019. David C. Koenig, Judge. Counsel: Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Joseph Easton, Rockledge, for Defendant.

ORDER

[Original Order at 27 Fla. L. Weekly Supp. 659a]

This cause came to be heard before the Court on October 1, 2019 on the State's *Motion For Rehearing and /or Reconsideration.* Ben Fox, Esq. appeared on behalf of the State of Florida and Joseph Easton, Esq. represented the Defendant. The Court, having heard and evaluated the written and oral arguments of counsel and being otherwise advised in the premises, finds as follows:

Although the court continues to have serious reservations about the probative value of the field sobriety exercises in this case, after reconsidering, the court finds that a reasonable officer considering the totality of circumstances presented could lawfully conclude that there was a substantial chance that the Defendant was driving impaired. Therefore, the court vacates its previous finding of no probable cause, finds there was probable cause and denies the probable cause part of the Defendant's Motion to Suppress.

Accordingly, it is therefore ORDERED and ADJUDGED that the State's Motion to Reconsider the probable cause section of the court's previous order issued in this case is ***GRANTED*** as noted above.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Judge candidate may correct a misstatement about the judge's ruling as reported by others and may generally discuss subject matter of judicial holding so long as no confidential or nonpublic information acquired in judicial capacity is disclosed—Judge candidate's statements must not be perceived as the candidate's commitment or promise to rule in a specific way in the future

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-04 (Election). Date of Issue: June 2, 2022.

ISSUE

1. If asked how many petitions which are required to be kept confidential pursuant to Florida Statutes, may a Judge Candidate disclose the total number of such petitions the judge has handled?

ANSWER: Yes.

2. If the judge candidate may disclose the number of petitions handled, may the judge disclose the rulings made by the judge?

ANSWER: No.

3. May the judge candidate respond to questions or when confronted about the propriety of the judge's decision in the case, by making statements about or discussing the facts heard at the hearing?

ANSWER: No, because regardless of what answer the may be given, it would subject the judge to future disqualification, or it would require the judge to discuss facts that are contained in records and files which are statutorily designated confidential and not subject to public disclosure by statute and the Canons of Judicial Conduct. However, the judge can generally make statements about the issues and subject matter involved in the cases, subject to restrictions of the Canons of Judicial Conduct.

4. May a judge candidate respond to or correct misstatements or mischaracterization of the judge's ruling as reported by others, including the media?

ANSWER: Yes. The judge may correct misstatements about the judge's actual ruling or issue that was present in the case.

FACTS

The inquiring judge is a candidate for re-election. On occasion, the judge handles cases in which the proceedings and any information that can be used to identify the petitioner is confidential and exempt from public disclosure under Florida Statutes. The case involved a petition to bypass, or to not be required to obtain, a required consent of a third party to undergo a medical procedure. After conducting the required hearing, the judge rendered a written opinion. This case resulted in an appeal in which the inquiring judge's ruling was reversed. The appellate opinion and some of the facts discussed in that opinion have been the subject of news articles and has generated public discussion regarding the case. Some of the media reports fail to accurately describe the holding and ruling. Instead of properly describing that the judge dismissed the petition as allowed by the Statute, the reports allege that the judge prevented the petitioner from obtaining the medical procedure.

The judge is being asked questions about the case. The judge wants to be able to answer the questions and correct any misstatement of the facts or the misleading media reports, but is concerned that the confidential nature of the proceedings prevents the judge from answering specific questions about the case. Some of the questions seek to find out the number of similar petitions that have been handled by the judge and what those rulings have been? Other questions deal with the facts of the case, as well as asking the judge to explain the judge's position, and reasons for denying the petition. The judge wants to know if the judge may discuss the facts that were presented in the hearing and all the facts that justified the judge's ruling.

Lastly, the judge wants to know if the judge can correct any misstatement being made by the media or others when they mischaracterize the actual legal issue decided by the Court.

DISCUSSION

The Commentary to Canon 3 of the Code of Judicial Conduct in relevant part provides as follows:

> **Canon 3B(9) and 3B(10).** Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary.

Canon 3B(9) prohibits a judge, "while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing."

Canon 3B(10) prohibits a judge "with respect to . . . controversies or issues likely to come before the court make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. (*emphasis added*).

All judges "must expect to be the subject of constant public scrutiny." Commentary to Canon 2A. This Commentary also reminds judges that they must "accept restrictions on the judges conduct that might be viewed as burdensome by the ordinary citizen . . ." *Id.* This they must do because the restrictions discussed above "are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary." *Id.*

All persons who appear before the Courts of this State must expect that the judge will "be faithful to the law . . ." and that the judge will "not be swayed by partisan interests, public clamor, or fear of criticism." *Canon 3B(2)*. Otherwise, the public will never have confidence in the difficult and important decisions judges are often called to make.

Not only do the above Canons restrict the inquirer's responses and public statements, but Florida Statutes also prohibit any information that could be used to identify the petitioner from being disclosed. This type of information and facts are confidential and exempt from public disclosure.

The JEAC has previously considered inquiries from candidates to judicial office which sought guidance on how to respond to questions from the public. In Fla. JEAC Opinion 2006-18, the inquirer candidate had received questionaries, which included questions involving controversial legal issues. There, we opined that a candidate for judicial office could answer questionnaires that included questions on controversial legal issues (same-sex marriage, parental notification, and school vouchers). The JEAC held that the candidate must "clearly indicate that the candidate pledges, when adjudicating a specific case, only to follow legal precedent anywhere it exists." *Id.* The JEAC cautioned the inquirer to also clearly indicate that the answers do not constitute a promise that the candidate will rule a certain way in a case.

In Fla. JEAC Op. 2000-03 [7 Fla. L. Weekly Supp. 364a], the judge was sent a letter from a newspaper seeking answers to "extensive detailed questions about the emergency shelter hearing over which the judge had previously presided." The JEAC's opinion noted that the reason that Canon 3 of the Florida Code of Judicial Conduct prevented the judge from making any public comment was premised on the fact that a party's attempt to recover attorney fees in the case was still pending. The JEAC therefore opined that the judge "should refrain from making public comments about said hearing during the course of the attorney's fees litigation, during the subsequent appellate

process and until final disposition of the matter. The opinion, however, does not specify whether the newspaper's questions being asked sought answers that dealt with the facts of the case, reason for the judge's decision or just about general legal procedures. The JEAC similarly held in Fla. JEAC Op. 2004-18 [11 Fla. L. Weekly Supp. 759a] that there was a judge who was a candidate for election that wanted to comment on the reason for the opponent's motion. Because the case was still pending, the Canon prohibited the judge to comment.

The case herein, however, is no longer pending nor are there any related collateral matters impending. "Impending" is defined by the Commentary to Canon 3B(10) as

> "an impending proceeding is one that is anticipated but not yet begun.

The Commentary goes on to state that

> "the requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition."

It is then clear that the prohibition applies to individual cases that are still involved in judicial process. Therefore, Canon 3B(10) does not prohibit the inquirer from making public comments about everything related to this case. However, other ethical and statutory restrictions will set limits on the judge's comments.

The JEAC will only render opinions on the application of the Code of Judicial Conduct to contemplated judicial conduct, but not of the application or interpretation of statutes as the one clothing this hearing with confidentiality protection. Canon 3B (9) and (10), however, do place restrictions on judges and judicial candidates' statements of their views in disputed legal or political issues.

The JEAC has previously dealt with this area. In Fla. JEAC Op. 2004-09 [11 Fla. L. Weekly Supp. 376a], this Committee discussed the limits of candidate speech. After reviewing precedent, including *In Re Kinsey*, 842 So. 2d 77 (Fla. 2003) [28 Fla. L. Weekly S97a], the Committee re-affirmed their previous opinion in Fla. JEAC Op. 02-13 [9 Fla. L. Weekly Supp. 645b]. There, the Committee described a candidate's freedom to make statements on political or controversial issues. That opinion succinctly sets out a description of the allowed conduct, as follows:

> . . .this Committee believes that a candidate may state his views on. . .other controversial issues so long as the candidate does not advocate opposition to or support of political issues, the candidate makes no pledge or promise of conduct in office other than the factual and impartial performance of the duties of the office, and the candidate does not make statements which commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the Court. The inquiring candidate should note that the Commentary to the Code states that a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views."

The Committee cautions the inquiring judge to be cautious in discussing facts and evidence presented in the hearing. In addition to the confidentiality afforded by the Statutes, Canon 3B(12) prohibits judges from disclosing or using, "for any purpose unrelated to judicial duties nonpublic information acquired in a judicial capacity." In Fla. JEAC Op. 2015-03 [22 Fla. L. Weekly Supp. 862a], the Committee held that a judge could not disclose, to an employee, facts that came in during testimony in a nonpublic domestic violence injunction case. Similarly, here the nonpublic information's use is unrelated to judicial duties, but rather it is intended to be used in an election campaign.

In sum, the inquiring judge may correct the misstatement about the judge's ruling and may make statements and discuss the subject matter involved in the hearing so long as the statements do not commit or appear to commit the judge to rule a definite way in future cases of a similar subject matter.

REFERENCES

In re Kinsey, 842 So. 2d 77 (Fla. 2003)
Fla. Code Jud. Conduct, Canon 2, Canon 3B(9) and Canon 3B(10)
Fla. JEAC Op. 2000-03, 2002-13, 2004-9, 2004-18, 2006-18, 2015-03

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Judges—Judicial Ethics Advisory Committee—Retired/senior judge—Senior judge may serve as arbiter for non-governmental regulatory organization

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2022-05. Date of Issue: June 15, 2022.

ISSUE

May a senior judge presiding over civil trials serve as an arbiter for the Financial Industry Regulatory Authority?

ANSWER: Yes, if such service does not involve matters in the circuit in which the senior judge presides over civil cases and all other requirements of Canon 5F(2) of the Florida Code of Judicial Conduct are met.

FACTS

A retired judge who is currently serving as a senior judge has been asked to serve as an arbiter for the Financial Industry Regulatory Authority (FINRA). FINRA is a non-governmental self-regulatory organization having authority over brokerage firms and their brokers. The judge asks if it is permissible for a senior judge to serve as both an arbiter for FINRA and as a senior judge.

DISCUSSION

As provided in Canon 5F(2), Fla. Code Jud. Conduct,

> A senior judge may serve as a mediator in a case in a circuit in which the senior judge is presiding over criminal cases or in a circuit in which the senior judge is not presiding as a judge . . .
>
> . . . A senior judge shall not serve as a mediator, arbitrator, or voluntary trial resolution judge in any case in a circuit in which the judge is currently presiding over civil cases as a senior judge. . . .
>
> A senior judge who provides mediation, arbitration, or voluntary trial resolution services may also preside over civil and criminal cases in circuits in which the judge does not provide such dispute-resolution services. . . .

The inquiring judge is currently assigned to hear civil cases and thus is subject to the provisions of the section quoted above. While the judge's question uses the term "arbiter," there does not appear to be any meaningful difference between that term and the term "arbitrator" as used in the Code of Judicial Conduct.

From the judge's description of FINRA, and from information contained in the FINRA's website (https://www.finra.org), it is a regulatory and disciplinary body working under the United States Securities and Exchange Commission to write and enforce rules regulating brokerage firms and their member-brokers. FINRA employs arbiters to resolve disputes which may arise as it performs its duties. While the issues involved in the arbitration services to be performed by the judge do not necessarily involve matters that would normally be resolved by courts, the Committee finds that the proposed conduct falls within the scope of the activity contemplated by Canon 5F(2).

In Fla. JEAC Op. 14-21 [21 Fla. L. Weekly Supp. 1117a], this Committee found that a senior judge is permitted to serve as a mediator for cases pending in a United States District Court or a United States Bankruptcy Court. Fla. JEAC Op. 15-15 [23 Fla. L. Weekly Supp. 799a] authorized a senior judge to act as mediator in cases pending before Florida's District Courts of Appeal. In Fla. JEAC Op. 16-22 [24 Fla. L. Weekly Supp. 777b], it was found that a senior judge may properly serve as an insurance umpire, and in Fla.

JEAC Op. 16-18 [24 Fla. L. Weekly Supp. 586a], service as a special magistrate was approved.

The Committee finds that service by a senior judge as a FINRA arbiter is similar to those activities previously found permissible and that the inquiring judge may serve in the capacity described in his inquiry. The judge is reminded, however, that all senior judges serving as arbitrators, mediators or other similar roles are bound by the provisions of Canon 5F(2), which prohibit senior judges from providing mediation, arbitration, or voluntary trial resolution services in any circuit in which the judge presides over civil cases.

Further, the judge is reminded that, absent express consent of all parties, a senior judge is prohibited from presiding over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator, arbitrator, or voluntary trial resolution judge within the previous three years.

REFERENCES

Fla. Code Jud. Conduct, Canon 5F(2)
Fla. JEAC Ops. 14-21, 15-15, 16-18, and 16-22

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