Volume 30, Number 4, August 31, 2022

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 189-260

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

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

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **TORTS—AUTOMOBILE ACCIDENT—DAMAGES—PAST MEDICAL EXPENSES. The circuit court ruled that a plaintiff who has been a Medicare beneficiary at all material times can only introduce evidence of past medical expenses in the amount paid to medical providers by Medicare. Further, in regard to medical providers who did not opt out of Medicare and did not submit bills for past medical expenses to Medicare, a plaintiff is precluded from introducing evidence as to the original charges beyond Medicare rates for the services provided. The court rejected the argument that the presence of a defendant's liability insurer as a potential primary payer allows a plaintiff who is a Medicare beneficiary to recover past medical expenses in excess of the Medicare rates.** *HUMPHRIES v. ZUCCARI. Circuit Court, Fifteenth Judicial Circuit in and for Palm Beach County. Filed May 23, 2022. Full Text at Circuit Courts-Original Section, page 212a.*

- **PUBLIC RECORDS—DEATH OF CHILD DUE TO ABUSE, ABANDONMENT OR NEGLECT. Because section 39.202(2)(o) provides that the Department of Children and Families' records shall be released to any person in the event the death of a child is determined to be the result of abuse, abandonment, or neglect, the Department did not have the discretion to determine when to release those records. The Department's delay in complying with a valid public records request until after it formally closed its investigation over a year after it knew that a child died of neglect and/or abuse was unlawful under the Florida Constitution and the Public Records Law.** *THE McCLATCHY COMPANY, LLC v. FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Circuit Court, Eleventh Judicial Circuit in and for Miami-Dade County. Filed March 8, 2022. Full Text at Circuit Courts-Original Section, page 209a.*

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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.

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JURISDICTION

LANDLORD-TENANT

LICENSING

TABLE OF CASES REPORTED (continued)

* * *

TABLE OF STATUTES CONSTRUED

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

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* * *

TABLE OF CASES TREATED

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TABLE OF CASES TREATED (continued)

* * *

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CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—Where witnesses reported that licensee had indicia of inebriation, and officer observed that licensee drove on road shoulder for 20 yards before drifting back into right lane, hearing officer did not depart from essential requirements of law by finding that officer had reasonable suspicion for stop

RACHEL TENSFELDT, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2021-AP-10, Division AP-A. March 30, 2022. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Alex King, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

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

On March 25, 2021, police stopped the Petitioner to check if she was ill, tired, or impaired after observing: (1) her vehicle's tires cross over the right solid white line onto the shoulder of the road for approximately 20 yards; and (2) her vehicle drifted back into the right lane of travel. Prior to the stop, witnesses had called police and raised concerns about the Petitioner being inebriated. Witnesses informed police that the Petitioner had trouble walking to her vehicle, had hit her head on the door frame of her vehicle several times, and had stopped at a green light and did not go until after it turned red.

The Petitioner's sole argument for relief is that the arresting officer had no basis for the stop that led to the DUI investigation. "[A] stop is permitted even without a traffic violation, so long as the stop is supported by a reasonable suspicion of impairment, unfitness, or vehicle defects." *Hurd v. State,* 958 So. 2d 600, 603-04 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1594a] (citations omitted). Based upon witness reports, as well as the officer's direct observations, the hearing officer did not depart from the essential requirements of the law by finding that police had reasonable suspicion to conduct an investigatory stop. *See generally Lacaretta Restaurant v. Zapeda,* 115 So. 3d 1091, 1093 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1385a] (" 'Departure from the essential requirements of law' is defined the same way across all uses of certiorari review: 'a violation of a clearly established principle of law resulting in a miscarriage of justice.' " (citation omitted)). Accordingly, the "Petition for Writ of Certiorari" is **DENIED,** (DEARING, SCHEMER, AND HEALEY, JJ., concur.)

* * *

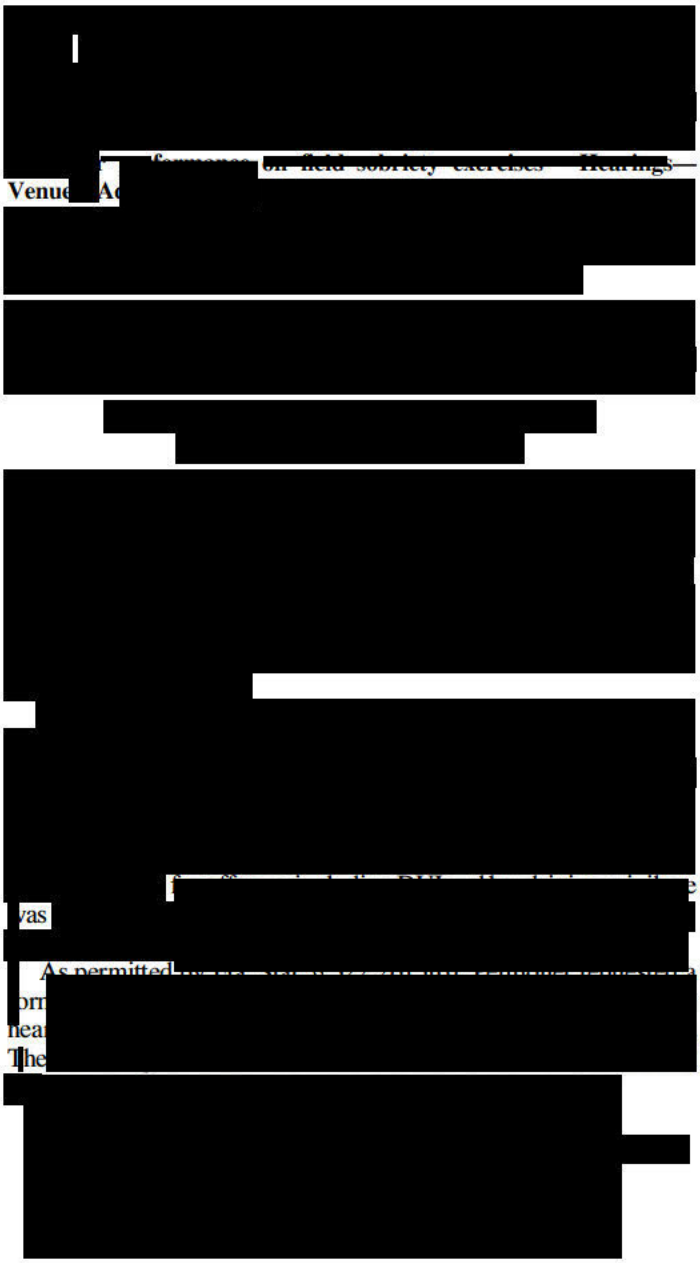
Licensing—Driver's license—Suspension—Driving under influence—Lawfulness of stop—No merit to argument that officer who observed licensee driving wrong way in lane of travel with flat tire had no basis for stop

INGRIDA PUZIKAS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 4th Judicial Circuit (Appellate) in and for Duval County. Case No. 16-2021-AP-11, Division AP-A. March 7, 2022. Petition for Writ of Certiorari from the decision of the State of Florida Department of Highway Safety and Motor Vehicles. Counsel: Joshua Alexander, for Petitioner. Mark L. Mason, Assistant General Counsel, DHSMV, for Respondent.

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

The Petitioner was stopped after an officer observed her driving southbound in the northbound lane of travel with a flat tire. Her sole argument for relief is that the arresting officer had no basis for the stop that led to the DUI investigation. Her argument is without merit. Accordingly, the "Petition for Writ of Certiorari" is **DENIED.** (AHO, GUY, and ANDERSON, JJ., concur.)

* * *



[redacted]

Counties—Animal control—Aggressive dogs—Due process—Notice—Owners of dog that, unprovoked, attacked and bit neighbor's dog while it was off owners' property were not deprived of due process by fact that notice of hearing on designation of their dog as "aggressive dog" erroneously stated that their dog was designated as "dangerous dog"—Accompanying letter explicitly informed owners that dog was designated as "aggressive dog," and this distinction was further clarified by hearing officer at hearing—Further, owners were not prejudiced from any error in notice, as "aggressive dog" designation is less severe than "dangerous dog" designation—Argument that owners suffered a "forfeiture" of their rights of ownership has no basis in record—Fact that code enforcement officer made legal and factual arguments regarding relevance of evidence at hearing did not deprive owners of due process—Officer was entitled to make arguments as county's representative at hearing

ALAIN FERZLI and TANYA FERZLI, Appellants, v. MIAMI-DADE COUNTY, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2021-47-AP-01. L.T. Case No. 2020-R031200. June 1, 2022. Appeal

from an Order of a Hearing Officer for Miami-Dade County, Department of Code Enforcement. Counsel: Heidi M. Mehaffey, for Appellants. Abigail Price-Williams, County Attorney, and Christopher J. Wahl, Assistant County Attorney, for Appellee.

(Before TRAWICK, WALSH and SANTOVENIA, JJ.)

(WALSH, J.) Alain and Tanya Ferzli appeal two orders designating their dog Bailey as an "aggressive dog" following a Miami-Dade County Code Enforcement hearing. The hearing officer determined that an initial "aggressive dog" determination was correctly issued in accordance with the provisions of 5-C.2(B) of the Code of Miami-Dade County. (App. at pp. 1-2). On appeal,[1] the Ferzlis argue that their due process rights were abridged and that the orders departed from the essential requirements of law.

Background

On June 7, 2021, the County issued the Ferzlis a citation under section 5-22 of Miami-Dade County Code for "Dog severely injured or kills domestic animal, red-tan Doberman Pinscher." (App. 03) Also on June 7, 2021, the County issued the Ferzlis a letter advising them as follows:

June 7, 2021

Alain Ferzli
Tanya Ferzli
[Editor's Note: Address redacted]
Coral Gables, FL 33146

On April 1, 2020, a complaint was filed with the Miami-Dade Animal Services Department regarding your dog "Bailey". The Department was requested to investigate whether or not your dog should be declared aggressive pursuant to Section 5-23.1(b) of the Code of Miami-Dade County. The purpose of this letter is to issue the findings of the investigation conducted by the Animal Services Department and the Department's decision as to whether or not a preliminary determination of "aggressive dog" should be entered in this case.

In making a preliminary determination as to whether or not a dog should be declared aggressive, a preponderance of evidence must support the fact that a violation of Section 5-23.1(b) occurred. After reviewing the case file, I have determined the violation did occur.

5-23.1(b): when unprovoked and while off the owners property, severely injures or kills a domestic animal

If you do not agree with this determination, you may request an appeal hearing by sending a written request to Investigator G. Boyett of the Animal Services Department, 3599 NW 79 Avenue, Doral, Florida 33122. Your request must be received within seven (7) calendar days of receipt of this letter.

The Ferzlis timely filed a request for an appeal hearing. The following evidence was presented.

The Ferzlis own a Doberman pinscher named Bailey. On March 27, 2020, Bailey escaped the Ferzlis' house, ran "full speed" from 250 to 300 yards away toward the street where a neighbor, Ms. Goodman, was standing with her two leashed dogs. (App. At p. 51) Bailey bit Mrs. Goodman's standard poodle Roxie on the rear end and would not let go. The Ferzlis' son ran to assist but was not able to pull the two dogs apart. Mrs. Ferzli then ran over and was able to pull Bailey off Mrs. Goodman's poodle. Ms. Goodman testified that her poodle Roxie sustained a deep puncture wound on her rear, and another on her leg. *Id.* Roxie was immediately taken to the veterinarian. A veterinarian bill submitted in evidence noted "p was attacked—puncture wound on thigh," "two adjacent small lacerations," and "staples were placed." (App. At p. 29). Photographs depicting the wounds were admitted. *Id.* at p. 53.

Bailey's owner, Mrs. Ferzli, testified that Bailey was always friendly to people and animals, including her own four children, and never had any issues with aggression before. (App. at pp. 70-73) Mrs. Ferzli testified that she and her son chased Bailey when she ran toward Mrs. Goodman, and Bailey jumped on Roxie's back. Mrs. Ferzli never saw Bailey bite Roxie and thought that Bailey's claw rather than her teeth could have punctured Roxie's rear leg. (App. At pp. 78-80) Mrs. Goodman testified in contrast that Mrs. Ferzli was not present when the bite occurred. According to Mrs. Goodman, Bailey jumped on Roxie's back, and "sunk her teeth into the back of her. And that's where that puncture wound came from." *Id.* at p. 89.

The Ferzlis also admitted their dog trainer's report, opining that Bailey was not an aggressive dog, as well as letters attesting to Bailey's gentle character.

The hearing officer clarified that the Department was only seeking designation of Bailey as an "aggressive dog," rather than a "dangerous dog" designation which could result in removal:

HEARING OFFICER: Just for clarification Mr. Boyett, we're not seeking destruction of the animal, you're just seeking a designation this morning, correct?

MR. BOYETT: Correct. This is just an aggressive designation.

HEARING OFFICER: Okay, understood.

(App. At p. 62)

Analysis

Appellate review of quasi-judicial proceedings in the circuit court is governed by well-established standards: (1) whether due process was afforded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Miami Dade County v. Omnipoint Holdings*, 863 So. 2d 195, 198 (Fla. 2003) [28 Fla. L. Weekly S717a]. Here, the Appellants do not challenge that competent substantial evidence supports the orders on appeal.

The Appellants first argue that the citation issued erroneously notified them of a pending "dangerous dog" designation under section 5-22 of the Miami-Dade Code, rather than an "aggressive dog" designation under section 5-23.1 of the Code. They claim that this error violated their due process rights and is a departure from the essential requirements of law. "A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard." *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts. . ." *Id.*

Here, the Ferzlis received due process. As an initial matter, there was no error in issuing a citation under section 5-22. Section 5-22(c) provides that a responsible person shall be liable when "[h]is or her dog, when unprovoked and while off the responsible party's property, attacks or bites a domestic animal." Bailey, while unprovoked and off her property, bit a domestic animal. The citation was correctly issued under section 5-22, and the Department may hold such a dog owner liable under 5-22(c)(2).

Even if the reference to 5-22 or a dangerous dog designation was in error, this alleged error did not confuse or mislead the Ferzlis. The original citation which referred to section 5-22, Miami-Dade Code was accompanied by a letter, issued the same day, which explicitly informed the Ferzlis that Bailey was designated an aggressive dog under section 5-23.1(b), of the Miami-Dade Code. The letter set forth the facts upon which the code enforcement investigator made his determination and explained to the Ferzlis how to request an evidentiary appeal hearing. The Ferzlis followed the instructions in the letter and timely requested a hearing. Moreover, during the hearing, the hearing officer clarified that the Department was seeking an aggressive dog designation not a dangerous dog designation. (App. at p. 62) Therefore, Appellants were not confused or misled in fact.

Further, as the code enforcement officer explained at the hearing, the two sections addressing designation of dogs work in tandem. Section 5-22 contains definitions applicable to section 5-23.1. *See* §5-22(b) (defining terms "unprovoked" and "serious injury" applicable to section 5-23.1(b) "aggressive dog" claims). And the Department employs section 5-22, not section 5-23.1, to issue a citation for both aggressive and dangerous dogs that bite a domestic animal. *See* § 5-22(c) (providing that responsible party is liable for a dog which, while unprovoked and off property, bites a domestic animal).

Moreover, there was no prejudice to the Appellants. The "aggressive dog" designation sought under section 5-23.1(b) is less severe than a "dangerous dog" designation under section 5-22. A dog deemed "dangerous" may be removed and euthanized, but an "aggressive" dog may not be removed unless the aggression is repeated.

Finally, the Appellants' argument that they have suffered a "forfeiture" is without basis in the record. Nothing in the orders entered work a forfeiture of their right of ownership of their dog. Because there was no confusion on the part of the Ferzlis, because the actual code provision was sent in writing in a letter to the Ferzlis, and because no prejudice ensued as a result of citing section 5-22, we find no due process violation and affirm on this issue.

The Ferzlis next argue that their due process rights were violated, and the essential requirements of law not followed because the code enforcement officer was permitted to act as a prosecutor by advising on the mechanics of the code and by making relevance arguments at the hearing. We find no merit to these arguments. First, there was no objection to the enforcement officer making legal or factual arguments at the hearing. Thus, this issue is unpreserved and waived. "[I]n order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal." *Singer v. Borbua*, 497 So. 2d 279, 281 (Fla. 3d DCA 1986); *Apesteguy v. Keglevich*, 319 So. 3d 150, 155 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D781a]. Having failed to make such arguments below, they are deemed waived on appeal.

Further, the code investigator is the County's representative at the hearing. There is nothing wrong with a litigant in code enforcement proceedings making evidentiary objections, arguments based on the Code or arguments on weighing evidence. In fact, section 8-CC(j) of the Miami-Dade Code of Ordinances preserves due process rights of both parties at an enforcement hearing. Precluding the enforcement officer from making such arguments would have therefore been error. The authority cited by the Appellants in support of their argument, *Cherry Commun., Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995) [20 Fla. L. Weekly S179a], is inapposite. In *Cherry*, a staff attorney, following a hearing, was permitted to have ex parte communications advising the Commission how to decide an issue, a clear violation of the opposing litigant's due process rights. No such violation occurred here. All statements and arguments by the code investigator were made on the record. Finally, the arguments made by the code investigator did no harm here. Whether or not Bailey was docile and obedient with her trainer or with other people had no bearing on whether her behavior met the definition of an aggressive dog under the ordinance. We therefore affirm on this issue as well.

The decision below is AFFIRMED. The Appellant's motion to return costs is DENIED. (TRAWICK and SANTOVENIA, JJ., concur.)

[1]We treat this Petition for Certiorari as an appeal. Section 767.12(4), Fla. Stat., states: "Upon a dangerous dog classification and penalty becoming final after a hearing or by operation of law pursuant to subsection (3), the animal control authority shall provide a written final order to the owner by registered mail, certified hand delivery or service. The owner may appeal the classification, penalty, or both, to the circuit court in accordance with the Florida Rules of Appellate Procedure after receipt of the final order." (emphasis supplied).

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Hearings—Inability to subpoena witness—Licensee was denied due process where state law and policy of Department of Highway Safety and Motor Vehicles prevented licensee from serving subpoena on arresting trooper, who was no longer employed by department, and hearing officer refused to issue subpoena for former trooper on her own initiative

SCOTT SMITH, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-5080, Division H. May 25, 2022. Rehearing Denied June 8, 2022. Counsel: Keeley R. Karatinos, Mander Law Group, Dade City, for Petitioner. Christie S. Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER GRANTING
PETITION FOR WRIT OF CERTIORARI

(EMMETT L. BATTLES, J.) This case is before the Court on Scott Smith's June 18, 2021 Petition for Writ of Certiorari. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner contends that he was denied his right to procedural due process because the hearing officer, after being notified that Petitioner was unable to serve *former* Trooper Noto due to statutory and administrative restrictions, refused to issue a subpoena on her own initiative. Petitioner argues that without the former trooper's testimony, Petitioner was denied a meaningful opportunity to be heard. Because state law and Department policy prevented the driver from properly serving a subpoena on the arresting officer, thus eliminating his ability to have the officer present at the hearing and denying Petitioner his right to a meaningful hearing, the court agrees that Petitioner was denied due process and grants the petition.

On March 15, 2021, Petitioner was arrested by Florida Highway Patrol (FHP) Trooper Noto for driving under the influence of alcohol or drugs (DUI). His driving privileges were suspended under the Implied Consent Law for refusing to submit to a breath test. Petitioner requested a formal review to challenge the suspension and received subpoenas from the Department for service. On May 4, 2021 Petitioner attempted to serve Trooper Noto. The attempt was rejected because, as of April 15, 2021, the trooper was no longer employed by FHP. Petitioner's counsel notified the hearing officer assigned to this case of the rejection of service and the impossibility of obtaining Trooper Noto's personal address, because personal contact information for former law enforcement officers is exempt from public records. § 119.071(4)(d), Fla. Stat. The hearing officer advised Petitioner's counsel that she was unable to provide advice or assist in serving the former trooper asserting that she did not have Noto's contact information and that issuing a subpoena on her own initiative would be a departure from neutrality.[1] At the formal review hearing, Petitioner's counsel moved to have his license suspension invalidated because he was denied the right to cross examine Trooper Noto as the sole author of the documents entered into evidence. The hearing officer denied the motion, finding no due process violation because the Confrontation Clause under the Sixth Amendment does not apply to civil administrative hearings.

As he did in the administrative proceeding, Petitioner again contends that his procedural due process rights were abridged because the hearing officer, after being notified that Petitioner was unable to serve former Trooper Noto due to statutory and administrative restrictions, refused to issue a subpoena on her own initiative. Petitioner further argues that he was denied a meaningful opportunity to be heard because his inability to properly serve the former trooper was caused by state law and policy. Petitioner concedes that he does not have a right to confront the arresting officer under the Sixth

Amendment because this is not a criminal proceeding. Instead, Petitioner argues, as he did in the proceeding below, that he was denied procedural due process under the Fifth and Fourteenth Amendments, which require fair notice and a meaningful opportunity to be heard when a property interest is involved. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).[2] Florida's statutory driver's license suspension hearings are facially valid and meet the standards of procedural due process; however, "if, under the facts of a particular case, a suspendee's rights have not been respected, the suspendee may be entitled to relief." *DHSMV v. Pitts*, 815 So. 2d 738, 743-44 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D999b].

To determine whether an administrative procedure provides sufficient procedural due process, this Court must consider three factors: first, the private interest affected by the procedure; second, the risk of erroneous deprivation and the probable value of additional or substitute safeguards; and third, the government interests that would be affected, including fiscal and administrative burdens, that the additional or substitute safeguards would require. *Mathews*, 424 U.S. at 334-35. The first factor requires the Court to determine what, if any, private interest is affected by the procedure at issue. *Id.* at 335. Florida courts have found that after a driver's license has been issued, continued possession of that license is an important private interest and should not be taken away without due process. *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1078-79 (Fla. 2011) [36 Fla. L. Weekly S243a]; *Wiggins v. Florida Dept. of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) [42 Fla. L. Weekly S85a].

The second factor considers the risk of erroneous deprivation of Petitioner's private interest and the probable value of additional substitute safeguards regarding that risk. Petitioner contends that the risk of erroneous deprivation in this case is caused by FHP's discretion to reject service for a trooper no longer employed by the agency, and the former trooper's personal contact information being unavailable to the public. §119.071(4)(d), Fla. Stat.; Rule 15A-6.012(3), F.A.C. Petitioner adds that witness testimony is the only method available to present a defense in the formal hearing, and that because former Trooper Noto was the sole officer involved in the investigation and arrest at issue in this case, §119.071(4)(d) and R. 15A-6.012(3) combine to form a denial of a meaningful opportunity to be heard. This second factor presents the Court with a dilemma. The Department is correct that the hearing officer is permitted to rely on documentary evidence alone when making a determination. §322.2615(11), Fla. Stat. The Department is also correct that former Trooper Noto was never properly served, albeit through no fault of Petitioner's. Given these realities, the Department maintains that the hearing officer was not required to invalidate the suspension under section 322.2615(11), Florida Statutes.

Although the Department is correct that section 322.2615(11) allows a hearing officer to conduct a hearing solely on the documents furnished to the Department by law enforcement, this ability is not unlimited. *DHSMV v. Colling*, 178 So. 3d 2, 5 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1195b] (when the Department proceeds without a witness at a formal review hearing, "it does so at the risk that the documents might contain irreconcilable, material contradictions"). Drivers are permitted to subpoena the arresting officer and breath test inspector to overcome the statutory presumption that the documents provided to the hearing officer are proper proof. *Yankey v. DHSMV*, 6 So. 3d 633, 638 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D418a]. And, the importance of their appearance is underscored in section 322.2615(11), which provides that the failure of a properly subpoenaed arresting officer or breath test operator to appear requires the hearing officer to invalidate the suspension. Here, again, the Department is correct that there is no failure to appear by the arresting officer because Petitioner was unable to serve the subpoena.[3] Generally, when a driver requests a subpoena, the driver is responsible for ensuring that the subpoena is enforced. § 322.2615(6)(c), Fla. Stat.; Rule 15A-6.012(2), F.A.C. . If a properly served witness fails to appear, the driver may choose to either participate in the hearing without the witness or ask for a continuance. *Objio v. DHSMV*, 179 So. 3d 494, 496 (Fla. 5th DCA 2015) [40 Fla. L. Weekly D2608a]. It is clear, then, that under most circumstances, the driver is responsible for ensuring that the witness appears to give testimony, and, if the witness' failure to appear can be ascribed to the driver, it is not a due process violation for the hearing officer to proceed without the requested witness.

Here, however, the failure to properly serve the arresting officer[4] was not caused by Petitioner, but by the fact that the designated FHP agent is permitted to reject service for former employees, and the personal contact information of former law enforcement officers is statutorily protected. It is important to note that the Florida legislature created different statutory outcomes regarding the absence of the arresting officer compared to other witnesses; the 2013 amendments to section 322.2615(11), reflect the importance of the arresting officer's testimony in formal hearings when compared to other witness testimony. *Compare* § 322.2615(6)&(11), Fla. Stat. (2010), *with* § 322.2615(6)&(11), Fla. Stat. (2013) (the failure of a subpoenaed witness to appear is not grounds to invalidate the suspension, *unless* the witness is the arresting officer or breath technician, in which case "the department shall invalidate the suspension"). Because state law and Department policy prevented Petitioner from properly serving the arresting officer, and the failure cannot be attributed to an act or omission of the driver, there is a risk of erroneous deprivation.

The third factor is the government's interest; in this case, ensuring the safety of travelers on public roadways though formal review hearings of license suspensions following a DUI arrest,[5] and protecting former law enforcement officers by keeping their personal contact information confidential. The formal review process is expeditious and facially valid when weighed against the private interest at stake. *Pitts*, 815 So. 2d at 743-44. It is sometimes necessary, however, to fill procedural gaps with basic principles of due process. *Massey v. Charlotte Cnty.*, 842 So. 2d 142, 147 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D407b]. Given that hearing officers are permitted to issue subpoenas on their own initiative, and that designated employees are not *required* to reject service for former officers, this Court concludes that additional safeguards may be employed in situations like the case at hand, without creating an undue burden or altering the existing rules and procedures. This Court therefore will not mandate a specific procedure that the Department must follow.

In light of the foregoing, the petition is GRANTED and the order below is QUASHED.

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[1]A hearing officer is permitted to issue a subpoena on his or her own initiative. 15A-6.012(1), F.A.C.

[2]The administrative order upholding the suspension of Petitioner's driving privilege did not address Petitioner's argument that his due process rights under the Fifth and Fourteenth Amendments were denied.

[3]It follows that if Petitioner could not *serve* the subpoena, the subpoena enforcement mechanism found in section 322.2615(6)(c), Florida Statutes, and Rule 15A-6.012(2), F.A.C. would not afford Petitioner the needed relief.

[4]In this case, the arresting officer was the *only* law enforcement officer to witness the arrest.

[5]*Wiggins*, 209 So. 3d at 1173.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Appeals—Certiorari—Licensee arrested for driving under influence by officers who had stopped to provide assistance to licensee on side of highway because licensee's vehicle had run out of gas—Hearing officer did not depart from essential requirements of the law in finding that there was sufficient evidence to establish probable cause for arrest—Licensee's statements to officers gave rise to a reasonable inference that licensee was driving the vehicle while impaired when the vehicle ran out of gas—Additionally, record indicates that every observation made at the scene before licensee's arrest was made solely by the officers, which is within the requirements of section 901.15(5)

JOSEPH CHARLES XUEREB, JR., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 20-CA-6968, Division E. March 17, 2022.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANNE-LEIGH GAYLORD MOE, J.) Joseph Charles Xuereb, Jr. seeks certiorari review of a hearing officer's decision to affirm the suspension of his driving privileges. This Court has jurisdiction. Because the hearing officer did not depart from the essential requirements of the law, the petition must be denied.

I. STANDARD OF REVIEW

When a circuit court reviews local administrative agency action on a petition for certiorari, it functions as an appellate court and is not entitled to reweigh the evidence or substitute its *judgment* for that of the agency. *Haines City Cmty. Dev't v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a]. Instead, its analysis is confined to whether (1) procedural due process was given; (2) the essential requirements of the law were observed; and (3) the administrative findings and judgment were supported by competent substantial evidence. *Id.*

II. FACTS AND PROCEDURAL HISTORY

Mr. Xuereb was arrested for driving under the influence on June 5, 2020, when law enforcement officers stopped to provide assistance to him on the side of I-10 in *Gadsden*. County. The first officer stopped to determine if the vehicle was disabled and Mr. Xuereb informed her that he had run out of gas. The second officer then detected the strong odor of alcohol on Mr. Xuereb's breath and learned that Mr. Xuereb believed that he was parked in front of his subdivision in Navarre, Florida—roughly 169 miles away. Mr. Xuereb informed one officer that his wife had just left home to bring him some gas and was only a few minutes away.

The *first-responding* officer noted that Mr. Xuereb's eyes were bloodshot and watery, his speech was slightly slurred, and his breath smelled of alcohol. Mr. Xuereb denied that he consumed any alcohol after he ran out of gas. He agreed to perform field sobriety exercises, during which additional indicators of impairment were observed. Based on the observations of and information obtained by the two officers, Mr. Xuereb was arrested and transported to Gadsden County Jail. Upon arrival at the jail, Mr. Xuereb twice refused to submit to a breath test. His driver's license was then suspended.

Mr. Xuereb sought review of the suspension at a hearing held on July 24, 2020. At the hearing, he argued that his arrest was unlawful and therefore the suspension should be invalidated. The hearing officer concluded that the arrest was lawful because the officers had probable cause as to each element of the crime. He further concluded that the suspension was proper because Mr. Xuereb refused to submit to a breath test and had been informed that refusal of the test would result in a license suspension. The hearing officer affirmed the suspension in an order dated July 30, 2020.

Mr. Xuereb asks for certiorari review of that order.

III. ANALYSIS

When considering whether a driver's license was properly suspended for failure to submit to a test pursuant to section 322.2615, Florida Statutes, a hearing officer must determine "whether the test was *administered* incident to a lawful arrest." *Fla. Dept of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070, 1079 (Fla. 2011) [36 Fla. L. Weekly S243a]. If the arrest was not lawful in the first place, then the suspension of the driver's license must be invalidated. *Id.* at 1076; *Arenas v. Dept of Highway Safety at Motor Vehicles,* 90 So. 3d 828, 834 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1024a].

Driving *under* the influence ("DUI") is a crime delineated in section 316.193, Florida Statutes. A person is guilty of DUI when he or she is found to have been "driving or in actual physical control of a vehicle within this state and . . . under the influence of alcoholic beverages . . . when affected to the extent that the person's normal faculties [were] impaired." § 316.193(1)(a), Fla. Stat.

Section 901.15, Florida Statutes provides a legal basis for warrantless arrest under specified circumstances. Under that statute, an officer may arrest a driver without a warrant if a violation of chapter 316 is committed "in the presence of the officer." § 901.15(5), Fla. Stat.

> An offense is committed in the presence of the officer when: the officer receives knowledge of the *commission* of an offense in his presence through any of his senses, or by inferences properly to be drawn from the testimony of the *senses*, or when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that [an offense is committed].

State v. Englehardt, 465 So. 2d 1366, 1368 (Fla. 4th DCA 1985) (quoting 6A C.J.S. *Arrest* § 18).

A violation has been "committed in the presence of the officer" if the suspect admits to an essential *element* of the crime when *making* a statement to the arresting officer. *U.S. v. Svaib,* 924 F. Supp. 137, 139 (M.D. Fla. 1996) (*holding* "[a] suspect's admission as to an essential *element* of a crime satisfies" the presence requirement). For that reason, Mr. Xuereb's arrest was lawful if the facts and circumstances observed gave the officer probable cause to believe that Mr. Xuereb was (1) driving or in actual physical control of the vehicle and (2) under the influence of alcoholic beverages to the extent that his normal faculties were impaired. Actual physical control "*means the defendant* must be physically in or on the vehicle and have the capability to operate the vehicle, regardless of whether he/she is actually operating the vehicle at the time." *Hughes v. State,* 943 So. 2d 176, 193 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1872a] (quoting Fla. Std. Jury Instr. (Crim.) 28.1) (internal quotations omitted).

The hearing officer's decision does not stray from these requirements. The hearing officer found that there was sufficient evidence to establish probable cause to arrest Mr. Xuereb for DUI. The hearing officer *emphasized* that Mr. Xuereb's statements to the law enforcement officers gave rise to a reasonable inference that he was driving the vehicle while impaired when the vehicle ran out of gas. In addition, the record indicates that every observation made at the scene before Mr. Xuereb's arrest was made solely by the officers, which is within the requirements of section 901.15(5), Florida Statutes.

Mr. Xuereb asserts that as a matter of law he could not have been in actual, physical control of the vehicle because it was out of gas and inoperable when the officers arrived. But Mr. Xuereb confuses the standard for a lawful arrest with the availability of a defense to DUI. It was not necessary for the arresting officer to find that the vehicle

was operable before finding probable cause to arrest Mr. Xuereb because operability is not an element of DUI. *State v. Fitzgerald,* 63 So. 3d 75, 78 (Fla. 2d DCA 2011) [6 Fla. L. Weekly D1076a] ("In Florida, a vehicle's inoperability is a defense rather than an element"); *see also* Fla. Std. Jury Instr. (Crim.) 28.1 (identifying inoperability as a defense to, not an element of, DUI and recognizing that inoperability "is not a defense if the defendant was driving under the influence before the vehicle became *operable."); Jones v. State,* 510 So. 2d 1147 (Fla. lst DCA 1987) (holding that the State is not required to prove that the vehicle is capable of immediate self-powered mobility" as an element of actual physical control); *State v. Benyei,* 508 So. 2d 1258 (Fla. 5th DCA 1987) (car may have been inoperable when the officer arrived on the scene, but the evidence was sufficient for the jury to find that the driver was intoxicated when the car went off the highway onto a median); *State v. Boynton,* 556 So. 2d 428 (Fla. 4th DCA 1989) (inoperability defense not available to a defendant who was driving under the influence at the time the car became inoperable).

Mr. Xuereb's arguments relying on *Steiner v. State,* 690 So. 2d 706 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D850a], and *Sawyer v. State,* 905 So. 2d 232 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1466c] are unpersuasive. *Steiner* involved a petition for writ of certiorari to the Fourth District Court of Appeal after the circuit court reversed the county court's grant of a motion to suppress. 690 So. 2d at 708. A condominium complex security guard observed the petitioner attempting to start a vehicle that was stopped in a driveway near the guardhouse. *Id.* at 707. After the guard observed smoke coming from the car and the petitioner swaying, the guard assisted the petitioner to a chair and called 911. *Id.* A community service aide arrived first and spoke with the petitioner who admitted that "he was attempting to restart his vehicle when the guard removed him from the car." *Id.* The aide, after *smelling* alcohol on the petitioner's breath, "called for another officer to conduct a DUI investigation." *Id.* When speaking with the petitioner, the DUI investigator smelled alcohol on the petitioner's breath and proceeded to arrest the petitioner for DUI. *Id.* "Petitioner moved to suppress the *evidence* alleging that his arrest was illegal," which the county court granted because there was no evidence to support a warrantless misdemeanor arrest. *Id.* at 708. The circuit court subsequently reversed, relying on cases involving distinguishable facts and issues. The Fourth District Court of Appeal concluded that when the circuit court decided the issue based on distinguishable cases, it departed from the essential requirements of the law. *Id.*

In Mr. Xuereb's case, the officer did not rely on the observations of non-officers in *finding* probable cause. Probable cause was based on the observations and information obtained by law enforcement officers who both responded to the *scene*. This is permitted under section 901.15, Florida Statutes. Further, the officer observed Mr. Xuereb in the vehicle and requested that he exit the vehicle to conduct field tests. Moreover, Mr. Xuereb told the officer he ran out of gas and had not consumed any alcoholic beverages since then. It was reasonable for the officer to conclude that Mr. Xuereb, who the officer observed to be impaired, was out of the gas on the side of I-10 because he was driving the vehicle under the influence when it ran out of gas.

Sawyer is *similarly* unhelpful. In that case, the petitioner requested certiorari relief from the Second District Court of Appeal after the circuit court affirmed the county court's denial of a motion to suppress evidence. 905 So. 2d at 233. The officer received information from two citizens that petitioner was driving erratically, then exited the vehicle and staggered to a nearby convenience store. *Id.* After receiving this information the officer approached petitioner outside the store, conducted field sobriety tests, and then arrested petitioner for DUI. *Id.* After the arrest, the officer searched petitioner and found marijuana, which petitioner subsequently moved to suppress arguing that the search was conducted after an unlawful arrest. *Id.* The circuit court affirmed the county court's denial of the motion, holding that the *citizens*' observations combined with the officer's observations and field tests established probable cause to arrest petitioner. *Id.* The Second District Court of Appeal granted certiorari because the officer incorrectly relied on the citizens' observations and otherwise never observed Sawyer in control of a vehicle. *Id.*

Those facts are materially different from Mr. Xuereb's situation. The officers who arrested him found him in the vehicle and they relied on their own observations to establish probable cause.

IV. CONCLUSION

The petition is denied.

* * *

Licensing—Driver's license—Suspension—Evidence—Appeals—Certiorari—Documents relied upon by hearing officer in upholding license suspension were not fatally defective because two affidavit signatures were not accompanied by an officer badge number or notary seal

KRISTIAN STEVENS, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Circuit Civil Division. Case No. 21-CA-5919, Division I. June 3, 2022.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PAUL L. HUEY, J.) This case is before the court on Kristian Stevens' Amended Petition for Writ of Certiorari. The petition is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for his unlawful breath-alcohol level. Petitioner contends that documents relied upon by the hearing officer were fatally defective because two affidavit signatures were not accompanied by a law enforcement badge number or notary seal.

Petitioner is mistaken. *Lambo v. DHSMV*, 14 Fla. L. Weekly Supp. 838b (Fla. 13th Cir. Ct. 2007) (a hearing officer in a formal license revocation hearing may properly rely on a document, despite a technical deficiency in notarization, when the identity of the notary can be established by signatures on other self-authenticating documents).

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

* * *

Licensing—Driver's license—Suspension—Driving with unlawful breath alcohol level—Lawfulness of stop—Where there was objective basis for traffic stop, law enforcement was not required to articulate belief that licensee was ill, tired, or impaired for stop to be lawful

STEVEN BLANCHARD, 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-7661, Division A. May 2, 2022. Counsel: E. Michael Isaak, Isaak Law, PLLC, Tampa, for Plaintiff. Christie S. Utt, General Counsel, and Mark L. Mason, Assistant General Counsel, DHSMV, Tallahassee, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(CHERYL K. THOMAS, J.) This matter is before the Court on Amended Petition for Writ of Certiorari filed December 29, 2021 (Doc. 9). The petition, originally filed September 22, 2021 is timely, and this court has jurisdiction. §322.31, Fla. Stat. Petitioner seeks review of the Department's final order upholding the suspension of his driving privilege for his unlawful breath-alcohol level. Petitioner

contends that the Department lacked competent, substantial evidence to find that Petitioner's arrest was preceded by a lawful traffic stop because the law enforcement officer did not affirmatively state a belief that Petitioner was ill, tired, or impaired.

On this issue, the petition is DENIED. *Coffee v. DHSMV*, 21-CA-4479 (Fla. 13th Jud. Cir., Mar. 8, 2022) [30 Fla. L. Weekly Supp. 61a] (finding that where there is an objective basis for a traffic stop, law enforcement is not required to articulate a belief that the driver was ill, tired, or impaired in order for the stop to be lawful).

The petition is DENIED on the date imprinted with the Judge's signature.

* * *

TATYANA VASILYEVNA YATSKU, Petitioner, v. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE22-000296 (AW). May 19, 2022. Petition for Writ of Certiorari for review of a decision rendered by the Department of Highway Safety and Motor Vehicles Bureau of Administrative Reviews; Craig P. Rogers, Hearing Officer. Counsel: Scott W. Sakin, Scott W. Sakin, P.A., Weston, for Petitioner. Elana J. Jones, Christie S. Utt, General Counsel, Department of Highway Safety & Motor Vehicles, Tallahassee, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(PER CURIAM.) Having carefully considered the Petition and Appendix, the Response, the Reply, and the applicable law, the Petition for Writ of Certiorari, is hereby **DENIED** on the merits. *See Michael J. Boyle v. Department of Highway Safety and Motor Vehicles,* 14 Fla. L. Weekly Supp. 1016a (10th Cir. Ct. Aug. 24, 2007); *Kathleen Piantanida v. Department of Highway Safety and Motor Vehicles,* 8 Fla. L. Weekly Supp. 229a (Fla. 17th Cir. Ct. Jan. 12, 2001); *Marc Aaron Overton v. Department of Highway Safety and Motor Vehicles,* 8 Fla. L. Weekly Supp. 529a (Fla. 8th Cir. Ct. June 12, 2001); *Bradley P. Anderson v. Department of Highway Safety and Motor Vehicles,* 10 Fla. L. Weekly Supp. 467a (Fla. 2nd Cir. Ct. May 21, 2003); *Brian James Johnson v. Department of Highway Safety and Motor Vehicles*, 9 Fla. L. Weekly Supp. 575a (Fla. 9th Cir. Ct. June 12, 2002). (BOWMAN, FAHNESTOCK and MOON, JJ., concur.)

* * *

CHRISTOPHER LAROZA, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21-022131. Admin. Hearing: D.L.# L620-107-58-219-0. May 19, 2022. Petition for Writ of Certiorari from Petitioner Christopher Laroza. Counsel: Gary S. Ostrow, The Law Firm of Gary S. Ostrow, P.A., Fort Lauderdale, for Petitioner. Elana, J. Jones, Assistant General Counsel, Tallahassee, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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

* * *

MICHAEL DE LA GARZA, Petitioner, v. STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE 22-000434. Admin. Hearing: D.L. # D426-541-70-450-0. May 19, 2022. Petition for Writ of Certiorari from Petitioner, Michael De La Garza. Counsel: Valentin Rodriguez, Valentin Rodriguez, P.A., West Palm Beach, for Petitioner. Craig P. Rogers, General Counsel, for Respondent.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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

* * *

5901 SW 162 AVE LLC, Plaintiff, v. TOWN OF SOUTHWEST RANCHES, FLORIDA, Defendant. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. CACE21020137, Division AP. May 19, 2022.

ORDER DENYING APPELLANT'S MOTION FOR ATTORNEY'S FEES

(JOHN BOWMAN, J.) **THIS CAUSE** is before the Court, in its appellate capacity, on Appellant's Motion for Attorney's Fees, filed on March 17, 2022. After review of the motion, applicable rules of procedure and applicable law, it is hereby **ORDERED** that the Appellant's Motion for Attorney's Fees is **DENIED**.

* * *

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CIRCUIT COURTS—ORIGINAL

Mortgages—Foreclosure—Guardian ad litem charged with locating heirs is not authorized to accept service of process for unidentified heirs in foreclosure case

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, Plaintiff, v. HEZEKIAH CARROLL, JR., et al., Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 15-317-CA. March 29, 2020. David Frank, Judge. Counsel: Marie Fox, Tromberg, Morris & Poulin, PLLC, Boca Raton, for Plaintiff. T. Whitney Strickland, Guardian Ad Litem, Tallahassee, for Defendants.

ORDER ON GAL'S MOTION FOR CLARIFICATION

This Cause came before the Court on the Guardian Ad Litem's motion for clarification, and the Court having reviewed the motion / petition, responses to the motion / petition, and all materials submitted in support of or opposition to it, and being otherwise fully advised in the premises, finds

The Guardian Ad Litem ("GAL"), Mr. Strickland, was appointed by this Court to protect the interests of heirs who, albeit are currently unknown, might be found, and if found, given notice of this proceeding. Without such notice, these persons would not be able to take action, if available, to save their family's property.

It appears that counsel for the plaintiff has asked the GAL if he would "accept service of process" on behalf of the parties for whom he was appointed. The GAL very understandably is concerned about this request and now seeks a court order clarifying his responsibilities in this regard.

The Court is also concerned that counsel for a plaintiff in a foreclosure case would ask a GAL to accept service for persons who may have a stake in the outcome of this case but have not yet been identified and/or located. Presumably, the plaintiff would then forego implementing legal protections given a litigant because, to the extent any such person exists, their temporary counsel, appointed by the court without their knowledge to simply look for them, would say it's OK to proceed. This even though the effect would be that these individuals would never actually receive proper notice of the lawsuit.

To be clear, the Court should expressly state the protections of which plaintiff would deprive these individuals:

- First, the chance that an heir could be located and thus could receive personal service of process (copies of the complaint and summons) with instructions on how to respond to prevent falling into default;
- Second, that a diligent search could be conducted for an heir identified but not located;
- Third, that notice by publication (constructive service) might find and give notice to an heir not otherwise identified and/or located.

The due process of notice and a right to be heard do not just emanate from rules of court. They literally flow from our national and state Constitutions. Our federal Constitution's Fifth and Fourteenth Amendments and Article I Section 9 of Florida's Constitution command that no person may be "deprived of life, liberty or property without due process of law?" Article I Section 2 of Florida's Constitution secures the "inalienable" right "to acquire, possess and protect property."

In 1972, the United States Supreme Court reminded Florida that the Fourteenth Amendment to the United States Constitution demands due process of law before depriving a person of his or her property. The case was *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The statutes at issue was the forerunner of Florida's current replevin statute, Sections 78.01, et seq. The Supreme Court struck down Florida's replevin procedure because it permitted the private taking of personal property with state enforcement without meaningful notice and a hearing. *Id.*

Have we cavalierly forgotten these principles, these commands? Is it the slight inconvenience or minimal cost that would result if the rules were followed? Perhaps it is the siege mentality of our current pandemic that encourages such irresponsible thought? Robert McKee famously pointed out that, "True character is revealed in the choices a human being makes under pressure. . . ." This is also true for a nation, a state, or a court. Regardless of environmental hardships, this Court will not look the other way and allow the possible deprivation of an heir's inalienable rights.

Accordingly, it is

ORDERED and ADJUDGED that the GAL's motion for clarification is GRANTED. GAL's in foreclosure cases are not authorized to accept service of process for defendants, who typically are clients they most likely will never completely represent or even locate. The wording of the order appointing the GAL is not meant to convey such permission and, to the extent that it does, that language is revoked. The duty of the GAL is to use true and robust efforts to locate heirs and is discharged once they are found. The responsibility of notice to defendants of foreclosure lawsuits falls squarely upon the shoulders of the plaintiffs.

IT IS FURTHER ORDERED that GAL will serve copies of this order on all persons and entities entitled to receive a copy, or otherwise entitled to notice, who will not automatically receive a copy via the Florida Courts E-Filing Portal.

* * *

Civil procedure—Dismissal—Unilateral offer to settle class action seeking relief under Florida Consumer Collections Practices Act and Florida Residential Landlord Tenant Act, which was rejected by plaintiff, did not moot plaintiff's claims

ARLIE CONNER, Plaintiff, v. JWB PROPERTY MANAGEMENT, LLC, Defendant. Circuit Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2021-CA-005830, Division CV-F. August 2, 2022. Marianne Aho, Judge. Counsel: Austin Griffin and Max Story, Story | Griffin, P.A., Jacksonville Beach, for Plaintiff. J. Russell Collins, Douglas Law Firm, Palatka, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came before the Court at hearing on July 13, 2022 via Defendant JWB Property Management, LLC's Amended Motion for Summary Judgment [Doc. 24], and on review of the Motion, Plaintiffs Response and Memorandum in Opposition [Doc. 28], and the argument of the parties and the record of this case, this Court finds that:

1. This case was filed by Plaintiff as a five-count class action seeking relief under the Florida Consumer Collections Practices Act (FCCPA) and the Florida Residential Landlord Tenant Act (FRLTA).

2. Defendant attempted to moot the Plaintiff's claims by hand delivering a check for $2,000, representing what Defendant alleged to be the complete statutory relief for Plaintiff, along with an offer to pay reasonable attorney's fees up to the date of the check.

3. The Plaintiff returned the check void and rejected this settlement offer.

4. Defendant filed an Amended Motion for Summary Judgment on the basis that this unilateral settlement offer mooted Plaintiff's claims, ending any standing to bring a class action.

5. Upon review of the record and relevant case law, there cannot be unilateral settlement under Florida law.

6. Even if the Defendant had been successful in mooting some of the monetary claims for damages, there would still be claims outstanding for injunctive relief and declaratory relief, among others.

7. The Court relies on two cases in this Order: *Campbell-Ewald Co. v. Gomez,* 577 U.S. 153 (2016) [25 Fla. L. Weekly Fed. S585a] (holding "that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation"); and *Benggio v. Prof'l Recovery Servs., Inc.,* No. 12-60168-Civ-SCOLA, at *3 (S.D. Fla. July 18, 2012) (holding that "Defendant's settlement offer does not moot Plaintiff's FDCPA claim because Plaintiff expressly seeks a judgment, which Defendant has not offered to give. Therefore, there remains a case or controversy over which this Court has subject matter jurisdiction"). For the purposes of this Order, *Benggio* is only considered persuasive, but not binding authority on this Court.

THEREFORE, it is hereby ORDERED that:

1. Defendant's Amended Motion for Summary Judgment is DENIED.

* * *

Civil procedure—Scientific evidence—Motion to prohibit testimony by plaintiff's expert witnesses in suit regarding defective construction and design of condominiums is denied where witnesses are qualified as experts, proposed testimony will assist jury, and methodology used by witnesses to investigate suspected conditions is generally accepted within applicable scientific community

OLD TOWN VILLAGES CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation, Plaintiff, v. ADMIRAL WINDOWS AND DOORS, INC.; MORTON CONCRETE, INC.; and STRANGE LATHING & PLASTERING, INC., Defendants. Circuit Court, 7th Judicial Circuit in and for St. Johns County. Case No. CA15-1288. June 8, 2022. Howard M. Maltz, Judge. Counsel: Barry B. Ansbacher and Michael Feinberg, Ansbacher Law, Jacksonville, for Plaintiff. Mark Boyle and Amanda K. Anderson, Boyle, Leonard & Anderson, P.A., Ft. Myers; and E.T. Fernandez and Ernesto L. Luna, Fernandez Trial Lawyers, P.A., Jacksonville, for Admiral Windows and Doors, Inc., Defendant. Taylor Jarman, Orr | Cook, Jacksonville; and Elizabeth Droz-Stolinas, O'Connor & O'Connor, LLC, Orlando, for Morton Concrete, Inc., Defendant.

ORDER DENYING DEFENDANT ADMIRAL WINDOWS AND DOORS, INC.'S THIRTEENTH MOTION IN LIMINE

(PROHIBITING SPECULATIVE TESTIMONY BY PLAINTIFF'S EXPERTS WOODS ENGINEERING, INC.)

This cause came before the Court on March 10, 2022, on *Defendant Admiral Windows and Doors, Inc.'s Thirteenth Motion in Limine (Prohibiting Speculative Testimony by Plaintiff's Experts Woods Engineering, Inc.)* filed on March 2, 2020.

PROCEDURAL POSTURE

1. This action comes before this Court on Plaintiff's November 25, 2015 Complaint [DIN 2] as amended by the Amended Complaint [DIN 1150] filed January 15, 2018.

2. The action arises from the development of a residential condominium complex in St. Johns County, Florida, known as "Old Town Villages," and Plaintiff's allegations regarding defective construction and design.

3. Plaintiff sued the developer, general contractor, and numerous subcontractors and suppliers. However, in 2020 Plaintiff settled its claims against the general contractor and developer, who respectively assigned their claims against subcontractors for indemnity.

4. On February 24, 2020, this Court severed the claims into four separate actions by the *Seventh Order Amending Case Management Order* [DIN 3330]. The claims against Defendants Admiral Windows and Doors, Inc. ("Admiral") and Morton Concrete, Inc. ("Morton"), both direct and assigned, are asserted in the above-styled action, referred to in the case management order as "Action 1." Defendant Strange Lathing & Plastering, Inc. has been dismissed from this action.

5. Admiral filed its *Thirteenth Motion in Limine (Prohibiting Speculative Testimony by Plaintiff's Experts Woods Engineering, Inc.)* on March 2, 2020 [DIN 3387] (the "Daubert Motion"), asserting a "Daubert" challenge to certain testimony anticipated to be offered by Plaintiff's experts. Morton joined Admiral's motion on March 5, 2020, but subsequently withdrew its joinder at the hearing.

6. At an evidentiary hearing on March 10, 2022, this Court heard testimony and arguments by counsel in support and in opposition to the Motion.

7. In particular, this Court considered the following evidence presented or proffered:

(a) Testimony of W. Ronald Woods, professional engineer;

(b) Testimony of Bryan Busse, professional engineer;

(c) Plaintiff's Exhibit 1 - Bryan Busse's Resume [DIN 3810];

(d) Plaintiff's Exhibit 2 - Photo Bates Stamped WEI OTV002489 - Front elevation [DIN 3811];

(e) Plaintiff's Exhibit 3 - Photo Bates Stamped WEI OTV002226 and Transcript Excerpt [DIN 3812];

(f) Plaintiff's Exhibit 4 - Photo Bates Stamped WEI OTV001275 - Interior Sliding Glass Door [DIN 3813];

(g) Plaintiff's Exhibit 5 - Proposal and Authorization for Professional Services to Old Town Villages [DIN 3814];

(h) Plaintiff's Exhibit 6 - Johnson-Graham-Malone, Inc. - Windows and Sliding Glass Door Submittal Dated 10.12.05 [DIN 3815];

(i) Plaintiff's Exhibit 7 - Woods Engineering Preliminary Report dated July 24, 2017;

(j) Plaintiff's Exhibit 8 - Woods Engineering July 2015 Preliminary Defect Grid [DIN 3817];

(k) Plaintiff's Exhibit 9 - Woods Engineering Rebuttal Report dated March 2, 2018 [DIN 3818];

(l) Plaintiff's Exhibit 10 - Woods Engineering November 7, 2019, Report [DIN 3819];

(m)Plaintiff's Exhibit 11 - Woods Engineering March 10, 2020, Report [DIN 3820];

(n) Plaintiff's Exhibit 12 - Woods Engineering December 17, 2021, Report [DIN 3821];

(o) Plaintiff's Exhibit 13 - Ronald Wood's Resume [DIN 3822];

(p) Plaintiff's Exhibit 14 - ASTM E2128-12 Standard Guide for Evaluating Water Leakage of Building Walls [DIN 3823];

(q) Plaintiff's Exhibit 15 - Qualitative Sampling of the Building Envelope of Water Leakage (Lonnie L. Haughton & Colin R Murphy) [DIN 3824];

(r) Plaintiff's Exhibit 16 - Case Law Exceeding the Boards of Expert Reason and Credibility (Lonnie Haughton) [DIN 3825];

(s) Plaintiff's Exhibit 17 - Robert Burke Jr.'s Resume [DIN 3826]; and

(t) Plaintiff's Exhibit 18 - Affidavit of Robert H. Burke Jr. [DIN 3827].

FINDINGS OF FACT

8. W. Ronald Woods and Bryan J. Busse, through Woods Engineering, Inc., were engaged by Plaintiff to investigate conditions at Old Town Condominiums.

9. Mr. Woods is licensed as a general contractor and roofing contractor. Both Mr. Woods and Mr. Busse are licensed as Florida professional engineers.

10. Woods and Busse have experience investigating, designing remediation plans, and administering remediation of light frame buildings with either stucco cladding, cementitious siding, sometimes referred to as Hardie Board, or both such as at the Old Town Villages buildings.

11. Woods and Busse are qualified to render opinions regarding the alleged defects at Old Town Villages, the causes of such alleged defects, the appropriate remediation of such alleged defects, and the cost to remediate the defects.

12. Woods and Mr. Busse reviewed the plans and specifications for Old Town Villages.

13. Woods, Busse, and technicians working for Woods Engineering, Inc., acting under the direction and supervision of Woods and Busse, visually inspected the exterior of all the buildings at Old Town Villages and made visual observations of the interior conditions in a significant number of the condominium homes at Old Town Villages.

14. Woods and Busse reviewed testimony from individuals deposed in this litigation who had direct knowledge or business records regarding the design or construction of the improvements at Old Town Villages.

15. Woods and Busse reviewed project files and records documenting the design and construction of Old Town Villages, the records of the building department for the permitting and inspections of Old Town Villages, and records regarding the manifestation of defects and performance of the improvements at Old Town Villages.

16. Woods Engineering, Inc. developed data as to the conditions of buildings behind the exterior cladding through (i) observations of manifestations visible to a trained eye on the exterior and interior surfaces, (ii) testing of windows and removal of surrounding claddings, (iii) inspection of roofs and attics, (iv) coring and other observations involving the selective removal of veneer surfaces, and (v) other observations of substrate conditions as indicated in the reports published by Plaintiff.

17. The methodology used by Woods Engineering Inc. to investigate the suspected conditions at Old Town Villages was a qualitative analysis generally in accordance with a recognized standard methodology published by the ASTM, in particular Standard ASTM-E2128.

18. Woods Engineering, Inc. performed the window tests in accordance with a recognized standard methodology published by the ASTM, in particular ASTM-E1105.

19. Standard ASTM-E2128 methodology is based on qualitative evaluation, not quantitative, and does not contemplate the engagement of a statistician or random testing in the evaluation of the conditions of a building. ASTM-E2128 does not require a statistically valid sample size to render an opinion. The protocol says you test using engineering discretion and principles. Testing is performed to verify and corroborate known opinions and theories about what is transpiring at the location. In other words, testing is performed to corroborate that certain conditions exist that have already been observed or are known about through other methods other than destructive testing, such as looking at plans and specifications, site visits, and review of testimony. It is simply a means of corroborating.

20. The ASTM standards followed by Woods Engineering, Inc. were developed by peer review and are generally recognized and accepted methods used by engineers and architects in the relevant scientific community, including expert witnesses retained by defendants in this same case when investigating building conditions.

21. The methodologies used by Woods Engineering, Inc. were reviewed by Robert Burke, a licensed architect, who confirmed the applicability, reliability, and acceptance of such methods and methodologies within the applicable scientific community.

ANALYSIS

Fla. Stat. §90.702[1] governs the admissibility of expert testimony and provides:

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

See also, In re Amendments to Florida Evidence Code, 278 So.3d 551 (Fla. 2019) [44 Fla. L. Weekly S170a]. The current version of Fla. Stat. §90.702 follows Rule 702 of the Federal Rules of Evidence. In *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the Supreme Court explained that Rule 702 imposes an obligation on a trial court to act as gatekeeper, to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Id.* at 589. Accordingly, courts properly admit expert testimony only when the proffering party establishes by a preponderance of the evidence that (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Hudgens v. Bell Helicopters/Textron,* 328 F.3d 1329, 1338 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C554a]. In *Kumho Tire Co. Ltd. v. Carmichael,* 526 U.S. 137 (1999), the Supreme Court explained that the "gatekeeper" role for the trial court, in determining the admissibility of expert testimony is applicable to non-scientific, as well as scientific expert testimony.

For the purpose of conducting the reliability inquiry mandated by *Daubert,* the Supreme Court has suggested that a trial court consider a number of factors, which include (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory has attained general acceptance in the relevant scientific community. *See Daubert,* 509 U.S. at 593-94. These factors are not exhaustive and do not necessarily apply to all experts or in every case. *Kumho Tire,* 526 U.S. at 141; *Allison v. McGhan Med. Corp.,* 184 F.3d 1300, 1312 (11th Cir. 1999). The Court's inquiry must focus on the methodology, not the conclusions, but the Court is not required to admit opinion testimony only connected to existing data by an expert's unsupported assertion. *Daubert,* 509 U.S. at 595; *General Electric Co. v. Joiner,* 522 U.S. 136, 146 (1997).

In addition to determining the reliability of the proposed testimony, *Daubert* instructs that Rule 702 requires the Court to determine whether the evidence or testimony assists the trier of fact in understanding the evidence or determining a fact in issue. *Daubert,* 509 U.S. at 591. This consideration focuses on the relevance of the proffered expert testimony or evidence. The Court explained that to satisfy this relevance requirement, the expert testimony must be "relevant to the task at hand." *Id.* Because scientific testimony does not assist the trier of fact unless it has a justified scientific relation to the facts, the U.S. Eleventh Circuit Court of Appeals has opined that "there is no fit where a large analytical leap must be made between the facts and the opinion." *McDowell v. Brown,* 392 F.3d 1283, 1299 (11th Cir. 2004) [18 Fla. L. Weekly Fed. C92a]. An expert must know facts which enable him to express a reasonably accurate conclusion instead of mere conjecture or speculation, and an expert's assurances that he has used generally accepted scientific methodology are insignificant. *McClain v. Metabolife Int'l, Inc.,* 401 F.3d 1233,1244 (11th Cir. 2005) [18 Fla. L. Weekly Fed. C281a]. An expert's opinion must be based on "knowledge," not merely "subjective belief or unsupported speculation." *Daubert,* 509 U.S. at 590. Nothing in *Daubert* requires a court "to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert," and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner,* 522 U.S. at 146. Further, to assist the trier of fact, expert testimony must concern "matters that are beyond the understanding of the average lay person . . . expert

testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *U.S. v. Frazier,* 387 F.3d 1260, 1262-63 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C1132a].

The undisputed evidence shows that both Woods and Busse have the requisite knowledge, skill, experience, training, and education and are thus qualified as experts in the areas of building design, forensic investigation, and remediation. Admiral did not dispute that the testimony of Woods and Busse would assist the trier of fact in determining relevant issues. This Court finds that the issues which will be presented to the jury include complex scientific and technical aspects of building design, performance, and remediation and agrees the proposed testimony of Woods and Busse will assist the jury. This Court, therefore, finds that Woods and Busse are qualified to offer expert testimony concerning the issues in this case.

This Court next considered whether challenged testimony (i) is based on sufficient facts or data; (ii) is the product of reliable principles and methods; and (iii) whether the experts reliably applied the principles and methods to the facts of this case. Factors considered by this Court included (i) whether the methodologies are subject to be tested and whether the methodologies have been tested; (ii) were the methodologies subjected to peer review and publication; (iii) the known or potential rate of error for the methodologies; (iv) the existence of standards controlling the methodologies; and (v) whether the methodologies are generally accepted in the applicable scientific community. These factors are guideposts, and thus, the proponent of the expert testimony need not demonstrate that all factors be met. This Court has considered these factors and finds that the proposed testimony of Woods and Busse is reliable. The opinions proffered by Woods and Busse meet the standards of reliability required under the analysis set forth in Fla. Stat. §§ 90.702 and 90.704, and are therefore admissible.

Therefore, it is ORDERED AND ADJUDGED that Admiral's Thirteenth Motion in Limine is DENIED.

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[1]The Florida Legislature amended §90.702 in 2013 to no longer follow the long-standing standard in *Frye v. U.S.,* 293 F. 1013 (1923) for the admissibility of scientific testimony, and adopted the *Daubert* standard adopted by the federal courts and the supermajority of states. However, in *DeLisle v. Crane Co.,* 258 So.3d 1219 (Fla. 2018) [43 Fla. L. Weekly S459a], our Supreme Court declared that the legislative amendment to §90.702 exceeded the authority of the Legislature because it is a procedural rule which was beyond the power of the Legislature to amend. In 2019, the Florida Supreme Court adopted the current version of §90.702, bringing Florida back to the *Daubert* standard. *In re Amendments to Florida Evidence Code,* 278 So.3d 551 (Fla. 2019) [44 Fla. L. Weekly S170a].

* * *

Creditors' rights—Fraudulent transfer of assets to trust—Motion for final summary judgment on count challenging defendants'/judgment debtors' transfer of asset to trust as fraudulent and all remaining affirmative defenses and for entry of money judgment against trust in amount of transferred asset is granted—Plaintiff has established prima facie case of fraud that defendants have failed to rebut—No merit to argument that plaintiff is not entitled to money judgment against trust pursuant to section 56.29(3) & (6)—No merit to argument that asset at issue, a 2013 judgment in favor of defendant in case alleging that plaintiff commenced involuntary bankruptcy proceedings against defendants in bad faith, is exempt from execution under federal bankruptcy policy—There is no Florida or federal constitutional or statutory exemption for claims brought under, or judgments issued pursuant to, U.S. Bankruptcy Code

U.S. BANK NATIONAL ASSOCIATION, Plaintiff, v. MAURY ROSENBERG, et al., Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2018-001348-CA-01, Section CA43. April 6, 2021. Michael Hanzman, Judge. Counsel: Jack C. McElroy and John W. Bustard, Miami, for Plaintiff. William Blum and Michael Friedman, Miami; and Thomas Burns (Appellate Counsel), Tampa, for Maury Rosenberg, Defendant. Daniel S. Gelber and Gerald Greenberg, Miami, for Douglas Rosenberg, Impleader Defendant.

AMENDED SUMMARY
FINAL JUDGMENT NUNC PRO TUNC

THIS CAUSE having come before the Court on February 24, 2021 on Plaintiff's Motion for Summary Final Judgment (the "***Motion***" or "***MSJ***"), and the Court having heard argument of counsel, reviewed the file, including Plaintiff's Motion, Defendants' Response and Plaintiff's Reply, and being otherwise fully advised in the premises, it is **ORDERED** and **ADJUDGED** as follows:

BACKGROUND

In or about August 2005, pursuant to a court-approved Settlement Agreement, Defendant Maury Rosenberg ("***Rosenberg***") provided an Individual Limited Guaranty (the "***Guaranty***") to Lyon Financial Services, Inc. ("***Lyon***"), Plaintiff U.S. Bank National Association's ("***Plaintiff***" or "***U.S. Bank***") predecessor-in-interest, in the amount of $7,661,945. Rosenberg's Guaranty related to medical equipment lease obligations owed to Lyon by companies created and managed by Rosenberg (such companies hereinafter collectively referred to as "***NMI***").

In February 2012, U.S. Bank commenced an action against Rosenberg styled *U.S. Bank National Association v. Rosenberg* in the United States District Court for the Eastern District of Pennsylvania, Case No. 12-00723-cv-CMR (E.D. Pa.) (the "***2012 Pennsylvania Action***") for a breach of his Guaranty that occurred in 2008. After several years of litigation, U.S. Bank obtained two final judgments against Rosenberg in September 2015 and May 2016 totaling in excess of $6.5 million without post-judgment interest (collectively, the "***U.S. Bank Judgments***"). In January 2018, U.S. Bank domesticated the U.S. Bank Judgments in Florida pursuant to Fla. Stat. §§ 55.505 *et seq.* Rosenberg has never made any payments towards the U.S. Bank Judgments.

Rosenberg was served with process in the 2012 Pennsylvania Action on February 22, 2012. A year later, in March 2013, Rosenberg prevailed at trial in a lawsuit against U.S. Bank in which Rosenberg had sued U.S. Bank pursuant to 11 U.S.C. §303(i) for commencing an involuntary bankruptcy against him in November 2008 in bad faith. Following the jury's verdict in favor of Rosenberg, on March 14, 2013, the U.S. District Court for the Southern District of Florida (the "***Florida District Court***") entered a Final Judgment in Rosenberg's favor against U.S. Bank and others, jointly and severally, in the amount of $6.12 million plus interest (the "***2013 Rosenberg Judgment***"). Rosenberg executed an assignment of the 2013 Rosenberg Judgment to Impleader Defendant Sara Rosenberg, as Trustee of the Douglas Rosenberg 2004 Trust (the "***Trust***") (collectively with Rosenberg, "***Defendants***") dated March 15, 2013 (the "***March 2013 Transfer***"), the day after the 2013 Rosenberg Judgment was entered.

On September 29, 2014, the Florida District Court, on U.S. Bank's motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), vacated the 2013 Rosenberg Judgment and entered a new judgment in the amount of $360,000. Following a successful appeal by Rosenberg, the 2013 Rosenberg Judgment was thereafter reinstated by the Florida District Court in May 2017.

After the 2013 Rosenberg Judgment was reinstated, U.S. Bank filed a motion for mutual judgment satisfaction (the "***Setoff Motion***") in the 2012 Pennsylvania Action in which U.S. Bank sought to set off the U.S. Bank Judgments against the 2013 Rosenberg Judgment. The Pennsylvania district court denied U.S. Bank's Setoff Motion in part because it accepted Rosenberg's argument that U.S. Bank was precluded from setting off its judgments against his 303(i) judgment as a matter of federal bankruptcy policy. On appeal of that decision, the Third Circuit affirmed, holding that the district court had not

abused its discretion in denying U.S. Bank's motion for the above-stated reason.

On July 2, 2018, U.S. Bank satisfied the 2013 Rosenberg Judgment by paying to Defendants' counsel the full amount of the judgment plus interest, $6,195,289.76. These judgment proceeds were disbursed by Defendants' counsel to the Trust and its creditors.

In September 2018, U.S. Bank filed an Amended Motion For Proceedings Supplementary To Execution And To Implead The Trust in which U.S. Bank moved, pursuant to Fla. Stat. § 56.29, for an Order (i) commencing proceedings supplementary to execution, (ii) impleading the Trust, (iii) issuing a Notice to Appear directed to the Trust, and (iv) granting U.S. Bank leave to file and serve a Supplemental Complaint. In October 2018, the Court granted U.S. Bank's motion, and, following rulings on several motions to dismiss, U.S. Bank filed its Second Amended Supplemental Complaint (the "***Complaint***") against Rosenberg and the Trust on May 1, 2019.[1] In the Complaint, U.S. Bank asserted various fraudulent transfer claims against Defendants pursuant to Fla. Stat. § 56.29(3), (6) and (9), including one (Count 11 of the Complaint) in which U.S. Bank sought to void the March 2013 Transfer as fraudulent and to have a money judgment entered against the Trust for the value of the fraudulently transferred 2013 Rosenberg Judgment pursuant to Fla. Stat. § 56.29(3) and (6).

Defendants filed a motion to dismiss the Second Amended Supplemental Complaint, which was granted, in part, and denied, in part, on June 12, 2019. Count 11 of U.S. Bank's Complaint regarding the March 2013 Transfer survived Defendants' motion to dismiss. On July 8, 2019, Defendants filed their Answer and Affirmative Defenses.

On August 8, 2020, U.S. Bank filed a Motion for Partial Summary Judgment, and, following two separate hearings on same, the Court granted partial summary judgment in U.S. Bank's favor on the following matters: (1) the Trust is a person on confidential terms with Maury Rosenberg; (2) Rosenberg's transfer of the 2013 Rosenberg Judgment to the Trust in 2013 is presumed under Fla. Stat. § 56.29(3)(a) to have been done to delay, hinder or defraud Rosenberg's creditors and thus it is Defendants' burden of proof to establish that the transfer was not done with an intent to hinder, delay or defraud Rosenberg's creditors; and (3) pursuant to Fla. Stat. § 56.29 and applicable principles of equity, the value of the transferred asset for purposes of determining the amount of damages to which U.S. Bank is entitled to recover from the Trust, if the March 2013 Transfer is found to be fraudulent, is that amount of money that was collected from U.S. Bank on the 2013 Rosenberg Judgment in 2018, $6,195,289.76. The Court also entered summary judgment in U.S. Bank's favor and against Defendants as to Affirmative Defenses Nos. 7, 9, 11, 23, 24, and 25 asserted by Defendants.

U.S. Bank, with leave of court, has now filed its Motion seeking summary final judgment on Count 11 of its Complaint (challenging the March 2013 Transfer as fraudulent under Fla. Stat. § 56.29(3) and (6)) and all of Defendants' remaining affirmative defenses, and the entry of a money judgment against the Trust in the amount that was collected from U.S. Bank on the 2013 Rosenberg Judgment in 2018, $6,195,289.76 (plus pre-judgment interest).

Defendants have opposed U.S. Bank's Motion on the following three bases: (i) there are genuine issues of dispute with regard to several of badges of fraud which preclude the entry of summary judgment; (ii) U.S. Bank is not entitled to a money judgment against the Trust under § 56.29(3)(b); and (iii) as a matter of federal bankruptcy policy, the fraudulently transferred asset at issue, Rosenberg's 2013 Judgment, is exempt from execution by U.S. Bank.

For the reasons set forth below, the Court grants U.S. Bank's Motion, enters summary final judgment against Defendants, and awards U.S. Bank a recovery from the Trust in the form of a money judgment for the value of the fraudulently transferred 2013 Rosenberg Judgment, $6,195,289.76 plus pre-judgment interest since August 6, 2018.

ANALYSIS

1. U.S. Bank is entitled to summary judgment on Count 11 of its Complaint because it has established a prima facie case of fraud which Defendants have failed to rebut

To prevail on its Motion seeking summary judgment on Count 11 of its Complaint, U.S. Bank must show that no genuine issue of material fact for trial exists as to Rosenberg's intent to delay, hinder or defraud his creditors. *See* Fla. Stat. § 56.29(3)(b). "Proof of fraud requires proof of intent. Obviously, in these situations, the parties will not readily admit to being instruments of fraud. Therefore, 'because of the difficulty of proving actual intent to defraud creditors, section 726.105(2) provides that fraudulent intent may be presumed from evidence of badges of fraud.' " *Gorrin v. Poker Run Acquisitions, Inc.*, 237 So. 3d 1149, 1154 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D265a].

As Defendants have pointed out, summary judgment is seldom granted in fraudulent transfer cases simply because "the determination of intent *often* presents a genuine issue of material fact." *Id.* at 1155 (emphasis added). Nonetheless, where there is no genuine issue of material fact, Florida courts will enter summary judgment in a fraud case. *See, e.g.*, *Amjad Munum, M.D., P.A. v. Azar*, 648 So. 2d 145, 153 (Fla. 4th DCA 1994) (affirming entry of summary judgment in a fraudulent transfer case). In *Azar*, the Fourth District Court of Appeal observed: "While recognizing that summary judgments are rarely countenanced in fraud cases, the uncontradicted facts in this case point to only one logical conclusion—that the transfer was fraudulent. A creditor may prove a fraudulent conveyance by establishing a prima facie case that is unrebutted, or by demonstrating actual fraudulent intent. . . . We find that [the defendant] did not establish sufficient facts to rebut the presumption of fraudulent transfer." *Id.* (citation omitted).[2]

Here, as in *Azar*, U.S. Bank has established a prima facie case of fraud and Defendants have not established sufficient facts to rebut the presumption of fraudulent transfer. As noted, the Court has already held in granting U.S. Bank's prior Motion for Partial Summary Judgment that U.S. Bank has established a prima facie case of fraud and that the March 2013 Transfer is presumed under Fla. Stat. § 56.29(3)(a) to have been done to delay, hinder or defraud Rosenberg's creditors.

Thus, in order to avoid the entry of summary judgment, Defendant must establish sufficient facts to rebut this presumption of a fraudulent transfer. Defendants, however, have not done so. Instead, based on the admissible evidence in the record, the relevant badges of fraud (which are set forth in Fla. Stat. § 726.105(2)[3]) point to only one logical conclusion—that Rosenberg's transfer of the 2013 Rosenberg Judgment to the Trust was fraudulent. Summary judgment is thus appropriate.

To start, Defendants do not challenge four of the applicable badges of fraud which prove Rosenberg's fraudulent intent:

1. the transfer or obligation was to an insider, the Trust;

2. before the transfer was made, the debtor, Rosenberg, had been sued or threatened with suit;

3. the transfer was of substantially all of the debtor Rosenberg's assets; and

4. the debtor, Rosenberg, was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

This is likely because the record evidence is indisputable with regard to these badges of fraud.

At the time of the March 2013 Transfer, Rosenberg did not own any other assets (thus the transfer was of substantially all of his assets), and he was insolvent, indebted to U.S. Bank for millions of dollars.[4] Further, Rosenberg made the March 2013 Transfer to the Trust after he had already been sued by U.S. Bank in the 2012 Pennsylvania Action.

As for the Trust, Rosenberg's wife, Sara Rosenberg, was (and still is) the sole trustee; Rosenberg's only child, Douglas Rosenberg, was (and still is) the grantor; and Douglas Rosenberg's unborn children, i.e., Rosenberg's unborn grandchildren, are the named beneficiaries. Further, the Trust documents provide that, even though Douglas Rosenberg is not a named beneficiary of the Trust, disbursements are nevertheless to be made to Douglas Rosenberg. For example, the Trust documents provide that (i) the Trustees (Rosenberg's wife, Sara) may pay to or apply for the benefit of the Grantor (Rosenberg's son, Douglas) "so much of the net income therefrom and so much of principal of the trust, up to the whole thereof, as the Trustees, in their discretion, shall deem advisable"; and (ii) "[u]pon the Grantor attending the age of forty-five (45) years, the Trustees shall pay over and distribute to him all of the remaining principal of the trust and such trust shall thereupon terminate." Rosenberg's transfer of the 2013 Rosenberg Judgment then was made to, and for the benefit of, members of his immediate family (as well as himself), and was a transfer to an insider of Rosenberg's.[5]

The record evidence also establishes that Rosenberg continued to maintain control over the transferred asset (and the transferee) after the March 2013 Transfer. *To establish the "control" badge of fraud, a plaintiff does not need to establish that the transferor maintained exclusive or total control over the transferred asset, only that he retained some control over the transferred asset and continued to benefit from same. See In re Bifani,* 580 F. App'x 740, 746 (11th Cir. 2014) (holding that the control factor was satisfied by the bankruptcy court's finding that the debtor maintained some control over the transferred real property where the debtor continued to reside in the property after the transfer and later received half of the profit from the sale of the transferred property).

Here, the evidence shows that Rosenberg continued to maintain some (if not exclusive) control over the 2013 Judgment after the March 2013 Transfer insofar as he continued to control the litigation against U.S. Bank and remained the named plaintiff in the case. The evidence further establishes that the Trust owns the apartment (located at the Four Seasons in downtown Miami) where Rosenberg has lived since 2004 or 2005; pays all of the expenses for the apartment as well as Rosenberg's other living expenses (meals, etc.) since at least 2010; and owns the vehicle (currently a Land Rover) that Rosenberg and his wife, Sara, use whenever needed. Rosenberg then clearly continued to enjoy use of the Trust's assets, including the fruits of the 2013 Rosenberg Judgment, after the transfer.

In addition, Rosenberg, through counsel, has admitted in open court that, even though he was not a named trustee or beneficiary, he nevertheless controlled the Trust, that no one else could make any decisions for the Trust, and that he could put money in and take money out of the Trust as he wanted. Douglas Rosenberg, the grantor of the Trust and Rosenberg's son, confirmed this fact, having testified at a deposition in May 2012 that his father, Maury Rosenberg, controls the Trust's cash.

These foregoing facts, showing that Rosenberg exercised control over both the transferred asset and the transferee (as well as the transferee's assets), provides further evidence of Rosenberg's fraudulent intent.

Finally, the record evidence shows that Rosenberg did not receive any consideration from the Trust in March 2013 in exchange for the assignment of the 2013 Rosenberg Judgment (or, at the very least, there is no record evidence of any consideration). Rosenberg and the Trust (collectively, "***Defendants***") nevertheless allege that Rosenberg received "substantial consideration" for the March 2013 Transfer back in January 2010 as part of a transaction with another one of Rosenberg's creditors, Sterling National Bank ("***Sterling Bank***").

According to Defendants' story, Sterling Bank, in January 2010, agreed to release Rosenberg, fully and unconditionally, from approximately $4.7 million in liability on a personal guaranty securing a loan from Sterling Bank to NMI in exchange for (i) NMI peacefully turning over its accounts receivable (the "***NMI A/R***") to Sterling Bank and (ii) the Trust releasing its subordinated lien in the NMI A/R. Defendants allege that Rosenberg, in order to induce his wife, as trustee, to release the Trust's alleged lien on the NMI A/R, granted the Trust a security interest in the future litigation proceeds arising from Rosenberg's 303(i) claims against U.S. Bank (the "***2010 Assignment of Proceeds***") (which claims resulted in the 2013 Rosenberg Judgment). Defendants allege that the March 2013 Transfer was "in furtherance of the 2010 Assignment of Proceeds, which was given for consideration and fair value as part of the Sterling Bank workout that relieved Rosenberg of approximately $4.75 million in liability on Rosenberg's personal guarantee to Sterling Bank."

There is no admissible record evidence, however, of this alleged consideration for the March 2013 Transfer, as there is no admissible record evidence of Sterling Bank ever releasing Rosenberg from approximately $4.75 million in liability on his personal guarantee in January 2010 or of Sterling Bank requesting that the Trust release its alleged lien in the NMI A/R in January 2010.[6] Instead, the admissible record evidence, which includes Rosenberg's contemporaneous email exchanges with Sterling Bank in January, February and March 2010 and Rosenberg's own September 2011 letter to his accountants, shows that (i) Sterling Bank did not request or require a release from the Trust in January 2010, (ii) the Trust did not provide a release of its alleged lien in the NMI A/R in January 2010, and (iii) Sterling Bank did not release Rosenberg from his Guaranty obligations in January 2010.

The foregoing badges of fraud then all prove Rosenberg's fraudulent intent. And the Court rejects Defendants' attempt to contrive a genuine issue of material fact by pointing to certain facts which Defendants argue rebuts U.S. Bank's prima facie case of fraud. For example, Rosenberg argues that the fact that he did not abscond or actively conceal the March 2013 Transfer somehow proves that the transfer was not made to delay, hinder or defraud his creditors. The Court, however, does not find that these facts create a reasonable inference that the March 2013 Transfer was not fraudulent. In defending against U.S. Bank's Motion, Defendants are only entitled to **reasonable** inferences in their favor. *See Deshazior v. Safepoint Ins. Co.*, 305 So. 3d 752, 755 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1210a] (recognizing the principle that a party defending a motion for summary judgment is entitled to all **reasonable** inferences in his or her favor); *see also Koflen v. Great Altantic & Pacific Tea Co., Inc.*, 177 So. 2d 529, 531 (Fla. 3d DCA 1965) ("In defending a motion for summary judgment, a party moved against is entitled to all reasonable inferences in his favor."). These other facts argued by Defendants—e.g., that Rosenberg did not abscond or actively conceal the March 2013 Transfer—do not create genuine issues of material facts (as the inferences that Defendants ask this Court to draw from them are unreasonable).

U.S. Bank therefore is entitled to the entry of summary judgment on Count 11 of its Complaint. U.S. Bank has established a prima facie case of fraud with respect to March 2013 Transfer and Defendants have not established sufficient facts, based upon the admissible record evidence before the Court, to rebut the presumption of fraudulent

transfer.

In fact, even if the Court were to consider Defendants' inadmissible hearsay regarding Sterling Bank's alleged statements to him in January 2010, summary judgment would still be appropriate. This is because the only logical conclusion that a reasonable jury could reach in this case is that Rosenberg's March 2013 Transfer of the 2013 Rosenberg Judgment to the Trust was fraudulent. Under the Florida Supreme Court's new summary judgment standard, the test is whether the evidence in the record is such that a reasonable jury could return a verdict for the nonmoving party, and **"[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment**." *See* Florida Supreme Court's December 31, 2020 Order amending Florida Rule of Civil Procedure 1.510 (Summary Judgment) at p.5 (emphasis added) (*quoting Scott v. Harris*, 550 U.S. 372, 380-81 (2007) [20 Fla. L. Weekly Fed. S225a] ("That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. **Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.**") (emphasis added)).

Here, no reasonable jury could believe Defendants' story that the March 2013 Transfer was not made with fraudulent intent because of the alleged consideration Rosenberg purportedly received for same in January 2010. The transfer was to an insider, the Trust; the transfer was made after Rosenberg had been sued by U.S. Bank; the transfer was of substantially all of Rosenberg's assets; Rosenberg was insolvent or became insolvent shortly after the transfer was made; and Rosenberg retained possession or control of the transferred asset, the 2013 Rosenberg Judgment, as well as the transferee, the Trust (and its assets).

In addition, Defendants' story that Rosenberg received "substantial consideration" for the March 2013 Transfer in the form of Sterling Bank's release of his $4.75 million personal guarantee in January 2010 is blatantly contradicted by the undisputed and contemporaneous record evidence in this case. This contemporaneous record evidence—which again includes Rosenberg's contemporaneous email exchanges with Sterling Bank in January, February and March 2010 and Rosenberg's own September 2011 letter to his accountants—shows that, contrary to Defendants' story, (i) Sterling Bank did not request or require a release from the Trust in January 2010, (ii) the Trust did not provide a release in January 2010, (iii) Sterling Bank did not release Rosenberg from his $4.75 million guaranty in January 2010, and (iv) the Trust provided no value or consideration for the assignment of litigation proceeds in January 2010.

Thus, even if the Court could consider Defendants' inadmissible hearsay evidence of the "substantial consideration" Rosenberg allegedly received for the transfer in January 2010 (i.e., Sterling Bank's release of his $4.75 million Guaranty), the Court would not adopt Defendants' version of the "facts" for purposes of ruling on U.S. Bank's Motion as no reasonable jury could believe Defendants.

2. U.S. Bank is entitled to a money judgment against the Trust pursuant to Fla. Stat. § 56.29(3) and (6)

Defendants argue in opposition to U.S. Bank's Motion that U.S. Bank is not entitled to any relief against the Trust under either subsections (3) or (6) of Fla. Stat. § 56.29 because those subsections purportedly do not authorize this Court to enter a money judgment against the Trust. In support of this argument, Defendants have cited to a September 2019 non-binding decision from the U.S. Bankruptcy Court, S.D. Fla., *British Am. Ins. Co. v. Fullteron (In re British Am. Ins. Co.)*, 607 B.R. 753 (Bankr. S.D. Fla. 2019) [28 Fla. L. Weekly Fed. B51a], as well as a subsequent decision from the Fourth District Court of Appeal (the "Fourth DCA"), *Uoweit, LLC v. Fleming*, 300 So. 3d 1201 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1740a], *rev. denied*, 2020 WL 7334275 (Fla. Dec. 13, 2020), that Defendants contend purportedly "confirms that no substantive claim for damages exists under Fla. Stat. 56.29 against the 2004 Trust, an impleaded party, other than under Chapter 726".

The Court previously rejected this same argument made by Defendants when denying Defendants' prior Motion for Judgment on the Pleadings, citing to the case of *Saadi v. Maroun*, 2020 WL 774287 (M.D. Fla. Feb. 18, 2020) which itself had rejected *British American* and held

> This Court is not persuaded by the *British American* court's analysis . . . There is nothing in the text of Florida Statute § 56.29 that *limits* the power to enter money judgments set forth in Florida Statute § 56.29(6) to *claims other than* those pursued under Florida Statute § 56.29(3)(b). In fact, in his objection to the Magistrate Judge's Report and Recommendation, Plaintiff cites to a case in which the court entered money judgments in connection with the creditor's . . . fraudulent transfer claims brought pursuant to Florida Statute § 56.29(3). *See In re McCuan*, 603 B.R. 829, 848 & 848 n. 113 (Bankr. M.D. Fla. 2019) (stating that the transfers were avoidable under Florida Statute § 56.29(3) and that the transferred asserts were subject to execution to satisfy the debt; citing to both Florida Statute § 56.29(3) & (6)). . . .
>
> For the reasons stated above, and because Florida Statute § 56.29 should be liberally construed, the Court concludes that Plaintiff may seek a money judgment in connection with his fraudulent transfer claim set forth in Count I.
>
> 2020 WL 774287 at *5.

This Court continues to agree with the *Saadi* court and respectfully rejects *British American*. In *British American*, the Bankruptcy Court concluded that Fla. Stat. § 56.29(3) provides a cause of action for fraudulent transfer that is independent of the causes of action provided under Chapter 726, Florida Statutes. But, in this Court's opinion, the Bankruptcy Court incorrectly concluded that the only available remedy under this provision, subsection (3), is to have a sheriff execute on the actual transferred property. Subsection (6) of the statute, however, expressly provides that the "court may enter any orders, judgments, or writs required to carry out the purpose of this section, . . . including entry of money judgments as provided in §§ 56.16-56.19 against any person to whom a Notice to Appear has been directed." The *British American* court nevertheless reasoned that subsection (6) only applies to claims under subsection (2) to recover property of the judgment debtor in the hands of another or a debt due to the judgment debtor, not to fraudulent transfer claims. *Id*. at 757 n.1. This Court respectfully disagrees.

The relief available under subsection (6) is plainly not limited to claims under just subsection (2). Rather, subsection (6) grants the court authority to enter orders, including money judgments, "required to carry out the purposes of this section." The reference to "**this section**" is a reference to section 56.29, not merely to subsection (2). The statute uses the term "subsection" when referring to a specific subsection. *See, e.g.,* § 56.29(2) (referencing "subsection (1)"). It uses the term "section" to refer to section 56.29 as a whole. There is no basis then to construe subsection (6) as a grant of authority to implement additional remedies only for subsection (2) claims but not for claims under subsection (3) like U.S. Bank's claim here.[7]

Numerous other Florida courts agree with this conclusion, that money judgments are authorized under the facts present here. In *Biel Reo*, the creditor brought proceedings supplementary and asserted claims under Fla. Stat. § 56.29(5) and (6). At that time, subsection (6)

was the equivalent of the present subsection (3). The First District explained that, when a claim is made under these sections, the courts "may 'enter any orders required to carry out the purpose of this section to subject property or property rights of any defendant to execution.' § 56.29(9), Fla. Stat. (2012)." *Biel Reo, LLC v. Barefoot Cottages Dev. Co., LLC*, 156 So. 3d 506, 508-09 (Fla. 1st DCA 2014) [39 Fla. L. Weekly D2584a].

The First District also noted the following: "Effective July 1, 2014, Section 56.29(9) was amended to expressly include what has long been the law in Florida, that "entry of any orders" includes "entry of money judgments against any impleaded defendants [.]" *Id*. at 509. Thus, the First District, in *Biel Reo*, made clear its view that, when a judgment creditor sues under the provision U.S. Bank relies on here—present section 56.29(3)—**the available relief includes the entry of a money judgment** against the impleaded defendant.

British American is also contrary to *Pollizzi v. Paulshock*, 52 So. 3d 786 (Fla. 5th DCA 2010) [36 Fla. L. Weekly D68a]. In *Pollizzi* a judgment creditor who held a judgment against a medical practice commenced proceedings supplementary and impleaded physician owners of the practice who had drained the operating account by making distributions to themselves. The judgment creditor asserted a fraudulent transfer cause of action. The Fifth District explained that in proceedings supplementary, "the court may enter any orders required to carry out the purpose of this section to subject property or property rights of any defendant to execution." The Fifth District stated:

> The Florida courts have consistently held that section 56.29 must be given a liberal construction in order to afford a judgment creditor the most complete relief possible. See *Mejia v. Ruiz*, 985 So.2d 1109 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1291a]; *Wieczoreck v. H & H Builders, Inc*., 450 So.2d 867 (Fla. 5th DCA 1984); *Neff v. Adler*, 416 So.2d 1240 (Fla. 4th DCA 1982).
>
> ***The trial court properly concluded that, under the facts of this case, such liberal construction enabled it to enter a money judgment against DAA's shareholders/corporate officers who were found to have improperly transferred monies from the corporation's accounts to themselves****. See Allied Industries Intern., Inc. v. AGFA-Gevaert, Inc*., 688 F. Supp. 1516 (S.D. Fla.1988) (holding that judgment creditor, in supplementary proceedings, was entitled to recover money judgment against impleaded judgment debtor's sole shareholder for shareholder's fraudulent transfer of corporate funds).

Pollizzi v. Paulshock, 52 So. 3d at 789 (emphasis added).

The Court, in fact, is not aware of any case where a Florida circuit court has held, as the *British American* court did, that the sole remedy for an inter-family or related party transfer to be a sheriff's levy on the specific property transferred. Of course, that restriction would severely restrict subsection (3)(a) claims and make that subsection essentially useless. Based on Defendants' view, a judgment creditor could utilize subsection (3) only if the impleaded transferee, at the time of entry of judgment, is still holding specific tangible property that can be seized by a sheriff. Such an interpretation would neuter subsection (3). The related party transferee could simply liquidate the tangible property or commingle funds and thereby immunize itself from judgment.

Florida courts simply have not construed section 56.29's related party fraudulent transfer provision to tie the court's hands in this manner. Rather, as indicated, they have construed the general grant of authority to award relief necessary to implement the purpose of the proceedings supplementary statute—now subsection (6) and formerly subsection (9)—to authorize the entry of money judgments on claims alleging related party or inter-family transfers. *See*, *e.g.*, *Fisherman's Wharf Realty Ltd. Partnership v. D & L Fitness, Inc*., 2004 WL 5452709 (Fla. Cir. Ct. Palm Beach Co. Feb. 26, 2004) (court had authority to enter money judgment against wife for amount of cash transferred, even though cash had been spent by wife; inequitable to allow wife "to escape liability for her intentional receipt of executable assets by depleting them during litigation delay caused in part by her concealment of the transfers."); *Casa Del Sol of Tequesta, LLC v. J. Helm Const.*, 2013 WL 5968044, at *7 (Fla. Cir. Ct. Palm Beach Co. Jan. 14, 2013) (claim under section 56.29(6)—predecessor version of 56.29(3)—where the court entered a money judgment against impleaded party Kim Helm, the owner of the judgment debtor, Helm Construction, for fraudulent transfers made by Helm Construction).

In an unpublished order, another judge of this court construed the exact provision U.S. Bank sues under here (then numbered as subsection (6) and now as (3)) to authorize the entry of a money judgment against a related party transferee. *See Interamerican Asset Mgmt. Ltd. v. Conticorp S.A*., Case No. 15-7313-CA-05 (Final Judgment), *aff'd per curiam sub nom.*, *I Drive Invs., LLC v. Interamerican Asset Mgmt. Fund Ltd*., 257 So. 3d 997 (Fla. 3d DCA 2018). The court stated: "Having found that the Impleaded Defendants are liable for the Challenged Transfers, the Court must fashion an appropriate remedy. Pursuant to Section 56.29(9) [predecessor of § 56.29(6)], the Court is empowered to enter an order awarding IAMF the cash equivalent of the membership interests in I Drive held by judgment debtor Luis Ortega. . . . For the reasons that follow, the Court finds the amount in question to be $4,292,500.00." Notably, in *Interamerican*, the court determined that the four-year statute of limitations set forth in the Uniform Fraudulent Transfer Act did not apply to the judgment creditor's fraudulent transfer claims under section 56.29(6)(a) (presently 56.29(3)(a)) against related party transferees. The court cited *Biel Reo*, *supra*, for this proposition. This Court has previously reached the same conclusion with regard to U.S. Bank's subsection 56.29(3)(a) claim.

Thus, U.S. Bank's position that this Court can enter a money judgment against the Rosenberg Trust on the claim asserted by U.S. Bank here is supported by Florida appellate court decisions, a recent decision of the United States District Court for the Middle District of Florida and Florida circuit court decisions.

The recent *Uoweit* decision out of the Fourth DCA does not change this result. Contrary to Defendants' suggestion, the Fourth DCA in *Uoweit* did not hold that a judgment creditor was not entitled, pursuant to Fla. Stat. § 56.29(6), to the entry of a money judgment against an impleaded party based on a claim under Fla. Stat. § 56.29(3)(b). *See generally Uoweit*, 300 So. 3d 1201. Instead, the Fourth DCA in *Uoweit* merely held what this Court has itself already held—that a Chapter 726 claim brought by a judgment creditor under subsection (9) of Fla. Stat. § 56.29 is subject to Chapter 726's statute of repose. *Id.* at 1205 ("[C]hapter 726 governs the timeliness of **a UFTA claim brought under section 56.29(9)**. The circuit court therefore correctly applied chapter 726 and the limitation period found in that chapter when it dismissed the creditor's claims.") (emphasis added). However, this holding in *Uoweit* has no applicability to U.S. Bank's subsection (3)(b) claim against Defendants (as it is not a Chapter 726 claim brought under subsection (9)).

That said, the Court rejects Defendants' argument that U.S. Bank is not entitled to a money judgment against the Trust under Fla. Stat. § 56.29(3) and (6). These two subsections of Fla. Stat. § 56.29 clearly and unambiguously provide the Court with authority to enter a money judgment against the Trust.[8]

> Section 56.29(3)(b) expressly provides
>
> When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by the judgment debtor to delay, hinder, or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. . . . Any person aggrieved by the levy or Notice to Appear may proceed under ss. 56.16-56.20.

Section 56.29(6), in turn, expressly provides

> **The court may enter any** orders, **judgments**, or writs **required to carry out the purpose of this section [56.29]**, . . . ***including entry of money judgments as provided in ss. 56.16-56.19 against any person to whom a Notice to Appear has been directed and over whom the court obtained personal jurisdiction irrespective of whether such person has retained the property,*** subject to applicable principles of equity, and in accordance with chapters 76 and 77 and all applicable rules of civil procedure. Sections 56.16-56.20 apply to any order issued under this subsection. [Emphasis added.]

Finally, Section 56.19—which is referenced in both subsections (3) and (6) of Fla. Stat. § 56.29—expressly provides

> **Upon the verdict of the jury,** ***the court shall enter judgment*** **deciding the right of property**, ***and if the verdict is for the judgment creditor, awarding a recovery by the judgment creditor from the claimant*** and the claimant's sureties, ***of the value*** (as fixed by the officer, or as fixed by the jury if fixed by it) of such parts ***of the property as the jury may have found subject to execution that were delivered to the claimant,*** and awarding separately such damages as may be awarded under s. 56.18, and of all costs attending the presentation and trial of the claim. [Emphasis added.]

Here, U.S. Bank has prevailed on summary judgment on its claim against the Trust under Fla. Stat. § 56.29(3)(b) and the Court has held that the 2013 Rosenberg Judgment transferred by Rosenberg to the Trust is subject to execution. Under Fla. Stat. § 56.29(6) then, the Court has the authority—in order to carry out the purpose of Section 56.29 (which includes subsection (3)(b))—to enter a money judgment against the Trust, even though the Trust may not have retained the fraudulently transferred property. And, pursuant to Fla. Stat. § 56.29(3) and (6) (as well as Fla. Stat. § 56.19), that money judgment shall be for the value of the fraudulently transferred property, which the Court has already held is $6,195,289.76 (plus pre-judgment interest).

3. <u>The 2013 Rosenberg Judgment Is Not An Exempt Asset Immune From Execution</u>

Defendants also argue in opposition to U.S. Bank's Motion that the 2013 Rosenberg Judgment is allegedly exempt from execution under federal bankruptcy policy. This is an argument that Defendants have raised before, and the Court once again rejects it.

The enforcement of foreign judgments is not a matter of mere grace. *Archbold Health Servs., Inc. v. Future Tech Bus. Sys., Inc.*, 659 So.2d 1204, 1205-06 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1884b]. Instead, it springs from the full faith and credit clause, Article IV, section 1, United States Constitution, and its implementing statute, 28 U.S.C., section 1738, which require every state to give the same effect to judicial proceedings as the rendering state gives them. *Id.*

In Florida, the Florida Enforcement of Foreign Judgments Act, Fla. Stat. § 55.501 *et seq.* (the "FEFJA") satisfies this requirement by providing a procedure for the holder of a foreign judgment to record the judgment and enforce it in Florida courts under Florida rules as if it were a Florida judgment. *See Pratt v. Equity Bank, N.A.*, 124 So. 3d 313, 315-16 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D2075a]; *see also* Fla. Stat. § 55.503 (providing that a foreign judgment may be recorded in the office of the clerk of the circuit court of any county, and, once so recorded, the judgment may be enforced as a judgment of a circuit court of this state); *and Fazzini v. Davis,* 98 So.3d 98, 102 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D1659a] ("When a foreign judgment is domesticated, it becomes enforceable as a Florida judgment.").

Here, U.S. Bank has domesticated the U.S. Bank Judgments pursuant to the FEFJA and obtained an order authorizing execution. The Judgments are therefore now enforceable as Florida judgments in the courts of this state, including this Court. As such, U.S. Bank is entitled to enforce the Judgments pursuant to Florida law. And, under Florida law, judgment creditors holding unsatisfied judgments are entitled to use statutory proceedings supplementary to assist them in collecting on those judgments, including Fla. Stat. § 56.29.

Section 56.29 states that the judgment creditor may pursue execution of "any property" of the judgment debtor that is not "exempt from execution." Thus, Section 56.29(2) provides that the judgment creditor, in a motion or affidavit shall "describe **any property of the judgment debtor not exempt from execution** in the hands of any person or any property, debt, or other obligation due to the judgment debtor which may be applied toward the satisfaction of the judgment." (Emphasis added). Similarly, Section 56.29(3)(b) provides: "When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by the judgment debtor to delay, hinder, or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. ***This does not authorize seizure of property exempted from levy and sale under execution*** . . ." (Emphasis added).

The foregoing statutory language makes it clear that U.S. Bank has the right to execute on **any** property of Rosenberg that is not exempt from execution. That said, "Exemptions are creatures of statute, unknown to the common law . . . . They rest on constitutional or statutory provisions and cannot be created by contract. Thus, assets are generally not exempt from claims of creditors unless specifically exempted by statute; in the absence of a statutory exemption provision, all of a debtor's property must be subject to the payment of debts." 35 C.J.S. *Exemptions* § 1.

In Florida, the Florida Constitution, at Article X, Section 4, establishes a constitutional exemption from execution for a person's homestead and personal property up to a value of $1,000. The Florida legislature, in turn, has enacted other specific, clearly defined statutory exemptions, which include, among other things, a judgment debtor's life insurance policies, the cash surrender values of life insurance policies and the proceeds of annuity contracts, disability income benefits under any policy or contract of life, health, accident, or other insurance, pension money and certain tax-exempt funds or accounts, and a judgment debtor's interest, not to exceed $1,000 in value, in a single motor vehicle. See Fla. Stat. §§ 222.01 *et seq*.

There is, however, no federal or Florida Constitutional or statutory exemption from execution for claims brought under, or judgments issued pursuant to, 11 U.S.C. § 303(i) (or the proceeds resulting therefrom).[9] And the Court does not believe it is free to fashion new judicially-created exemptions based on purported bankruptcy policy considerations, when, as here, the Florida legislature has expressly stated in a statute that "**any property**" not exempt may be subject to execution and has also proscribed the specific types of property that are exempt from execution, without including an allowance for judicially-created exemptions based upon any public policy and/or bankruptcy policy considerations that might be identified by some courts. The Florida legislature has specifically identified what property may be executed upon and what property is exempt, and it is not the Court's prerogative to modify, extend, limit or alter the applicable statutes. That is a matter of public policy for the Florida legislature to determine, and the Court does not believe it has the discretion to exempt any additional types of property not specifically exempted from execution by the Florida legislature, the U.S. Congress and/or the federal bankruptcy code, including the 2013 Rosenberg Judgment. *See McDonald v. Roland*, 65 So. 2d 12, 14 (Fla. 1953) ("Where the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify it or shade it,

out of any consideration of policy or regard for untoward consequences."); *and Baldwin v. Henriquez*, 279 So. 3d 328, 336 (Fla. 2d DCA 2019) [44 Fla. L. Weekly D2311a] (discussing the constitutional homestead exemption) ("Finally, where we can discern the constitutional provision's plain, ordinary, and unambiguous meaning, we cannot modify the will of the people in their passage of the constitutional provision based on policy considerations."). *See also Bankston v. Brennan*, 507 So.2d 1385, 1387 (Fla. 1987) ("[W]hen the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch.").

The Court recognizes that Rosenberg successfully defended against U.S. Bank's Setoff Motion previously filed in the 2012 Pennsylvania Action by persuading the Pennsylvania district court to accept Rosenberg's argument that U.S. Bank was precluded from setting off its judgments against his 303(i) judgment as a matter of federal bankruptcy policy. However, the Third Circuit, in affirming the order denying U.S. Bank's Setoff Motion, did not hold that there was a hard and fast bankruptcy rule that a 303(i) claim and its proceeds were exempt from execution. *See U.S. Bank, N.A. v. Rosenberg*, 741 Fed. Appx. 887, 889-890 (3d Cir. 2018). Instead, the Third Circuit simply held that setoff was an equitable right to be permitted solely within the sound discretion of the court, and that the Pennsylvania district court had not abused her discretion by denying U.S. Bank the equitable remedy of setoff. *Id.*

Here, unlike in the context of a setoff motion, the Court does not find that it has the equitable discretion to deny U.S. Bank's right to execute on the 2013 Rosenberg Judgment under Fla. Stat. § 56.29. Instead, Fla. Stat. § 56.29's provisions with regard to U.S. Bank's right to execute on the 2013 Rosenberg Judgment are mandatory, as demonstrated below:

> Fla. Stat. § 56.29
>
> (1) When any judgment creditor holds an unsatisfied judgment or judgment lien obtained under chapter 55, the judgment creditor may file a motion and an affidavit so stating, identifying, if applicable, the issuing court, the case number, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, **and thereupon the judgment creditor *is entitled to these proceedings supplementary to execution***.
>
> . . .
>
> (3)(b) When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by the judgment debtor to delay, hinder, or defraud creditors, **the court *shall* order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution**. This does not authorize seizure of property exempted from levy and sale under execution . . .

Further, even if the Court had the discretion to deny U.S. Bank's right to execute on the 2013 Rosenberg Judgment under Fla. Stat. § 56.29 on the purported bankruptcy policy grounds advanced by Defendants, the Court sees no reason why it should not permit U.S. Bank to execute on the 2013 Rosenberg Judgment. The 2013 Rosenberg Judgment is no different than the U.S. Bank Judgments, as they are all merely money judgments. The Court sees no reason why one judgment is different from another merely because of the nature of the underlying claim that led to the judgment.[10] As the United States Supreme Court has held, setoff is the well-established common-law "right of one party to use his claim in full or partial satisfaction of what he owes to the other"—a principle "grounded on the absurdity of making A pay B when B owes A." *Studley v. Boylston Nat'l Bank of Boston*, 229 U.S. 523, 528 (1913); *accord Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995).

Finally, the Court notes that, if it were not to permit U.S. Bank to execute on Rosenberg's only asset, the 2013 Rosenberg Judgment, for the purported bankruptcy policy grounds advanced by Defendants, it would, in essence, be giving Rosenberg a double recovery, to wit: Rosenberg received payment in full on his judgment and U.S. Bank is then prohibited from recovering any money on its judgment. This outcome requested by Defendant is neither equitable nor is it provided for under Florida law.

It is therefore ORDERED AND ADJUDGED as follows:

1. Plaintiff U.S. Bank's Motion for Summary Final Judgment is hereby GRANTED.

2. Summary judgment is hereby entered in favor of U.S. Bank and against Defendants on all of the remaining affirmative defenses asserted by Defendants: Affirmative Defenses Nos. 1-6, 8, 10, 12-22, and 26.

3. Pursuant to Fla. Stat. § 56.29(3)(b) and (6), Summary Final Judgment is hereby entered in favor of Plaintiff U.S. BANK NATIONAL ASSOCIATION and against Impleader Defendant SARA ROSENBERG, AS TRUSTEE OF THE DOUGLAS ROSENBERG 2004 TRUST *nunc pro tunc* to March 16, 2021 (the date of the original Summary Judgment entered by this Court) in the total amount of **$7,193,589.99** representing $6,195,289.76 paid on the 2013 Judgment fraudulently transferred, plus $998,300.23 in prejudgment interest at the Florida statutory interest rate from August 6, 2018 through March 16, 2021, for which total amount of **$7,193,589.99, for which let execution issue.** In addition, said total amount due shall bear interest from March 17, 2021 forward at the prevailing legal rate of interest, which rate is 4.81% per annum, but which will be adjusted in accordance with any statutory changes in the rate in accordance with Florida statutory law, from the date hereof until paid.

4. In view of the entry of summary judgment on Count 11 of U.S. Bank's Complaint, Counts 1, 10 and 12 of U.S. Bank's Complaint are hereby dismissed as moot.

5. The last known addresses of the parties are as follows:

Plaintiff U.S. Bank National Association:
800 Nicollet Mall Minneapolis, Minnesota 55402
Attn: Legal Department
and
Jack McElroy, Esquire John Bustard, Esquire
c/o Shutts & Bowen LLP 200 South Biscayne Boulevard, Suite 4100, Miami, Florida 33131

Defendant Maury Rosenberg:
1425 Brickell Avenue Suite No. 57E Miami, Florida 33131
and
Barry Blum, Esquire
c/o Genovese Joblove & Battista, P.A. 100 Southeast Second Street 44th Floor, Miami, Florida 33131

Impleader Defendant The Douglas Rosenberg 2004 Trust:
c/o Sara Rosenberg, Trustee 1425 Brickell Avenue Suite No. 57E Miami, Florida 33131
and
Barry Blum, Esquire
c/o Genovese Joblove & Battista, P.A. 100 Southeast Second Street 44th Floor, Miami, Florida 33131

6. It is further ordered and adjudged that the judgment debtor, Impleader Defendant SARA ROSENBERG, AS TRUSTEE OF THE DOUGLAS ROSENBERG 2004 TRUST, shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, John W. Bustard, Esq., within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed.

7. The Court hereby reserves jurisdiction to enter further Orders as

are appropriate, including, without limitation, (i) to determine the issue of Plaintiff's entitlement to recover its reasonable attorney's fees and costs from Defendant and Impleader Defendant and/or the amount of same; and/or (ii) to compel the judgment debtor, Impleader Defendant SARA ROSENBERG, AS TRUSTEE OF THE DOUGLAS ROSENBERG 2004 TRUST, to complete form 1.977, including all required attachments, and serve in on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney.

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[1]The parties have previously agreed in this case that U.S. Bank's Supplemental Complaint filed in these proceedings supplementary constitutes a Notice to Appear "on steroids" and that therefore the Trust is deemed to be subject to a Notice to Appear with respect to U.S. Bank's claim brought under Fla. Stat. §§ 56.29(3) and (6).

[2]*See also In re: Cole*, 2020 WL 7233190, **2-5 (M.D. Fla. Dec. 8, 2020) (where the bankruptcy court granted the bankruptcy trustee's motion for summary judgment on its intentional fraud claim against the debtor who had transferred nearly $4 million to joint accounts held by the debtor and his wife as tenants by the entireties for no consideration shortly after receiving a notice of default on a $12 million personal guaranty; "To conclude, the Court in this unusual case can conclude as a matter of law and on undisputed facts that [the debtor] transferred the $4 million . . . actually intending to hinder, delay, and defraud his creditors . . .").

[3]When considering fraudulent transfer claims made under Fla. Stat. § 56.29, it is well-established that courts may look to the elements of fraudulent transfer claims under Chapter 726, Florida Statutes. *See Mejia v. Ruiz*, 985 So. 2d 1109, 1112-13 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1291a]. That said, the "badges of fraud," as set forth in Fla. Stat. § 726.105(2), include: (1) whether the transfer was to an insider; (2) whether the debtor retained possession or control of the property transferred after the transfer; (3) whether, before the transfer was made, the debtor had been sued (or threatened with suit); (4) whether the transfer was of substantially all of the debtor's assets; (5) whether the value of the consideration received by the debtor, if any, was reasonably equivalent to the value of the asset transferred; and (6) whether the debtor was insolvent or became insolvent shortly after the transfer was made.

[4]The debtor's assets for purposes of determining the debtor's solvency in fraudulent transfer cases do not include the property at issue that has been transferred by the debtor with intent to hinder, delay or defraud creditors. *See* Fla. Stat. § 726.103(4).

[5]Fla. Stat. § 726.102(8) defines an "insider" as a relative.

[6]Defendants cite to two declarations signed by Rosenberg in 2020 and a document entitled "Acknowledgment of Termination of Security Agreements and Liens" signed by Rosenberg's wife, Sara, in August 2013 ("Sara's Statement") to support their story that Rosenberg received "substantial consideration" for the March 2013 Transfer in January 2010. However, these documents, in which Defendants try to introduce evidence of Sterling Bank's out-of-court statements allegedly made to Rosenberg in January 2010, constitute inadmissible hearsay as they are being introduced to prove the out-of-court statements of a third party to this action, Sterling Bank. *See* Fla. Stat. §§ 90.801 and 90.802. Defendants have also not properly introduced Sara's Statement and the settlement agreement with Sterling Bank to which it is attached as business records, and have made no argument that any exception to the hearsay rule applies to the documents or Sterling's out-of-court statements upon which Defendants' claim that Rosenberg received "reasonably equivalent value" for the transfer at issue is based. That said, under Florida law, a trial court cannot consider inadmissible evidence in determining the disposition of a motion for summary judgment. *Rose v. ADT Security Serv.*, Inc., 989 So. 2d 1244, 1249 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D2162b] (affirming entry of summary judgment after holding that the nonmovant's evidence in opposition to the motion for summary judgment was inadmissible hearsay); *see also Arce v. Wackenhut Corp.*, 40 So. 3d 813, 815-816 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D1471b] (same). In addition, the Court also cannot consider Rosenberg's two unnotarized declarations because they do not constitute proper "summary judgment evidence"; rather, "summary judgment evidence" is limited to "affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence". *See* Fla. R. Civ. P. 1.510(c). And even if the Court were to consider Rosenberg's hearsay statements in the unnotarized declarations, it would not change the result. No genuine issue of material fact exists as to Rosenberg's fraudulent intent.

[7]Moreover, a claim under subsection (3) is, in practical effect, a claim to return property of the judgment debtor. The avoidance of a fraudulent transfer presumes that the transferee is not the rightful owner of the property, having obtained the property fraudulently. It makes no sense to interpret the statute to allow courts to grant a money judgment against a transferee holding property still titled in the debtor's name, but not to permit money judgments to be entered against transferees who received the debtor's property as part of a fraudulent transfer. In fact, the need for an available money judgment remedy is greater in the latter situation. When a third party is still holding property owned by the debtor, the remedy of a levy would seem more than adequate.

[8]And even if Fla. Stat. § 56.29(3)(b) and (6) were not as clear and unambiguous as the Court believes them to be on this issue, the Florida Supreme Court has nevertheless held that Florida's proceedings supplementary statute "should be given a liberal construction so as to afford to the judgment creditor the most complete relief possible." *See Richard v. McNair*, 121 Fla. 733, 742-43, 164 So. 836, 840 (1935); *see also Gen. Guaranty Ins. Co. of Fla. v. DaCosta*, 190 So. 2d 211, 213 (Fla. 3d DCA 1966) (same) (*citing, among others, Ryan's Furniture Exchange v. McNair*, 162 So. 483 (1935)); *and Neff v. Adler*, 416 So. 2d 1240, 1242 (Fla. 4th DCA 1982) (same) (*quoting Richard v. McNair*) (superseded by statute on other grounds). Here, a liberal construction of Fla. Stat. § 56.29(3)(b) and (6) would certainly lead to the conclusion that the Court has the authority to enter a money judgment against the Trust pursuant to these subsections.

[9]In addition, Chapter 222, Florida Statutes, does not provide, more generally, that the Court may recognize exemptions based on court-created public policy reasons, including any bankruptcy law public policy(ies) that some bankruptcy courts have identified and applied in pending bankruptcy cases before them. Moreover, this is not a bankruptcy case, and neither of the Defendants is in bankruptcy.

[10]The Court recognizes that Defendants have cited to a number of decisions where other courts have also exercised their discretion to deny a judgment creditor's setoff motions against 303(i) judgments (most involving attorney's fees awards) based on their belief that a bankruptcy policy against setoff exists with respect to 303(i) claims and judgments. The Court respectfully disagrees with these other courts too (as well as with the recent *NMI* decision cited by Defendants where the bankruptcy court simply denied U.S. Bank's motion to dismiss NMI's June 2020 bankruptcy petition without prejudice), and notes that other judges do not agree that any such bankruptcy policy exists. *See, e.g., In re Better Care, Ltd.*, 97 B.R. 405, 415 (Bankr. N.D. Ill. 1989) (where the bankruptcy court granted a setoff of a creditor's claim against a debtor's claim for damages under section 303(i); in reaching this decision, the bankruptcy court recognized that damages under section 303(i) are no different than any other award of damages when it comes to setoff and that, even when a petitioning creditor has acted in bad faith, the Bankruptcy Code does not eliminate the creditor's right to recover on a valid underlying claim).

* * *

Public records—Death of child due to abuse, abandonment or neglect—Where section 39.202(2)(o) provides that Department of Children and Families' records shall be released to any person in event of death of child determined to be result of abuse, abandonment or neglect, DCF did not have discretion to determine when to release records— DCF's failure to timely release records was unlawful delay under Florida Constitution and Public Records Law where DCF knew that child died of neglect and/or abuse very shortly after death and received valid public records requests shortly after death and again three months later, but DCF did not release records until after it formally closed its investigation over a year after death

THE McCLATCHY COMPANY, LLC, et al., Plaintiffs, v. FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-003289-CA-01, Section CA23. March 8, 2022. Barbara Areces, Judge. Counsel: Carol Jean LoCicero and Mark Caramanica, Tampa; and Dana J. McElroy, Fort Lauderdale, for Plaintiffs. John M. Jackson, Deputy General Counsel, and Andrew J. McGinley, Acting General Counsel, Florida Department of Children & Families, Tallahassee, for Defendant.

ORDER DENYING DCF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND FINAL JUDGMENT IN FAVOR OF PLAINTFFS ON THE FIRST AMENDED COMPLAINT

THIS CAUSE, having come before the Court at a hearing conducted on March 1, 2022, on the Florida Department of Children and Families' ("DCF") Motion for Partial Summary Judgment, filed on October 27, 2021, and a final evidentiary hearing in this matter, the Court, having reviewed the filings, records submitted by DCF *in camera*, and evidence submitted and filed by the parties, and heard testimony from witnesses and argument of counsel, it is hereby:

ORDERED and ADJUDGED as follows:

1. DCF's Motion for Partial Summary Judgment, filed October 27, 2021, is denied for the reasons stated on the record. Section 39.202(2)(o) of the Florida Statutes is the relevant statute, which provides that DCF records "shall" be released to "[a]ny person in the event of the death of a child determined to be a result of abuse, abandonment, or neglect." DCF argues that Section 39.202(2)(o) vests it with sole authority and discretion to determine when to release such records under this provision. In this regard, the Court finds that Section 39.202(2)(o) of the Florida Statutes cannot be read as urged by DCF. All facts and circumstances known about a child's cause of

death, regardless of their source, must be taken into account. So too must any actions taken by DCF or other governmental authorities in response to a child's death. Further, such determinations cannot be ignored, dismissed, or otherwise delayed when known facts, circumstances, and actions would reasonably indicate a child's death resulted from abuse, abandonment, or neglect. Relying on principles of statutory construction, as well as the undisputed facts, evidence, and testimony in the record, the Court finds that DCF's interpretation of the statute is contrary to the legislative history of Section 39.202(2)(o) and incorporates internal "determination" review processes that result in unlawful delays to the public's right of access to public records.

2. With respect to the ultimate issues in this case, the evidentiary filings, testimony, and *in camera* records conclusively establish that a determination sufficient to trigger release of DCF's records under Section 39.202(2)(o) was made concerning R.B. in November of 2020. Specifically, DCF itself clearly knew that R.B., the child whose records were sought by Plaintiffs pursuant to public records requests, died of neglect and/or abuse very shortly after his November 6, 2020, death. Among other things, on November 12, 2020, the agency filed a sworn dependency petition in the juvenile division of Miami-Dade Circuit Court stating that R.B. died after sustaining multiple injuries due to severe physical abuse and medical neglect while in the care and custody of his parents.

3. Despite valid public records requests in November 2020 and February 2021 by Plaintiffs, DCF did not begin to publicly release its files on R.B. until February 10, 2022, two days after the agency formally closed its investigation. Accordingly, DCF's failure to timely release its records concerning R.B., with appropriate statutory redactions, was an unlawful delay under Article I, Section 24 of the Florida Constitution and Chapter 119 of the Florida Statutes. Final judgment in favor of the Plaintiffs on their First Amended Complaint is hereby entered.

4. It is further **ORDERED** that, to the extent DCF has not released to Plaintiffs its entire file on R.B.—meaning all public records in its possession, custody, or control related to R.B.—as of the date of this Order and Final Judgment, DCF is ordered to do so within five (5) days, with appropriate statutory redactions.

5. The Court reserves jurisdiction to determine Plaintiffs' entitlement to, and amount of, taxable costs and attorneys' fees. It also reserves jurisdiction to determine, if necessary, whether DCF has produced all agency records related to R.B. and the lawfulness of any redactions applied to the public records disclosed by DCF in this action.

* * *

Creditors' rights—Proceedings supplementary—Jurisdiction—Non-residents—Minimum contacts—Proceeding to determine ownership of artwork located in Miami that is sought in partial satisfaction of foreign judgment where resolution of ownership issue determines ultimate question of whether interpleaded non-resident defendant that stores, maintains, and insures artwork should reasonably anticipate being haled into court in Florida where artwork is located—Judgment debtor has executable property interest in artwork where defendant is sham trust set up for sole purpose of shielding judgment debtor's assets from creditors; judgment debtor has always maintained complete control over artwork and defendant; defendant has no purpose except to assist judgment debtor in efforts to defraud, hinder and delay creditors; judgment debtor and defendant are alter-egos, and transfer of artwork to defendant was fraudulent—Defendant is subject to *in personam* jurisdiction of Florida court

BNP PARIBAS JERSEY TRUST CORPORATION LIMITED, a registered private company organized under the laws of the Bailiwick of Jersey, Judgment Creditor, v. EDOARDA CROCIANI, an individual, Judgment Debtor, UNITED TRUST (ANGUILLA) LIMITED, as trustee of Apollo Trust, and UNITED INTERNATIONAL TRUST, N.V., as the trustee of the Apollo Trust, Impleaded Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Complex Business Litigation Case No. 2018-5221 CA 01 (43). June 1, 2022. Michael A. Hanzman, Judge. Counsel: Michael A. Pineiro, Marcus Neiman Rashbaum & Pineiro LLP, Miami, for Plaintiff (Judgement Creditor). John M. Rubens, Kluger, Kaplan, Silverman, Katzen & Levine, Miami, for Defendant (Judgment Debtor).

ORDER

I. INTRODUCTION

In *Apollo Tr. v. BNP Paribas Jersey Tr. Corp. Ltd.,* No. 3D20-180, 2022 WL 302550 (Fla. 3d DCA Feb. 2, 2022) [47 Fla. L. Weekly D326a], our appellate court directed this Court to conduct an evidentiary hearing for purposes of determining whether Defendant, Edoarda Crociani ("Crociani"), has an "executable interest" in certain paintings now stored at Museo-Vault in Miami, and claimed to be owned by Defendant Apollo Trust ("Apollo" or "Trust"). If Crociani in fact has an "executable interest" in the paintings, the Third District held that "Apollo and its trustees, who undisputedly store, maintain and insure the artwork in Miami, could reasonably anticipate being haled into a Florida court where the assets are located." *Id.* Put simply, the "resolution of this inquiry" will determine whether Apollo is subject to the Court's jurisdiction.[1]

Pursuant to our appellate court's mandate, this Court has now conducted the evidentiary hearing and finds, with no difficulty, that Crociani has an "executable interest" in these assets because she owns them, and always has. She owns the paintings because: (a) Apollo is a sham "trust" Crociani set up for the sole purpose of shielding her assets from creditors; (b) she has always maintained complete control over Apollo and the paintings, the only "assets" ever placed in the Trust; (c) the Trust has no purpose other than to assist Crociani in her efforts to defraud, hinder, and delay her creditors; (d) Crociani and the Trust are "alter egos" in every sense, as Apollo is nothing other than a "mere instrumentally" of Crociani, conceived and employed for the sole purpose of defrauding Crociani's creditors, *see, Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So. 2d 1114 (Fla. 1984); and (e) the transfer of Crociani's paintings into the Trust was fraudulent. Fla. Stat. § 726.105(1)(a). Indeed, virtually every statutory "badge of fraud" confirms that this "transfer" was a complete farce.

II. FACTS

As the Third District noted, this litigation "involves family disputes, trusts, art collections, allegations of hidden assets, and domestication of a judgment and freeze order from the Island of Jersey." *Apollo Tr.,* 2022 WL 302550, at *1. For present purposes it is not necessary to take a deep dive into the underlying facts, as they are set forth in the *Apollo Trust* opinion. Suffice it to say, Plaintiff, BNP Paribas Jersey Trust Corporation ("BNP"), and Crociani served as co-trustees of the Grand Trust, a trust set up for the benefit of Crociani's daughters. At or about 2010/2011, BNP and Crociani decided to transfer the investment portfolio held by the Grand Trust into another family trust—the Fortune Trust. Because one or more of Crociani's daughters, who were the beneficiaries of the Grand Trust, did not consent to this transfer, Crociani agreed to indemnify BNP against any liability that might arise as a result of its having served as a co-trustee and having agreed to this transaction.

One of Crociani's daughters then sued both BNP and Crociani for breach of trust. BNP, in turn, filed a cross-claim seeking indemnification from Crociani, and secured a pre-judgment worldwide asset freeze from the Royal Court of Jersey which restricted Crociani from: (1) removing assets from the Island of Jersey held by her or others which she has direct or indirect control; and (2) disposing or diminishing the value of any assets held by her or over which she has direct or indirect control, up to the value of $194 million.

The Jersey court eventually entered judgment against Crociani and BNP and ordered that they reconstitute the Trust or provide it with

equitable compensation for the current value of the assets removed. Crociani and BNP were ordered to make an initial payment of $100,347,046.00. The Jersey court also found that Crociani was obligated to indemnify BNP for the full amount of its liability to the Grand Trust, as well as any other loss sustained. Crociani has not satisfied any portion of the judgments against her, and BNP has initiated two proceedings in this Court in an effort to collect from her the substantial amounts it has paid to satisfy the Jersey decree.[2]

Sometime in 2015, while the litigation was pending in the Royal Court of Jersey, and after BNP had asserted its right to indemnification, Crociani set up the "Apollo Trust" and eventually transferred into it seven (7) extremely valuable paintings.[3] She then moved these paintings from Singapore to Switzerland, from Switzerland to Luxembourg and from Luxembourg to Miami, where they are now stored.[4] Apollo has, and never has had, any other assets. Crociani, therefore, has paid all of its expenses. She also has exercised complete control over the Trust from its inception. And while she claims the Trust was set up for "estate planning," no evidence suggests, let alone demonstrates, that Apollo served any "estate" planning purpose, other than to keep assets away from Crociani's creditors so they may be passed on to her heirs, undoubtedly a form of "estate planning" in its broadest sense.

III. ANALYSIS

Because the transfer of the paintings occurred "within (1) year before" Crociani was served with process in an action brought against her, and she and Apollo were at the time on "confidential terms," the transaction is presumed to have been done to delay, hinder or defraud her creditors. Fla. Stat. § 56.29(3). The burden was therefore placed on Crociani to prove otherwise.[5] She has not come close to meeting that burden. To the contrary, virtually every statutory badge of fraud confirms the fraudulent nature of these transfers, *Gorrin v. Poker Run Acquisitions, Inc.,* 237 So. 3d 1149 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D265a], as:

1. The transfer was to an "insider" (Fla. Stat. § 726.105(2)(a));

2. Before the transfer Crociani had been sued by her daughter for tens of millions of dollars—and was facing an indemnification claim from BNP (Fla. Stat. § 726.105(2)(d));

3. Crociani received no "consideration" for the transfer (Fla. Stat. § 726.105(2)(h));

4. There was no "legitimate" purpose for the transfer (i.e., tax savings, etc.) (Fla. Stat. § 726.105(2)(f));

5. Crociani maintained "control" over the transferred assets (Fla. Stat. § 726.105(2)(g));[6]

6. Crociani removed and concealed the paintings (transporting them from Singapore to Switzerland, from Switzerland to Luxembourg, and ultimately from Luxembourg to Miami, for no purpose other than to keep them out of the reach of creditors) (Fla. Stat. § 726.105(2)(a)); and

7. The transfer occurred shortly before a substantial Judgment was entered against Crociani (Fla. Stat. § 726.105(2)(j)).[7]

IV. CONCLUSION

In *Apollo Trust* the Third District rhetorically asked, "Who is Apollo?" The answer is "Crociani," and vice-versa. *Apollo* is nothing more than a "paper" trust set up to take title to Crociani's assets and place them beyond the "easy" reach of her creditors. And the paintings Apollo purports to "own" were fraudulently transferred into this sham "trust" for one purpose—and one purpose only—to delay, hinder and defraud Crociani's creditors, including BNP. In fact, the evidence in this case is so lopsided that no reasonable factfinder could conclude otherwise. *See, e.g., Amjad Munim, MD., P.A. v. Azar,* 648 So. 2d 145, 153 (Fla. 4th DCA 1994) (affirming summary judgment in a fraudulent transfer case where "uncontradicted facts . . . point to only one logical conclusion"). As a result, the paintings stored in Museo-Vault are property of BNP's debtor, Crociani, who has an "executable interest" in them. Apollo is therefore subject to *in personam* jurisdiction in this forum, as it "could reasonably anticipate being haled into a Florida court where [these] assets are located." *Apollo Trust,* 2022 WL 302550, at *5.

For the foregoing reasons this Court, like its predecessor, denies Apollo's Motion to Dismiss for lack of *in personam* jurisdiction.

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[1]Obviously, this is a case where the issue of personal jurisdiction is intertwined with the merits, as the question of whether Crociani has an "executable interest" in the paintings turns on whether Apollo is Crociani's alter-ego and/or whether the paintings were fraudulently transferred by Crociani to the Trust in order to avoid claims of creditors—questions the answers to which will also inform the "merits" of the case.

[2]This case is a Proceeding Supplementary brought pursuant to Florida Statute § 56.29. In a related action, styled *BNP Paribas Jersey Trust Corp. Ltd. v. Edoarda Crociani, et al.,* Case No. 2020-8711 CA 01, BNP asks the Court to afford "comity" to the Jersey court's freeze order, which BNP says attaches to all the paintings held at Museo-Vault.

[3]The Parties' dispute when the Apollo Trust was legally formed, and when the paintings were legally transferred into the Trust. BNP says the Trust was formed, and the paintings legally transferred, sometime in December 2015. Apollo insists the Trust was formed, and the paintings transferred, in July 2015. It makes no difference because before either of these dates: (a) Crociani had been sued by her daughter for breach of trust; (b) Crociani knew she had an obligation to indemnify her co-defendant BNP; and (c) in May 2015, BNP advised Crociani that it would be seeking indemnity. Thus, regardless of whether Apollo was formed and the transfer took place in July 2015, December 2015, or anytime in between, at the time Apollo was formed, and the paintings were transferred into it, Crociani was facing substantial exposure to the Grand Trust and BNP.

[4]Thereby imposing on the Miami-Dade judiciary, and taxpayers of Florida, the burden of administrating and shouldering the expense of this litigation, despite the fact that the Parties' dispute has absolutely no relation to this forum.

[5]This burden-shifting concept is expressly set forth in Florida Statute §56.29(3) and well established under Florida law. *See, e.g., Nally v. Olsson,* 134 So. 2d 265, 267 (Fla. 2d DCA 1961) ("[o]rdinarily a party that alleges fraud must prove it and in setting aside a fraudulent conveyance, the burden of proof rests on the complainant, the presumption being against the existence of fraud. *Tischler v. Robinson,* 1920, 79 Fla. 638, 84 So. 914. *However, where the parties involved in the alleged fraudulent transaction are relatives or close associates of the transferor, such close relationship tends to estabish [sic] a prima facie case which must be met by evidence on the part of the defendant, and transactions are regarded with suspicion*"). The Court notes, however, that the shifting of the burden here was meaningless, as BNP affirmatively proved that Crociani and the Trust are alter-egos, and that the paintings were fraudulently transferred from Crociani to Apollo.

[6]Though "exclusive" control is not required, *In re Bifani,* 580 Fed. Appx. 740,746 (11th Cir. 2014), it was demonstrated here. Crociani kept "possession" of the paintings as a so-called "agent" of the Trust; she directed where the paintings would be stored—sending them on a world-wide tour for no purpose other than to place them beyond the reach of creditors; she paid all the expenses of maintaining the works (storage, insurance, etc.); she decided whether the paintings would be insured and for how much; she hired and directed counsel in this litigation; she has paid all of Apollo's expenses; and she has made—and continues to make—all decisions for the "Trust" since its inception. As if that were not enough, in response to the Court's pointed inquiry, Gregory Elias, the principal of the entity serving as Apollo's supposed "Trustee," candidly acknowledged that Crociani has "controlled" the Trust since its inception and continues to control it to date.

[7]While these "badges of fraud" are itemized in Chapter 726, they have their origin in case law long pre-dating the statute. *Florida Nat. Bank of Gainesville v. Sherouse,* 86 So. 279, 280 (Fla. 1920) ("[t]here are a multitude of circumstances in this case, which, to say the least, are calculated to create suspicion, and many of which are recognized badges of fraud. . ."); *Mejia v. Ruiz,* 985 So. 2d 1109, 1113 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D1291a] ("because of the difficulty of proving actual intent to defraud creditors, section 726.105(2) provides that fraudulent intent may be presumed from evidence of 'badges of fraud' "). Furthermore, a court is not required to find the presence of all the badges of fraud to infer fraudulent intent. A few will do. *Mejia, supra* ("[w]hile a single badge of fraud may amount only to a suspicious circumstance, a combination of badges will justify a finding of fraud"); *Gen. Trading Inc. v. Yale Materials Handling Corp.,* 119 F.3d 1485 (11th Cir. 1997) (explaining that, while a single badge of fraud might not suffice, several of them, considered together, may afford a basis to infer fraudulent intent); *McGinley Partners, LLC v. Royalty Properties, LLC,* 185 N.E.3d 722 (Ill. App. Ct. 2021) (noting that the UFTA does not require a court "to consider all 11 factors," and holding that trial court correctly presumed fraud based on five factors).

* * *

Civil procedure—Discovery—Depositions—Expert witness fee—Amount

BRENDA WATTY, Plaintiff, v. WHOLE FOODS MARKET GROUP, INC., Defendant. Circuit Court, 12th Judicial Circuit in and for Sarasota County. Case No. 2021CA002836. May 24, 2022. Andrea McHugh, Judge. Counsel: Joel Williams, for Plaintiff. Victoria N. Godwin-Reese, for Defendant. Mark A. Goldstein, Miami, for Non-Party Myles Samotin, M.D.

ORDER DETERMINING REASONABLE DEPOSITION FEE FOR EXPERT WITNESS DR. MYLES SAMOTIN

THIS CAUSE, having come before this Court on Defendant's Motion for Court to Determine Reasonable Deposition Fee for Expert Witness Dr. Myles Samotin, and the Court being advised of the parties' position and having heard from Plaintiff's counsel, Defense counsel, and Counsel for Dr. Samotin, and being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED as follows:

1. Defendant's Motion is **GRANTED.**

2. Defendant shall prepay $2,000 an hour, with a 2-hour minimum to Dr. Samotin for his deposition.

3. Dr. Samotin shall provide an invoice to the Defendant to this effect and shall provide several dates when he is available to be deposed in this action.

4. Should the invoice from the doctor include time for preparation for his deposition, including but not limited to review of file materials, that time will be paid by the Plaintiff, at the same $2,000/hr. rate.

* * *

Torts—Personal injury—Automobile accident—Damages—Past medical expenses—Plaintiff who has been Medicare beneficiary at all material times can only introduce evidence of past medical expenses in amount paid by Medicare to medical providers—Further, in regard to medical providers who did not opt out of Medicare and did not submit bills for past medical expenses to Medicare, plaintiff is precluded from introducing evidence as to original charges beyond Medicare rates for services provided—No merit to argument that presence of defendant's liability insurer as potential primary payer allows plaintiff who is Medicare beneficiary to recover past medical expenses in excess of Medicare rates

CHRISTA HUMPHRIES, Plaintiff, v. LARRY ZUCCARI, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Civil Division AF. Case No. 2020CA001543AXX. May 23, 2022. John S. Kastrenakes, Judge. Counsel: Jonathan M. Cox, Keller, Keller & Caracuzzo, P.A., West Palm Beach, for Plaintiff. Thomas A. Berger, Boyd & Jenerette, P.A., Boca Raton, for Defendant.

ORDER ON DEFENDANT'S MOTION *IN LIMINE* ON PLAINTIFF'S PAST MEDICAL EXPENSES

THIS CAUSE came before the Court on March 7, 2022 upon Defendant's Motion *in Limine* on Plaintiff's Past Medical Expenses ("Motion"), and the Court, having reviewed the Motion, the Plaintiff's Response in Opposition, having reviewed the court file and record, having heard argument of counsel, being familiar with the applicable law, and after being otherwise duly advised in the premises, finds as follows:

A. Factual Findings.

1. This is a personal injury action arising out of a December 7, 2018 auto accident.

2. Plaintiff seeks, among other damages, recovery of past medical expenses.

3. Plaintiff is enrolled in Medicare and was so enrolled at the time of the accident.

4. The following medical providers provided treatment to Plaintiff, submitted Plaintiff's bills to Medicare, and were paid by Medicare: (a) Jupiter Pain; (b) Resolute Pain; (c) Jupiter Outpatient; (d) MD Now; (e) Palm Beach Gardens Hospital; and (f) Good Sam Hospital.

5. Defendant seeks to limit evidence to the amounts Medicare paid for the treatment/services in past medical expenses for these six providers. Plaintiff agrees to this relief.

6. The following medical providers provided treatment to Plaintiff, did not opt-out of Medicare, and did not submit bills to Medicare: (a) Dr. Theofolis; (b) Dr. Contando; and (c) Advanced Diagnosis.

7. Defendant seeks to limit evidence to the amounts Medicare would have paid had Plaintiff's bills been submitted by these three providers to Medicare. Plaintiff opposes this relief.

B. Legal Analysis and Ruling.

1. Limitations on recoverable past medical expenses in a personal injury action.

It is Plaintiff's burden to present evidence proving a "specific and definite amount of economic damage," including those for past medical treatment. *United Auto. Ins. Co. v. Colon*, 990 So. 2d 1246, 1248 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2283a] (internal citations omitted). A personal injury plaintiff can recover compensatory or actual damages for the loss (designed to make the plaintiff whole) but cannot recover damages in excess of the amount that represents that actual loss sustained. *MCI WorldCom Network Servs., v. Mastec, Inc.*, 995 So. 2d 221, 223 (Fla. 2008) [33 Fla. L. Weekly S473a]; *Coop. Leasing, Inc. v. Johnson*, 872 So. 2d 956, 957-58 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D902b].

2. Medical providers participating in Medicare must accept Medicare rates unless they properly opt-out of the Medicare program.

Medicare was enacted as Title XVIII of the Social Security act and titled, "Health Insurance for the Aged and Disabled." 42 U.S.C. § 1395, *et. seq*. The Centers for Medicare & Medicaid Services ("CMS") administers the Medicare program and states as follows with regard to medical charges to beneficiaries for services covered by Medicare: "[I]f the provider bills Medicare, the provider must accept the Medicare approved amount as payment in full and may charge beneficiaries only deductibles and coinsurance."[1]

> The Social Security Act and Section 1848(g)(4)(A) states in pertinent part: For services furnished on or after September 1, 1990, within 1 year after the date of providing a service for which payment is made under this part on a reasonable charge or fee schedule basis, a physician, supplier, or other person (or an employer or facility in the cases described in section 1842(b)(6)(A)
>
> (i) shall complete and submit a claim for such service on a standard claim form specified by the Secretary to the carrier on behalf of a beneficiary; and
>
> (ii) may not impose any charge relating to completing and submitting such a form.

42 U.S.C. § 1395w-4(g)(4)(A)(i-ii).

"If the physician fails to submit a claim to the Medicare carrier on behalf of the beneficiary when one is required to be submitted the Secretary may impose sanctions." *Stewart v. Sullivan*, 816 F. Supp. 281, 284 (D.N.J. 1992). *See* 42 U.S.C. § 1395w-4(g)(4)(B)(i-ii).

Providers may elect *not* to bill Medicare under 42 U.S.C. § 1395a under limited circumstances if they properly "opt-out" of Medicare. Federal law requires providers to follow strict processes for opting out of the program. *See* 42 U.S.C. § 1395a; 42 C.F.R. §§ 405.405, 405.410, 405.420, 405.425 & 405.430. If the provider does not follow all requirements for opting out, a private contract requiring a patient to pay the full amount of the provider's charge for medical treatment is null and void. *See Medicare Benefit Policy Manual, Chapter 15 at 40.10, Failure to Properly Opt Out* (explaining that when either the private contract does not meet required specifications, or the practitioner fails to submit an opt-out affidavit, the contract is null and void

and "[t]he physician/practitioner must submit claims to Medicare for all Medicare-covered items and services furnished to Medicare beneficiaries, including the items and services furnished under the nullified contracts.").[2] *See also* 42 C.F.R. §§ 405.405(c), (d); 405.430.

In this case, Plaintiff's providers were enrolled in the Medicare program and did not opt-out; they were required to accept Medicare rates for the services/treatment as a matter of law.

3. A plaintiff is not entitled to admit into evidence and recover more than what Medicare paid (or would pay) for medical expenses.

Medicare rates for treatment are generally less than those billed by health care providers. *See generally Bailey v. Rocky Mt. Holdings, LLC*, 889 F.3d 1259, 1271 n. 24 (11th Cir. 2018) [27 Fla. L. Weekly Fed. C871a] (discussing Medicare rates for medical services). Nevertheless, "payment by Medicare requires the provider to whom payment is made to accept such amount in full satisfaction of the total charge even though the amount charged exceeds the amount paid by Medicare." *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547, 549 (Fla. 4th DCA 2003) [29 Fla. L. Weekly D103a].

The undiscounted excess medical charges cannot be admitted in evidence because it would result in a windfall to the Plaintiff by permitting recovery for past medical expenses for which she was never and will never be liable for. *Thyssenkrupp*, 868 So. 2d at 550. As the Court in *Cooperative Leasing, Inc*. stated:

> The issue in this case is the appropriate measure of compensatory damages for past medical expenses. "The objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money." *Mercury Motors Express, Inc., v. Smith*, 393 So. 2d 545, 547 (Fla. 1981). "The primary basis for an award of damages is *compensation*." *Fisher v. City of Miami,* 172 So. 2d 455, 457 (Fla. 1965). In this case, Johnson sought to collect the "additional value of medical services reasonably made necessary" by the appellants. We conclude, however, that Johnson was not entitled to recover for medical expenses beyond those paid by Medicare because she never had any liability for those expenses and would have been made whole by an award limited to the amount that Medicare paid to her medical providers.

Coop. Leasing, Inc., 872 So. 2d at 957-58.

Original charges by health care providers, therefore, are irrelevant and inadmissible when the provider accepts payment from Medicare in full satisfaction of the charge. *See Thyssenkrupp*, 868 So. 2d at 551. "[I]t is error to permit a plaintiff to introduce into evidence (and to request from the jury) the gross amount of medical bills rather than the lesser amount actually paid as a governmental or charitable benefit in full settlement of those bills." *Matrisciani v. Garrison Prop. & Cas. Ins. Co*., 298 So. 3d 53, 59 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D1409c] (citing *Thyssenkrupp*, *Boyd*, and *Coop. Leasing, Inc.*). *See also Dial v. Calusa Palms Master Ass'n*, 308 So. 3d 690 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2783a] (affirming decision limiting evidence of Plaintiff's past medical expenses to the Medicare bills that were tendered and paid); *Gulfstream Park Racing Ass'n v. Volin*, 326 So. 3d 1124 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1146a] (holding the circuit court erred in allowing Plaintiff to introduce evidence of the amount billed by medical providers ("phantom damages") instead of the discounted amount Medicare paid for past medical expenses).

Notably, Medicare is not a collateral source subject to reduction post-trial, pursuant to section 768.76, Florida Statues. "Section 768.79 excludes Medicare benefits as collateral sources because the federal government has a right to reimbursement . . . for payments it has made on [a plaintiff's] behalf." *Coop. Leasing, Inc*., 872 So. 2d at 960. *See also Matrisciani*, 298 So. 3d at 58; *Humana Medical Plan, Inc. v. Reale*, 180 So. 3d 195, 207 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D2678a] (holding that section 768.76, Florida Statutes, excludes consideration of Medicare benefits as a collateral source).

The parties here agree that Plaintiff can only introduce into evidence (and recover), the past medical expenses in the amount paid by Medicare. Accordingly, Plaintiff may only introduce into evidence the discounted amounts Medicare paid for past medical expenses for the following providers: (a) Jupiter Pain; (b) Resolute Pain; (c) Jupiter Outpatient; (d) MD Now; (e) Palm Beach Gardens Hospital; and (f) Good Sam Hospital.

Additionally, based on the facts and legal authority outlined above, the Court finds and concludes as follows: (1) Plaintiff bears the burden of proving a specific and definite amount of past medical expenses; (2) Plaintiff cannot recover in excess of the damages sustained; (3) Plaintiff was a Medicare beneficiary at all material times; (4) as a Medicare beneficiary, Plaintiff is not liable for reimbursement of any amount in excess of Medicare rates; (5) none of Plaintiff's health care providers opted-out of Medicare, and were, therefore, required by law to submit Plaintiff's bills to Medicare and accept Medicare rates as payment in full; (6) those providers who did not properly opt-out violated statutory law by not submitting Plaintiff's bills to Medicare; (7) the improper charges in excess of applicable Medicare rates are not recoverable either by the providers or Plaintiff; and (8) awarding Plaintiff anything above the Medicare rates would result in a wind-fall as over and above the amounts necessary to make Plaintiff whole. Accordingly, Plaintiff is precluded from introducing evidence as to the original charges beyond the corresponding Medicare rates for the same to establish past medical expenses.

4. *Joerg* applies only to *future* Medicare benefits, not *past* Medicare benefits.

Plaintiff relies on *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015) [40 Fla. L. Weekly S553a] in opposition to Defendant's Motion. The holding in *Joerg* is inapplicable because it only applies to *future* Medicare benefits, which are uncertain and for which Medicare retains a right of reimbursement. *Id.* at 1253. Defendant is not attempting to limit evidence as to future treatment potentially covered by Medicare. Defendant's motion pertained only to *past* medical treatment, which should have been paid for by Medicare. Instead, this issue is governed by *Coop. Leasing* and *Thyssenkrupp* both of which remain good law. *See Dial*, 308 So. 3d at 691 (determining that *Joerg* did not abrogate the evidentiary ruling in *Coop. Leasing*, and only spoke to *future* Medicare benefits, not past benefits).

5. The presence of Defendant's liability insurer as a potential primary payer is irrelevant.

Plaintiff argues Medicare is a secondary payer under federal law, and the presence of primary payer (in this case the Defendant's insurer) precludes Medicare from paying for Plaintiff's treatment. Initially, this is incorrect as Medicare *has* paid much of Plaintiff's past medical bills in this case. Additionally, regardless of whether there may be a primary payer, such entity's responsibility to pay has not been demonstrated. Even if it had been demonstrated, that would only mean the primary payer is responsible for reimbursing Medicare for Medicare's conditional payments made at the Medicare rates. In any event, the most Plaintiff could recover would be the rates charged by Medicare.

"The Medicare Secondary Payer statute ("MSP") . . . makes Medicare the secondary payer for medical services provided to Medicare beneficiaries whenever payment is available from another primary payer." *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1306 (11th Cir. 2006) [19 Fla. L. Weekly Fed. C974a]. One such primary payer is an automobile or liability insurance policy or plan. *Id*. (citing 42 U.S.C. § 1395y(b)(2)(A)). *See also MSP Recovery Claims v. QBE*

Holdings, Inc., 965 F.3d 1210, 1214 (11th Cir. 2020) [28 Fla. L. Weekly Fed. C1470a] ("Sometimes a third party has an obligation to pay for a beneficiary's healthcare costs, such as when a person enrolled in Medicare is injured in an automobile accident caused by another driver . . ."); *Cochran v. U.S. Health Care Fin. Admin.*, 291 F.3d 775, 777 (11th Cir. 2002) [15 Fla. L. Weekly Fed. C588a] (primary payer includes the private insurer of someone liable to the beneficiary).

"This means that if payment for covered services has been or is reasonably expected to be made by someone else, Medicare does not have to pay." *Glover* at 1306. But Medicare often makes conditional payments for covered services when the primary payer is not expected to pay **promptly**. *Id.* "The way the system is set up the beneficiary gets the health care she needs, but Medicare is entitled to reimbursement if and when the primary payer pays her." *Cochran*, 291 F.3d at 777.

> Authority to make conditional payment. The Secretary may make payment under this title with respect to an item or service if a primary plan described in subparagraph (A)(ii) [subpara. (A)] has not made or cannot reasonably be expected to make payment with respect to such item or service **promptly** (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.

42 U.S.C. § 1395y(b)(2)(B)(i) (emphasis added).

In that scenario, Medicare has a right of reimbursement from the primary payer. Reimbursement must occur if the primary payer "has or had a responsibility to make payment with respect to such item or service." *Glover* at *id.* (quoting 42 U.S.C. § 1395y(b)(2)(B)(ii)). Responsibility is demonstrated by "a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." *Id.* In other words, "a separate adjudication or agreement." *MSP Recovery, LLC v. Allstate Ins. Co.*, 835 F.3d 1351, 1361 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C738a] ("In *Glover*, we concluded that responsibility [to pay] must be demonstrated by 'a separate adjudication or agreement.' "). *See also Cochran*, 291 F.3d at 778 (reimbursement responsibility based on "judgments or settlements related to injuries for which Medicare paid medical costs, thereby casting the tortfeasor as the primary payer"). "That is why Medicare asks attorneys handling any related tort suits for its beneficiaries to supply the agency with a copy of the agreement setting out the share of the recovery they are to receive." *Id.*

In *Glover*, Plaintiff argued Defendants' (primary payers) responsibility to pay was demonstrated simply because Defendants were litigating a state court tort claim. *Glover*, 459 F.3d at 1308. The Eleventh Circuit rejected that argument. Defendants' responsibility to pay was not demonstrated simply by being a party to the tort litigation. Defendants were never adjudicated liable and never made a payment conditioned on a release of claims for the health care expenses caused by the tort. *Id.* at 1308. Defendants' responsibility to pay for items or services, therefore, was not demonstrated simply based on filing the underlying tort action or the subsequent action under the MSP to recover benefits. *Id.* at 1309. Until Defendants' responsibility to pay is demonstrated (e.g., by a judgment), there is no obligation to reimburse Medicare. *Id.* The Eleventh Circuit, in a different case, gave a real-world example:

> As with most complex concepts, a real-world example helps make the Act's contours more clear. Imagine a 65-year-old Medicare beneficiary who is injured when he slips on the wet floor of a supermarket and subsequently receives medical attention for his injuries. If the supermarket's negligence caused the man's injuries, the supermarket (or its liability insurance carrier) is ultimately responsible for his medical bills. But if the supermarket denies responsibility, litigation may be required to resolve the man's negligence claim, and he may not have the money to pay for his medical care in the meantime. Because this is a situation in which the supermarket cannot reasonably be expected to pay **promptly**, the Act allows Medicare to pay the man's medical bills on a conditional basis.
>
> Now imagine that the man and the supermarket settle the negligence claim and that the supermarket's insurer pays the settlement funds to the man. To recoup the medical payments Medicare conditionally made, the Act allows the government to sue the insurer (which, because of the settlement, has been demonstrated to be the primary payer), the injured man (who is the recipient of a payment from the primary payment), or both of them. The government can, of course, recover only once, *see* 54 Fed. Reg. 41716, 41720 (Oct. 11, 1989) (the agency "will not pursue duplicate recoveries"), and if its recovery is against the insurer, the insurer can in turn sue the man to recover the payment it made to him, *see Shalala*, 23 F.3d at 418 n.4. *See also* 42 C.F.R. § 411.24(i)(1) ("If Medicare is not reimbursed as required . . . the primary payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party.").

U.S. v. Stricker, 524 F. App'x. 500, 504 (11th Cir. 2013) (emphasis added). *See also Shapiro v. Sec'y of HHS*, No. 15-22151-Civ-COOKE/TORRES, 2017 U.S. Dist. LEXIS 42278, *6 (S.D. Fla. Mar. 23, 2017) (explaining tortfeasor's post-judgment and post-settlement responsibility to reimburse Medicare).

Additionally, 42 U.S.C. § 1395y(b)(2)(A) does not address whether providers may charge or bill a Medicare beneficiary in excess of Medicare rates or whether they may enter into a private contract with a beneficiary without first opting out of the Medicare program. Thus, health care providers remain legally restricted in the amounts they can charge Medicare beneficiaries regardless of whether those charges are ultimately paid by Medicare or a primary payer in the future.

In this lawsuit, regardless of whether there may be a primary payer, such entity's responsibility to pay has not been demonstrated. Such entity is not even a party to this lawsuit. And there is no judgment and no settlement in this case. The simple fact that an entity may insure the Defendant in this action does not demonstrate that entity's responsibility to pay for Plaintiff's medical expenses.

Moreover, even if Medicare *had* paid for Plaintiff's medical expenses, and even if—ultimately—an insurer is responsible to reimburse Medicare as the primary payer, the insurer would reimburse Medicare at the rates charged by Medicare. Absent properly opting-out of Medicare, nothing in 42 U.S.C. § 1395y suggests a provider can charge greater amounts than Medicare's rates. Further, the CMS guidelines again state: "[I]f the provider bills Medicare, the provider must accept the Medicare approved amount as payment in full and may charge beneficiaries only deductibles and coinsurance."

Thus, Plaintiff would still only incur actual medical expenses at the lower Medicare rates. And only those costs may be awarded to make the Plaintiff whole.

6. A Plaintiff also owes an obligation to submit medical bills to Medicare.

A Medicare beneficiary can submit his bills to Medicare if his physicians do not.[3] Doing so would mitigate the Plaintiff's damages.

> [T]he term "mitigation of damages" has no single meaning and is used by the courts to describe several different problems in the law of damages, the term as used herein encompasses those facts which tend to show that the conceded or assumed cause of action does not entitle the plaintiff to as large an amount of damages as would otherwise be recoverable. Specifically, the type of problem litigated herein involves the doctrine of avoidable consequences, or efforts to minimize damages, where the plaintiff reasonably could have avoided a part or all of the consequences of the defendant's wrongful act.

Parker v. Montgomery, 529 So. 2d 1145, 1147 (Fla. 1st DCA 1988) (concluding that "the concept of avoidable consequences or mitigation of damages is included within the . . . definition of comparative fault").

Both comparative fault and avoidable consequences make recovery dependent on the plaintiff's proper care of the protection of her own interests and both require she act as a reasonable person under the circumstances. *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934, 942 (Fla. 1996) [21 Fla. L. Weekly S232a]. "Accordingly, if some of the damages incurred could have reasonably been avoided by the plaintiff, [this] doctrine prevents those damages from being added to the amount of damages recoverable." *Id.*; *See also Sys. Components Corp. v. Fla. DOT*, 14 So. 3d 967, 982 (Fla. 2009) [34 Fla. L. Weekly S393a].

7. Public policy favors limiting a plaintiff to recover only Medicare's reimbursement rates.

Not only does federal law require the providers accept Medicare, but public policy favors requiring providers accept Medicare reimbursement rates for Medicare enrolled patient/plaintiffs. Judge Thomas H. Barkdull, III issued a comprehensive order on this issue. In granting Defendant's motion to limit evidence of medical expenses to Medicare rates—where Plaintiff's providers were required but did not submit Plaintiff's bills to Medicare—he explained the public policy reasons in support of his decision:

> The particular danger that is sought to be avoided are situations where patients/plaintiffs, who are Medicare beneficiaries and who have filed suit against an alleged tortfeasor, receive medical treatment from providers who would otherwise accept Medicare reimbursement rates but decline to submit bills for treatment through Medicare in these litigation cases so that they may charge and claim full value for their treatment. All too frequently, these plaintiffs, who, by virtue of being Medicare recipients, are recognized as being at-risk population due either to seniority or disability, are left with exorbitant medical bills when they are unsuccessful in litigation.
>
> Based on this long standing established public policy, this Court finds that in addition to the federal regulations which govern how participating physicians and practitioners are permitted to charge and contract with beneficiaries, there is a legitimate government interest in protecting the elderly community and other beneficiaries from being charged in excess of Medicare reimbursement rates and in properly and thoroughly advising plaintiff-patients of the perils of permitting their providers to bill outside of the Medicare reimbursement schedules. These public policy concerns support this Court's ruling.

Richardson v. Wal-Mart Stores, Inc., No. 2014-CA-015197 (Fla. 15th Cir. Ct., Dec 13, 2017) (Order on Re-Hearing on Wal-Mart Stores, Inc.'s Motion to Limit Medical Bills Provided Under Letters of Protection).

The purpose behind Title XVIII of the Social Security Act, the administration of the Medicare program by CMS, and the case law cited above, is thwarted by permitting Plaintiff to recover in excess of Medicare rates when the services/treatment is required by law to be limited to Medicare rates. Plaintiff's health care providers here are only legally permitted to charge Plaintiff in the amounts established by the Medicare program. Plaintiff, therefore, is only responsible for that amount, which would represent Plaintiff's compensatory damages. If a defendant can only be liable for Plaintiff's compensatory damages for past medical expenses, it would contravene public policy for said defendant be held liable for an amount greater than what Plaintiff would ever be responsible for paying. **WHEREFORE**, it is hereby

ORDERED and ADJUDGED that Defendant's Motion is **GRANTED**. Plaintiff may only introduce into evidence (and recover) the amounts of past medical expenses paid by Medicare for the following providers: (a) Jupiter Pain; (b) Resolute Pain; (c) Jupiter Outpatient; (d) MD Now; (e) Palm Beach Gardens Hospital; and (f) Good Sam Hospital. Plaintiff may only introduce into evidence (and recover) the Medicare rates for her past medical expenses billed by the following providers: (a) Dr. Theofolis; (b) Dr. Contando; and (c) Advanced Diagnosis.

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[1]*Medicare Secondary Payer (MSP) Manual, Chapter 2 - MSP Provisions*, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/msp105c02.pdf

[2]https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c15.pdf

[3]*See* https://www.medicare.gov/claims-and-appeals/file-a-claim/file-a-claim.html

* * *

Civil procedure—Discovery—Non-party—Motion to quash subpoena of nonparty is granted where nonparty is not properly named in subpoena and subject matters of examination are not set forth in subpoena

CHRISTINA A. MCLOUGHLIN, Plaintiff, v. ARTHUR C. KRUG, Defendant. Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 50-2021-CA-04169 XXXX MB. May 25, 2022. Samantha Schosberg Feuer, Judge. Counsel: Marc De Lavalette, for Plaintiff. Shawn Jeremy Davis, for Defendant. Mark A. Goldstein, Miami, for Nonparty.

ORDER GRANTING
NONPARTY INTERVENTIONAL PAIN MD, LLC'S
MOTION TO QUASH DEFENDANT'S SUBPOENA

This cause came before the Court on April 5, 2022, upon Nonparty, Interventional Pain MD, LLC's Motion to Quash or Modify the Defendant's subpoena and and the Court having reviewed the Motion, heard argument of counsel for the nonparty and Defendant and being otherwise fully advised in the premises, it is Ordered as follows:

1. Nonparty, Interventional Pain MD, LLC's Motion to Quash or Modify the Defendant's subpoena is granted as the nonparty is not properly named in the subpoena and the subject matters of the examination are not set forth in the subpoena as required by Fla.R.Civ. P. 1.310(b)(6). See *Chiquita Int'l Ltd. v. Fresh Del Monte Produce, N.V.,* 705 So. 2d 112, 113 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D290b]

2. The subpoena is quashed without prejudice to the Defendant issuing a new subpoena.

3. If a Motion to Quash is directed to a new subpoena issued by the Defendant, pursuant to Local Rule 4, counsel shall make reasonable efforts to speak to one another and engage in reasonable compromises to resolve or narrow the disputes before seeking Court intervention.

* * *

Torts—Tortious interference with business relationship—Defamation—Slander and libel—Summary judgment—Where materials plaintiff relies upon to oppose defendant's amended motion for summary judgment do not comply with rule 1.510(c)(1) or fulfill plaintiff's obligation to serve response required by rule 1.510(c)(5), facts set forth in amended motion and statement of facts are taken as undisputed—Motion for summary judgment is granted where there is no genuine issue of material fact that defendant sued wrong business entity and that plaintiff did not issue credit card that is subject of action

CLIMAX AM, LLC, Plaintiff, v. AMERICAN EXPRESS, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE 18 029773, Division 09. June 10, 2022. Jeffrey R. Levenson, Judge.

ORDER GRANTING
AMERICAN EXPRESS COMPANY'S AMENDED MOTION
FOR SUMMARY JUDGMENT AND FINAL JUDGMENT

THIS CAUSE came before this Court on June 8, 2022, for hearing on American Express Company's Amended Motion for Summary

Judgment, filed on May 6, 2021. This Court having reviewed the Amended Motion for Summary Judgment, including all attached exhibits, along with American Express Company's Statement of Facts in Support of its Amended Motion for Summary Judgment, having acknowledged that Plaintiff Climax AM, LLC, filed the Notice of Filing of and Affidavit of Lisa Landsman Pomeranz (both filed Sept. 17, 2020), its Memorandum in Opposition to Defendant's Motion for Summary Judgment (filed Oct. 5, 2020), and the Notice of Filing of and deposition transcript of Keith Herr taken on April 2, 2021 (filed May 17, 2022), and having heard the argument of counsel and being otherwise fully advised in the premises, does hereby determine as follows:

INTRODUCTION AND BACKGROUND

Plaintiff Climax AM, LLC ("Plaintiff") filed its Complaint in this case on December 31, 2018, alleging claims against Defendant American Express Company ("AEC") for (1) tortious interference with business relationships, and (2) slander and libel. Plaintiff's claims are predicated on an alleged business relationship with AEC and on a revolving line of credit that Plaintiff alleges AEC was obligated to provide to Plaintiff. On August 12, 2020, AEC filed its Motion for Summary Judgment, arguing that Plaintiff had not named the correct American Express entity because AEC is a bank holding company, does not issue any type of credit product, and never had any dealings with Plaintiff. AEC also filed its affidavit as an exhibit to its summary judgment motion, and later filed the affidavit of non-party American Express National Bank on October 15, 2020, in support of its Motion for Summary Judgment. *See* Aff. of AEC in Support of Mot. for Summ. J. (attached as Ex. A to AEC's Mot. for Summ. J. filed Aug. 12, 2020); AEC's Not. of Filing Aff. of Non-Party American Express National Bank (filed Oct. 15, 2020).

In response to AEC's Motion for Summary Judgment, in 2020 Plaintiff filed the affidavit of Lisa Landsman Pomeranz, and its Memorandum in Opposition to Defendant's Motion for Summary Judgment. *See* Notice of Filing and Aff. of Lisa Landsman Pomeranz (both filed Sept. 17, 2020); Mem. in Opp'n to Def.'s Mot. for Summ. J. (filed Oct. 5, 2020). AEC then filed its Reply in Support of Its Motion for Summary Judgment on October 23, 2020. For various reasons, the hearing on AEC's Motion for Summary Judgment was scheduled and then either deferred or canceled on four different occasions between September 23, 2020, and March 11, 2021.

Following the amendment of Florida Rule of Civil Procedure 1.510, on May 6, 2021, AEC filed its Amended Motion for Summary Judgment, which amended its summary judgment arguments to account for the changes in Rule 1.510, and which re-attached the affidavits and documents that AEC had previously filed in support of its original Motion for Summary Judgment. *See* AEC's Am. Mot. for Summ. J. (filed May 6, 2021). AEC also filed its Statement of Facts pursuant to Rule 1.510(c)(1)(A). *See* Def. AEC's Statement of Facts in Support of its Am. Mot. for Summ. J. On May 17, 2022, Plaintiff filed the deposition transcript of Keith Herr without any accompanying memorandum, statement of facts, designations, or other explanation. *See* Notice of Filing (filed May 17, 2022). Plaintiff did not amend its prior Memorandum in Opposition, nor did it file a new response to AEC's Amended Motion for Summary Judgment or a statement of facts.

ANALYSIS

I. PLAINTIFF FAILED TO COMPLY WITH FLORIDA RULE OF CIVIL PROCEDURE 1.510

A. Amendments to Florida Rule of Civil Procedure 1.510 Effective May 1, 2021

On December 31, 2020, the Florida Supreme Court, on its own motion, amended Florida Rule of Civil Procedure 1.510 and adopted "the summary judgment standard articulated by the United States Supreme Court." *In re: Amendments to Fla. R. of Civ. P. 1.510*, No. SC20-1490, 309 So. 3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a]. After a four-month period of reviewing comments and hearing oral argument, the amendment went into effect on May 1, 2021. *In re: Amendments to Florida Rule of Civil Procedure 1.510*, No. SC20-1490, 2021 WL 1684095 [317 So. 3d 72] (Fla. Apr. 29, 2021) [46 Fla. L. Weekly S95a].

Effective May 1, 2021, Rule 1.510 was amended to read as follows:

> **(a) Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.
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> * * *
>
> **(c) Procedures.**
>
> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
>
> * * *
>
> **(e) Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may:
>
> (1)give an opportunity to properly support or address the fact;
>
> (2)consider the fact undisputed for purposes of the motion;
>
> (3)grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Fla. R. Civ. P. 1.510(a), (c), and (e) (May 1, 2021).

In its opinion adopting the federal summary judgment standard, the Florida Supreme Court advised that the new Rule 1.510 "must govern the adjudication of any summary judgment motion decided on or after [the effective date of May 1, 2021], including in pending cases." *In re: Amendments to Florida Rule of Civil Procedure 1.510*, No. SC20-1490, at 13. Additionally, "where a pending summary judgment motion has been briefed but not decided, the court should allow the parties a reasonable opportunity to amend their filings to comply with the new rule." *Id*.

B. Plaintiff Failed to File a Response to the Amended Motion for Summary Judgment or Otherwise Comply with Rule 1.510.

In response to the amendment of Rule 1.510, on May 6, 2021, AEC filed its Amended Motion for Summary Judgment, which amended its summary judgment arguments to account for the change in Rule 1.510, and which re-attached the affidavits and documents that AEC had previously filed in support of its original Motion for Summary Judgment. AEC also filed its Statement of Facts pursuant to Rule 1.510(c)(1)(A). On May 17, 2022, Plaintiff filed the deposition

transcript of Keith Herr without any accompanying memorandum, statement of facts, designations, or other explanation. Plaintiff did not amend its prior Memorandum in Opposition, nor did it file a new response to AEC's Amended Motion for Summary Judgment or a statement of facts.

Rule 1.510(c)(5) states that a "nonmovant ***must*** serve a response," to a motion for summary judgment, making the filing of a response mandatory. *Meisels, P.A. v. Dobrofsky*, ___ So. 3d ____, 2022 WL 2057777, at *3 (Fla. 4th DCA June 8, 2022) [47 Fla. L. Weekly D1239a] (emphasis added). Therefore, Plaintiff was required to serve a response to the Amended Motion for Summary Judgment. Not only does Plaintiff's 2020 Memorandum in Opposition fail to respond to AEC's Amended Motion for Summary Judgment as required by Rule 1.510(c)(5), but it also fails to properly assert facts or address any of the facts set forth in AEC's Statement of Facts. The Court finds that the materials Plaintiff relies upon to oppose AEC's Amended Motion for Summary Judgment do not comply with the procedures required by Florida Rule of Civil Procedure 1.510(c)(1) or fulfill Plaintiff's obligation to serve a response under subsection (c)(5). *Dobrofsky*, ___ So. 3d ____, 2022 WL 2057777 (where a nonmoving party fails to respond to a motion for summary judgment with its supporting factual position, as required by Rule 1.510, a court can consider the moving party's facts as undisputed and grant summary judgment).

Pursuant to Rule 1.510(e)(2), the Court thus considers the facts set forth in AEC's Amended Motion for Summary Judgment and Statement of Facts as undisputed for purposes of summary judgment. The Court now turns to the substance of AEC's Amended Motion for Summary Judgment.

II. AEC IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

A. Summary Judgment Standard

A party is entitled to summary judgment ". . . if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a); Fed. R. Civ. P. 56(a). "If the movant meets its evidentiary burden, the burden shifts to the nonmoving party to establish—with evidence beyond the pleadings—that a genuine dispute material to each of its claims for relief exists." *Benjamin v. Thomas*, 766 Fed. App'x 834, 836 (11th Cir. 2019) (quoting *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 692 (11th Cir. 2014) [25 Fla. L. Weekly Fed. C701a] (internal quotations omitted)). There is no genuine dispute as to any material fact "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 248 (1986). A non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 389 (2007) [20 Fla. L. Weekly Fed. S225a].

B. Summary Judgment is Appropriate Because There is No Genuine Issue of Material Fact That Plaintiff Had No Dealings with AEC.

Summary judgment is appropriate where a defendant can show that "plaintiff has named a wrong party as a defendant." 10A Fed. Prac. & Proc. § 2729 (4th ed. 2021). "When a plaintiff files suit against the wrong company, a court may grant summary judgment in favor of the improperly named defendant." *Witter v. Bank of America*, 2008 WL 11470984, at *7-8 (N.D. Ga. May 15, 2008) (granting summary judgment against plaintiff cardholder where it named Bank of America corporation, rather than its subsidiary that was the actual issuer of the subject credit card, in FCRA dispute, and "the undisputed evidence show[ed] that BOA Corporation does not issue credit cards."); *Wolfe v. Emcare, Inc.*, 2015 WL 1346811 (M.D. Fla. Mar. 24, 2015) (granting summary judgment where defendant came forward with evidence that it was not the proper party to the action, and the plaintiff failed to provide any evidence or designate any specific facts showing there was a genuine issue for trial). *See also Barker v. American Express Company*, 2017 WL 3951905 (N.D. Ca. Sept. 7, 2017), *aff'd* 719 Fed. Appx. 717 (9th Cir. 2018).[1]

The Court finds that AEC has adequately demonstrated that Plaintiff sued the wrong American Express entity. Fatal to Plaintiff's claims here, Plaintiff cannot show that it had any type of business relationship with AEC. AEC, on the other hand, has provided documentation showing that the agreement for the account at issue here was, in fact, with American Express National Bank, not with AEC. The January 2, 2015, and October 4, 2018, Cardmember Agreements that are attached to AEC's Amended Motion for Summary Judgment, together with the affidavits filed by AEC, demonstrate that AEC is not—and never was—the issuer of the Business Platinum Card® that is the subject of this action. The sworn affidavits filed by AEC further demonstrate that AEC is a bank holding company and that AEC does not issue or service credit cards or other credit products, and did not issue, service, review, suspend, report on, or communicate with third parties concerning Plaintiff's account as Plaintiff alleges in the Complaint.

AEC has indisputably shown that it never had any business dealings or relationship with Plaintiff upon which Plaintiff's claims are predicated. The Court finds that there is no genuine issue of material fact that AEC is not a proper party to this action, and summary judgment is appropriate. Accordingly, it is hereby,

ORDERED and ADJUDGED as follows:

1. The Court finds American Express Company's Amended Motion for Summary Judgment and Statement of Facts to be detailed, proper, well-supported, and well-founded. The Court fully adopts and incorporates by reference the arguments and reasoning set forth in the Amended Motion for Summary Judgment.

2. Plaintiff has failed to demonstrate the existence of a genuine issue as to any material fact under Florida Rule of Civil Procedure 1.510, as amended effective May 1, 2021, that would preclude entry of summary judgment.

3. American Express Company's Amended Motion for Summary Judgment is **GRANTED**.

4. This Order fully disposes all of the claims in this case by Plaintiff Climax AM, LLC against Defendant American Express Company, and shall operate as a Final Judgment in this case.

5. Plaintiff Climax AM, LLC, whose address is 1920 East Hallandale Beach Boulevard, Suite 802, Hallandale, Florida 33009, shall take nothing by this action, and Defendant American Express Company, whose address is 200 Vesey Street, New York, New York 10285, shall go hence without day.

6. The Court reserves jurisdiction to enforce this Order, to award attorneys' fees and costs upon proper motion, and to enter such other and further orders as are necessary and proper.

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[1]The Northern District of California's Order in the *Barker* case is persuasive and applicable here because (1) the court applied the federal summary judgment standard now used in Florida, and (2) the facts and procedural background in *Barker* are nearly identical to the facts of this case.

* * *

Torts—Discovery—Compulsory defense examination—Failure to attend—Sanctions

SANTIAGO SANTANA, Plaintiff, v. ANA PEREZ, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE21005304, Division 03. June 15, 2022.Barbara McCarthy, Judge. Counsel: Nathan J. Hoy, Fort Lauderdale, for Plaintiff. Emilio A. Cacace, Fort Lauderdale, for Defendant.

ORDER ON DEFENDANT'S MOTION TO COMPEL DEFENSE EXAMINATION AND FOR SANCTIONS

THIS CAUSE having come on to be heard on Defendant's Motion to Compel Defense Examination and For Sanctions, and the Court having heard argument of counsel, and being otherwise advised in the premises, it is hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED to the extent that Plaintiff agrees to submit to the scheduled Defense Examination on 9.8.22. Additionally, Defendant is entitled to the $425.00 disruption fee incurred due to Plaintiff's failure to attend the Defense Examination on 3.7.22. The $425.00 will be taxed at the conclusion of litigation whereby Plaintiff shall pay Defendant $425.00 for the disruption fee.

* * *

Torts—Negligence—Contractors—General contractor that applied for and was issued permits for construction of townhouses had non-delegable duty to ensure compliance with Florida Building Code—General contractor also had non-delegable duty to supervise, direct, manage, and control work of subcontractors and is, as matter of law, liable for actions or omissions of subcontractors

GRANDE OAKS AT HEATHROW ASSOCIATION, INC., a Florida Not-For-Profit Corporation, Plaintiff, v. KOLTER SIGNATURE HOMES, LLC, a Florida Limited Liability Company; JOHN CSAPO; HEATHROW OAKS, LLC, a Foreign Limited Liability Company; et al., Defendants. Circuit Court, 18th Judicial Circuit in and for Seminole County. Case No. 2020-CA-003188. June 6, 2022. Jessica Recksiedler, Judge. Counsel: Brett J. Roth and Keegan A. Berry, Ball Janik, LLP, Orlando, for Plaintiff. Robert A. Carlson, for Kolter Signature Homes, LLC, Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT REGARDING KOLTER SIGNATURE HOMES, LLC'S NON-DELEGABLE DUTY

THIS CAUSE came before the Court on May 25, 2022, on Plaintiff's Motion for Summary Judgment on KOLTER Signature Homes, LLC's Non-Delegable Duty (Docket No. 1721). Having considered the arguments of counsel, pleadings, the record evidence, and being otherwise fully advised in the premises, the Court hereby ORDERS that Plaintiff's Motion is hereby **GRANTED**, as follows:

1. The Court finds that there is no factual dispute that KOLTER SIGNATURE HOMES, LLC (KOLTER) through its respective licensed qualifying agents (John Csapo and Joe Pease) was the general contractor which applied for and was issued the permits to construct the 314 townhomes at the Grande Oaks at Heathrow which is the subject of this lawsuit (the "Project").

2. The permit applications submitted by KOLTER for construction of the Project provided as follows:

> "I hereby certify that I have read an examined this application and know the same to be true and correct. All provisions of all laws and ordinances governing this type of work will be complied with whether specified herein or not."

3. The Florida Building code is a law regulating construction in the jurisdiction where the Project was constructed.

4. By submitting the permit applications, KOLTER and its qualifying agents certified to the Seminole County Building Department that the Florida Building Code would be complied with for the construction of the Project.

5. By submitting the permit applications for the construction of the Project, KOLTER (the general contractor) had a non-delegable duty to ensure the Florida Building Code was complied with. See, e.g., *Bialkowicz v. Pan Am. Condo. No. 3, Inc.,* 215 So. 2d 767, 771 (Fla. 3d DCA 1968)("The duty of care, with respect to the property of others, imposed by a city building permit upon a general contractor cannot be delegated to an independent sub-contractor."); *Mastrandrea v. J Mann, Inc.,* 128 So.2d 146, 148 (Fla. 3d DCA 1961) ("a duty imposed by Statute or Ordinance, such as the building code involved in this case cannot be delegated to an independent contractor."); *Rangel v. Northstar Homebuilders, Inc.,* 2018 WL 7019103, at *1-2 (Fla. 11th Cir. Ct. 2018)("The qualifying contractor, which executes the building permit application, is not discharged from the above described non-delegable duty to comply with its terms and conditions by hiring an independent contractor to perform work on the Subject Property.").

6. KOLTER, as the licensed general contractor who pulled the permits for the construction the Project, had a non-delegable duty to supervise, direct, manage, and control the work, including the work performed by its subcontractors. *See* Fla. Stat. 489.105(4); *see also* Deposition of John Csapo dated February 22, 2022, at Page 63 Lines 2 to 22 (Exhibit A to Docket No. 1721).

7. Accordingly, as a matter of law, KOLTER's non-delegable duties also renders KOLTER liable for the actions or omissions of its subcontractors on the Project. *See Biscayne Roofing Co. v. Palmetto Fairway Condo. Ass'n, Inc.*, 418 So. 2d 1109, 1110 (Fla. 3d DCA 1982) (finding general contractor liable to condominium association for its subcontractor's negligence); *See also Armiger v. Associated Outdoors Clubs, Inc.* 48 So.3d 864, 875 (Fla 2d DCA 2020) [35 Fla. L. Weekly D2194a] (When "a party is subject to a nondelegable duty. . . assignment of liability based on the tortious acts of another is not a consideration.").

8. Nothing herein prohibits KOLTER's causes of actions against the other parties to this action.

* * *

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COUNTY COURTS

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Summary judgment entered in favor of insurer based on exhaustion of benefits defense where there is no evidence that insurer reimbursed other medical providers for untimely bills and no evidence that insurer handled plaintiff provider's claim in bad faith—Assignment of benefits did not give plaintiff right to argue whether insurer should or should not have paid PIP claims submitted by insured or other providers

ADVANCED DIAGNOSTIC GROUP, LLC, a/a/o Deborah Cooper, Plaintiff, v. FIRST ACCEPTANCE INSURANCE COMPANY, INC., Defendant. County Court, 4th Judicial Circuit in and for Duval County. Case No. 16-2021-SC-016418-XXXX-MA. May 11, 2022. Roberto A. Arias, Judge. Counsel: Travis Greene, Anidjar & Levine, Plantation, for Plaintiff. Alexander S. Lloret, McFarlane Law, Coral Springs, for Defendant.

ORDER ON DEFEDANT'S MOTION FOR FINAL SUMMARY JUDGMENT, PLAINTIFF'S MOTION FOR CONTINUANCE AND PLAINTIFF'S MOTION TO COMPEL BETTER RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION AND TO OVERRULE OBJECTIONS

THIS CAUSE having come before the Court on May 3, 2022, upon Defendant's Motion For Final Summary Judgement Regarding Exhaustion of Benefits, Plaintiff's Motion for Continuance and Plaintiff's Motion to Compel Better Responses to Plaintiff's Request for Production and to Overrule Objections, and the Court having reviewed the entire Court file, considered argument of counsel, and being otherwise advised in the premises, the Court finds as follows:

STATEMENT OF UNDISPUTED FACTS AND PROCEDURAL HISTORY

1. ADVANCED DIAGNOSTIC GROUP, LLC. ("Plaintiff") brought the instant action against FIRST ACCEPTANCE INSURANCE COMPANY ("Defendant") to recover Personal Injury Protection ("PIP") benefits.

2. The instant action stems from a July 18, 2018 motor vehicle accident involving the Plaintiff's assignor, Deborah Cooper (the "Claimant") wherein the Claimant sustained injuries.

3. The policy under which Plaintiff seeks PIP benefits was issued by the Defendant to the Plaintiff's assignor, Deborah Cooper (the "Claimant"). Said policy provided for $10,000 in PIP coverage and was in full force and effect at the time of the July 18, 2018 motor vehicle accident.

4. Following the July 18, 2018, motor vehicle accident, the Claimant sought treatment with several providers for her injuries including MBB Radiology, Orange Park Medical Center, Personal Injury Physicians and Plaintiff.

5. As reflected in Defendant's PIP Payment Log ("PIP Log"), Defendant timely received bills from MBB Radiology, Orange Park Medical Center and Personal Injury Physicians pursuant to Florida Statute §627.736(5)(c) prior to receiving Plaintiff's bill.

6. After a reasonable investigation Defendant found that the timely submitted bills from MBB Radiology, Orange Park Medical Center and Personal Injury Physicians were compensable and reimbursed these bills in the order in which they were received.

7. Consequently, the $10,000.00 in personal injury protection benefits available to the Claimant exhausted with a November 28, 2018, payment issued to Personal Injury Physicians.

8. On January 21, 2019, Plaintiff sent a pre-suit demand Letter seeking PIP benefits in the amount of $3,120.00 for date of service October 23, 2018.

9. On February 13, 2019, Defendant sent a demand response advising Plaintiff that the $10,000 in PIP benefits coverage available to the Claimant were exhausted. In addition, Defendant provided a PIP Log to Plaintiff evidencing the exhaustion.

10. Despite being advised of the exhaustion, Plaintiff filed the instant cause of action through an Assignment of Benefits ("AOB") signed by the Claimant.

11. In response to Plaintiff's Complaint, Defendant filed an Answer and raised exhaustion of benefits as an Affirmative Defense.

12. During the course of litigation Plaintiff requested all the Explanation of Benefits ("EOBs") of the non-party medical providers that Defendant reimbursed in order to determine whether any "improper payments" were made to said medical providers.

13. Defendant objected to producing the EOBs of the non-party medical providers asserting that Plaintiff's AOB did not give Plaintiff standing to challenge the reasonableness of another medical provider's charges.

14. Additionally, Defendant asserted that absent any reimbursement of untimely bills, the only way to avoid Defendant's exhaustion defense would be a finding that Defendant acted in bad faith in the handling of the Claimant's PIP claim.

15. In response to Defendant's objection, Plaintiff filed its Motion for Continuance and Motion to Compel Better Responses to Plaintiff's Request for Production and to Overrule Objections.

LEGAL ANALYSIS AND CONCLUSION

16. The summary judgment standard provided for in Fla. R. Civ. P. 1.510 shall be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

17. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-324 (1986). Summary Judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

18. The movant has the burden of showing that there is no genuine issue of material fact, but the nonmoving party is not thereby relieved of his own burden of producing evidence that would support a jury verdict. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256 (1986). The burden on the moving party may discharged upon showing the absence of evidence to support the nonmoving party's case. *Celotex,* 477 U.S. at 325. The nonmoving party must set forth specific facts showing a genuine issue for trial. *Anderson,* 477 U.S. at 256. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. *Matushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

19. It is Plaintiff's contention that if Defendant made "improper payments" to the nonparty medical providers, Plaintiff would be entitled to reimbursement in the amount of the improper payments. Plaintiff contends that it is entitled to the EOBs of nonparty medical providers in order to verify whether any improper payments were made by the Defendant which resulted in the exhaustion of benefits.

20. It is Defendant contention that it properly exhausted the $10,000.00 in PIP benefits by reimbursing the Claimant's medical bills in the order in which they were received. Defendant contends that to overcome its exhaustion defense Plaintiff must prove the payment of untimely medical bills or bad faith in the handling of the claim.

21. In support of its argument, Defendant relies on *Northwoods Sports Medicine & Physical Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance* Co., 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] and on *Progressive Select Insurance Company v. Dr. Rahat Faderani, DO, MPH, P.A.,* 330 So. 3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a].

22. In *Northwoods Sports Medicine & Physical Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance* Co., 137 So. 3d 1049 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] the Fourth DCA held that "[o]nce the PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims, *absent bad faith in the handling of the claim by the insurance company*." *Id.* at 1057 (emphasis added); *see also GEICO Indem. Co. v. Gables Ins. Recovery, Inc.,* 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a].

23. This court finds that Plaintiff's claims are without merit. In *Progressive Select Insurance Company v. Dr. Rahat Faderani, DO, MPH, P.A.,* 330 So. 3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a] the Fourth DCA analyzed whether "improper payments" to another medical provider constitute bad faith in the handling of the claim. As succinctly stated by the Fourth DCA:

> Were we to write on a clean slate, and except for untimely payments, we would hold that an insurance company's "improper" payments to another provider do not constitute bad faith sufficient to overcome the insurance company's exhaustion of benefits defense to a provider who sues for payment after the policy limits have been exhausted. In *Northwoods,* we allowed bad faith "*in the handling of the claim by the insurance company*" to overcome the defense. 137 So. 3d at 1057. We construe that to mean bad faith in the handling of the claim at issue, not a claim by a third party, particularly where there is no evidence that the third party contested how the insurance company handled that party's claim. In other words, the conduct of the insurance company must be directed at the provider attempting to avoid the exhaustion of benefits claim.

24. The record evidence is clear. There is no evidence that Defendant reimbursed other non-party providers for untimely bills. Therefore, no gratuitous payments were made. Additionally, there is no record evidence before this court that Defendant handled the at issue claim in bad faith.

25. Plaintiff's allegation of "improper payments" to other, non-party medical providers is not supported by the record evidence. This court is bound by *Progressive Select Ins. Co. v. Dr. Rahat Faderani, supra,* that improper payments to other, non-party medical provider does not constitute bad faith in handling of the claim. Thus, there is no record evidence before this court that Defendant handled the at issue claim in bad faith.

26. Defendant also contends that Plaintiff lacks standing to question Defendant's payment of PIP benefits to other, non-party providers under the AOB signed by the Claimant.

27. This court agrees with Defendant's contention. The AOB gives Plaintiff the Claimant's rights and benefits under the policy to collect PIP benefits for services and/or treatment provided by the Plaintiff. The AOB does not convey rights and benefits to Plaintiff to argue whether Defendant should or should not have paid a PIP claim made by the Claimant or another provider. *See Susanti K. Chowdhury MD PA a/a/o Angela Hammel v. Progressive American Insurance Company,* (Pinellas Cty. Ct. Judge Kathleen Hessinger, Oct. 10, 2016) [24 Fla. L. Weekly Supp. 691c] ("Plaintiff's assignment from the insured gives the Plaintiff the insured's rights and benefits under the policy to collect PIP benefits for Plaintiff only, not to dictate whether the insurer should or should not have paid a claim to the insured or another medical provider. Beyond the standing issue, allowing one medical provider to file suit, or maintain a suit, against the insurer, after benefits are exhausted, on the grounds that 'had the insurer not paid a PIP claim by another provider or the insured, then this Plaintiff/medical provider may have received the benefits' opens a Pandora's Box that would keep insurers open to litigation, for years, after paying the required PIP benefits under the policy.")

28. For the foregoing reasons, this court finds that Defendant properly exhausted the Claimant's $10,000 PIP benefits and Plaintiff does not have a judiciable issue against Defendant.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

Plaintiff's Motion for Continuance is hereby **DENIED**.

Plaintiff's Motion to Compel Better Responses to Plaintiff's Request for Production and to Overrule Objections is hereby **DENIED.**

Defendant's Motion for Final Summary Judgement is hereby **GRANTED.**

Plaintiff shall take nothing from this action, and Defendant shall go hence without day.

The Court reserves jurisdiction to determine Defendant's entitlement to fees and costs.

* * *

Insurance—Rescission of policy—Material misrepresentation—Summary judgment

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—Automobile—Windshield repair—Appraisal—Insurer's motion to compel appraisal is granted where there is valid contract with mandatory appraisal provision, plaintiff as assignee of insured is bound by terms of contract, appraisal is appropriate since only issue is amount of loss, and insurer has taken no action to waive right to appraisal

ALLIED AUTO GLASS, LLC, a/a/o Tavia McMillen, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-SC-51756-O, Division 73. May 24, 2022. Andrew L. Cameron, Judge. Counsel: Imran E. Malik, Malik Law, P.A.,

Maitland, for Plaintiff. Lisa M. Lewis, Cole, Scott & Kissane, P.A., Tampa, for Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, MOTION TO STAY AND COMPEL APPRAISAL

THIS CAUSE having come before the Court on Defendant's Motion to Dismiss, or Alternatively, Motion to Stay and Compel Appraisal and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon:

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is hereby Denied.

ORDERD AND ADJUDGED that Defendant's Motion to Stay and Compel Appraisal is hereby Granted.

Plaintiff, Allied Auto Glass, LLC as the assignee of Tavia McMillen brought this Complaint for breach of contract against Defendant, State Farm Mutual Automobile Insurance Company. Defendant argues in pertinent part that the Complaint should be dismissed because Plaintiff failed to satisfy a mandatory condition precedent to bringing the lawsuit by failing to comply with the appraisal process. State Farm's 6910A Amendatory Endorsement states, "If there is a disagreement as to the cost of repair. . .an appraisal will be use as the first step toward resolution." Further, the policy provides that, "[l]egal action may not be brought against ***us*** until there has been full compliance with all the provisions of this policy. Policy Form 9810A at 46. In the alternative, State Farm argues that this matter should be stayed, and the parties compelled to comply with the appraisal provision of the policy.

Plaintiff argues that the appraisal provision does not apply to a third-party assignee, that State Farm did not appropriately issue payment pursuant to the policy's limits of liability provision and that there were public policy concerns with regard to Florida Statute 627.428.

The Court hereby finds that State Farm has admitted coverage and liability. State Farm has issued a partial payment and the mandatory appraisal provision of the policy applies. The Court further finds that appraisal is a condition precedent to brining suit. When ruling on a Motion to Compel appraisal, there are three factors for the Court to consider 1) whether a valid agreement exists, 2) whether the matter is appropriate for appraisal and 3) whether that right has been waived. *Heller v. Blue Aerospace, LLC*, 112 So.3d 635 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. This Court finds that there is a valid contract. Allied Auto Glass, LLC as the assignee of Tavia McMillen steps into the shoes of the insured and is bound by the terms of the policy. The Court finds that this matter is appropriate for appraisal as the only issue is the amount of loss. Lastly, this Court finds that State Farm has taken no action to waive it rights to appraisal.

For the reasons stated above, Defendant's Motion to Dismiss is hereby Denied. Plaintiff's Motion to Stay and Compel Appraisal is hereby granted. The parties shall name their appraisers within 30 days and the appraisal process shall be completed within 120 days from the date of this Order.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Reasonableness of charges—Summary judgment—Summary judgment entered in favor of provider where deposition and affidavit of medical provider's corporate representative were sufficient to carry provider's burden to establish absence of factual issue regarding reasonableness of charges and insurer filed no opposing evidence—No merit to argument that deposition and affidavit are hearsay evidence—Further, explanations of benefits that are hearsay may be considered in passing on motion for summary judgment where they could be reduced to admissible evidence at trial

NGUYEN WELLNESS CENTER, LLC., a/s/o Leslie Bell, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County, Division 72. Case No. 2013-CC-008860-O. May 19, 2022. Andrew Bain, Judge. Counsel: Dave T. Sooklal, Anthony-Smith Law, P.A., Orlando, for Plaintiff. Christopher Kirwan, Kirwan, Spellacy, Danner, Watkins & Brownstein, P.A., Ft. Lauderdale, for Defendant.

ORDER REGARDING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court on May 3, 2022, upon Plaintiff's Motion for Final Summary Judgment and the Court having heard argument from both parties and otherwise being fully advised of the premises makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

Nguyen Wellness Center ("Plaintiff") filed this lawsuit seeking reimbursement of Personal Injury Protection ("PIP") benefits for treatment rendered to the Defendant, State Farm Mutual Automobile Insurance Company's ("Defendant") insured, Leslie Bell, as a result of an accident that occurred on July 3, 2011. The seminal issue in this case is whether Defendant breached its policy and the No Fault Statute by reimbursing Plaintiff's charges pursuant to the schedule of maximum charges though Defendant did not elect to utilize the schedule in its policy. The trial court ultimately decided this issue in Plaintiff's favor and entered final summary judgment in Plaintiff's favor regarding the entirety of the issues raised in this lawsuit. In doing so, the trial court precluded Defendant from litigating the reasonableness of Plaintiff's charges. Defendant appealed the final judgment.

On Appeal, the Ninth Circuit sitting in its appellate capacity upheld the summary judgment on all grounds except one—Defendant's ability to litigate the reasonableness of Plaintiff's charges. Specifically, the Appellate Court held that, "State Farm should have been allowed to litigate the reasonableness of Nguyen's charges, even though State Farm used a fee schedule and the Policy failed to clearly and unambiguously give notice of its election to do so." However, the reversal was not without limitation, as the Court also held that, "State Farm is precluded form availing itself of the "fee schedule limitation." Thus, the case was remanded to this Court to allow Defendant to litigate the reasonableness of Plaintiff's charges. Defendant has since been afforded that opportunity, and the sole remaining issue which is now before the Court is the reasonableness of Plaintiff's charges.

FACTUAL BACKGROUND AND UNDISPUTED FACTS

1. **Defendant's Policy**

a. Defendant issued a policy of insurance that provided Personal Injury Protection benefits ("PIP") to Leslie Bell ("Bell") for the subject motor vehicle accident.[1]

b. It is undisputed that Defendant's policy does not clearly and unambiguously elect to utilize the schedule of maximum charges to calculate PIP reimbursements. Instead, Defendant's policy elected to utilize the following factors to determine PIP reimbursements:

> To determine whether a charge is reasonable we may consider ***usual and customary charges and payments accepted by the provider, reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.*** We will not pay any charge that the No-Fault Act does not require us to pay or the amount of any charge that exceeds the amount the No-Fault Act allows to be charged.[2]

2. **Nguyen Wellness' Treatment and Charges at Issue**

a. It is undisputed that Bell received treatment from Nguyen Wellness from April 23, 2012 through September 26, 2012, which

was related and necessary as a result of the injuries Bell suffered in the subject motor vehicle accident.[3]

b. It is undisputed that Nguyen Wellness submitted bills for dates of service April 23, 2012 through September 26, 2012, to Defendant for the following CPT codes and billed the following amounts for the same. These are the CPT codes at issue as well as the charges for the same:

- 98941: $75.00;
- 97010: $11.00;
- G0283: $27.00;
- 97035: $27.00;
- 97039: $18.00;
- 97124: $60.00.[4]

c. It is undisputed that Defendant reduced Nguyen Wellness' charges to the following amounts solely based on the schedule of maximum charges:

- 98941: $71.02;
- 97010: $10.00;
- G0283: $26.50;
- 97035: $24.58;
- 97039: $15.00;
- 97124: $49.92.[5]

3. **Nguyen Wellness' Evidence Regarding the Reasonableness of its Charges.**

a. Defendant deposed Dr. Thuy Nguyen on two separate occasions in this case regarding the reasonableness of Plaintiff's charges.

b. Defendant noticed the deposition of Nguyen Wellness' Corporate Representative pursuant to Fla. R. Civ. P. 1.310(b)(6) and included the following areas of inquiry in its "Matters on Which Examination is Requested" regarding the reasonableness of Nguyen's charges:

i. Each amount charged and billed by the Plaintiff for services and/or supplies rendered to the patient/alleged assignor and which are the subject of the Plaintiff's Complaint, as well as the current status of each such charged and/or billed amounts, including but not limited to any and all payments, reductions, adjustments, write-offs, liens, and letters of protection;

ii. Usual and customary charges and payments accepted by the Plaintiff from any and all sources, including but not limited to HMOs, PPOs, Medicare, Medicaid, automobile insurers, MedCash Funding and similar financiers of accident patient medical expenses, Workers' Compensation insurers/funds, self-pay patients, charitable organizations, and/or letters of protection, for the same services and/or supplies at issue in the Plaintiff's Complaint;

iii. Any information regarding reimbursement levels in the community for the same services and/or supplies at issue in the Plaintiff's Complaint;

iv. For the six months before, month of, and six months after the date(s) of service at issue in Plaintiff's Second Amended Complaint:

(a) The percentage of time the Plaintiff received payment of 100% of the gross amount charged for each of the medical services at issue in Plaintiff's Second Amended Complaint; and

(b) The percentage of time the Plaintiff accepted as full and final payment less than 50% of the gross amount charged for each of the medical services at issue in Plaintiff's Second Amended Complaint.

v. For the corresponding calendar year in which each medical service was allegedly provided by the Plaintiff to Leslie Bell (2012), the lowest, highest, and average amount that the Plaintiff accepted as full and final payment any and all of the same services for all patient, together with the method for obtaining these figures;

vi. For 2011 to the present, and for the same medical services rendered to all patients as are at issue in this lawsuit, the usual and customary charges and payments accepted by the Plaintiff from all payment sources; and,

vii. All information within your possession and/or control regarding reimbursement levels in the community for the same services at issue in the Plaintiff's Second Amended Complaint for the calendar years 2011, 2012, and 2013.

c. Dr. Thuy Nguyen was produced as Plaintiff's Corporate Representative regarding the above-mentioned areas of inquiry and she testified at deposition as to the reasonableness of the charges at issue in this case as follows:

i. She is the owner of Nguyen Wellness and is designated as Nguyen Wellness' Corporate Representative regarding the areas of inquiry listed above[6];

ii. She was responsible for overseeing Nguyen Wellness' billing including the billing at issue in this case[7];

iii. She set the prices for the services rendered to Mr. Bell at issue in this case[8];

iv. She based the amounts for the services at issue in this case by asking her colleagues about their fee schedule, and based Nguyen Wellness's off their range as well as her education and experience as well as PIP payments from automobile insurance carriers[9];

v. Nguyen Wellness charges for the services at issue in this case did not change for the timeframe within which Mr. Bell received treatment[10];

vi. She did not recall the names of her colleagues she consulted but they were located in the Central Florida area[11].

vii. Nguyen Wellness has been reimbursed the full amount billed for the entirety of the charges at issue in this case from PIP insurance carriers[12];

viii. Nguyen Wellness took into account reimbursements from PIP insurance carries in determinizing its charges at issue in this case[13];

ix. When asked for the identity of other insurers who paid Nguyen Wellness the full amounts billed for the charges at issue in this case, Dr. Nguyen provided the following PIP insurance carriers: Auto Injury Solutions, Safeco, Geico, Direct General and Ocean Harbor[14];

x. Upon Defendant's request at the deposition, Dr. Nguyen produced Explanations of Benefits from the above-mentioned PIP insurance carriers and Defendant attached the same as an Exhibit to Dr. Nguyen's deposition[15].

d. Plaintiff filed the Affidavit of Dr. Nguyen on May 6, 2015, attesting that the charges for services rendered to Bell represent the usual and customary charges that Plaintiff billed for the services rendered, were based on local and customary prices as well as the type of treatment, the amount of time spent with the patient and the skill of the professional treating the patient.[16]

e. Explanations of Benefits From PIP Insurance Carriers:

i. Direct General's Explanation of Benefits allowing the full amount billed by Plaintiff for the following treatment at issue in this case in 2011 and 2012:

1. 98941;
2. 97035;
3. 97124;
4. 97010; and,
5. G0283.[17]

ii. Geico's Explanation of Benefits allowing the full amount billed by Plaintiff for the following treatment at issue in this case in 2012:

1. 97039;
2. 97010; and,
3. G0283.[18]

iii. Safeco's Explanation of Benefits allowing the full amount billed by Plaintiff for the following treatment at issue in this case in 2012:

1. 97010;
2. 97039;
3. 97035; and,
4. G0283.[19]

iv. Defendant's Explanation of Benefits allowing more than the full amounts billed by Plaintiff for the following treatment to another medical provider in the same geographical area as Plaintiff in 2012:

1. 97010; and,

2. 97014/G0283.[20]

4. Defendant did not timely file any evidence in opposition to the evidence proffered by Plaintiff.

ISSUE TO BE DECIDED BY THE COURT

The sole remaining issue in this case presented to this Court is whether Plaintiff's charges are reasonable.

ARGUMENT BY THE PARTIES

1. Plaintiff contends that there is no genuine issue of material fact regarding the reasonableness of the charges at issue in this case based on the unopposed evidence proffered by Plaintiff in support of the reasonableness of its charges.

2. In particular, Plaintiff has provided the following evidence in support of the reasonableness of its charges:

a. Dr. Nguyen's deposition transcript attesting to the following:

i. Dr. Nguyen testified as Plaintiff's Corporate Representative regarding the reasonableness of the charges at issue in this case;

ii. Dr. Nguyen is responsible for overseeing billing;

iii. Plaintiff charged the same amount for the services at issue in this case for all patients and did not change its charges for the entirety of the timeframe within which Mr. Bell received treatment;

iv. Plaintiff was reimbursed the full amount billed for the charges at issue in this case from other PIP insurers including Safeco, Geico, Direct General and Ocean Harbor;

v. Dr. Nguyen consulted her colleagues in the Central Florida area regarding their fee schedules and Plaintiff considered that in setting its fee schedule along with Dr. Nguyen's education and experience;

b. Dr. Nguyen's Affidavit attesting that the charges at issue in this case represent the usual and customary charges that Plaintiff billed for the services rendered, were based on local and customary prices as well as the type of treatment, the amount of time spent with the patient and the skill of the professional treating the patient;

c. Plaintiff's bills reflecting Plaintiff's usual and customary charges for the treatment at issue in this case;

d. Explanation of Benefits reflecting reimbursements made by the following PIP insurance carriers to Plaintiff for the full amounts charged in this case:

i. Direct General, Geico and Safeco.

e. Explanations of Benefits from Defendant reflecting PIP reimbursements to another medical provider in Orange County, Florida, for an amount greater than the charges for the same services at issue in this case.

3. Plaintiff contends that the above-mentioned evidence establishes that there is no genuine issue of material fact regarding the reasonableness of Plaintiff's charges because it proves that Plaintiff's charges were the usual and customary charges and payments accepted by Plaintiff, reflect the reimbursements levels in the community, and includes other information relevant to the reasonableness of service.

4. The subject policy and Florida's No-Fault Statute include certain factors to be considered in determining the reasonableness of Plaintiff's charges such as: usual and customary charges and payments accepted by the provider; reimbursement levels in the community; and various federal and state medical fee schedules applicable to automobile and other insurance coverages; and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

5. As to the first factor, "usual and customary charges and payments accepted by the provider," Dr. Nguyen testified at deposition and in her Affidavit that she sets Plaintiff's pricing and the charges reflected in Plaintiff's bills are Plaintiff's usual and customary charges as they were the same for the entire timeframe within which Mr. Bell received treatment. Also, Dr. Nguyen testified that the amounts reflected in Plaintiff's bills were the usual and customary payments accepted by Plaintiff for the treatment at issue in this case as PIP insurers including Geico, Safeco, Direct General and Ocean Harbor reimbursed the same in full and Plaintiff took those payments into account in setting its charges. The aforementioned is summed up in the following chart:

Location	CPT Code	Amount Billed	Amount Allowed	Ins. Co.
Orlando	98941	$75.00	$75.00	Direct General
Orlando	97010	$11.00	$11.00	Direct General, Geico, Safeco
Orlando	G0283	$27.00	$27.00	Direct General, Geico, Safeco
Orlando	97035	$27.00	$27.00	Direct General, Safeco
Orlando	97039	$18.00	$18.00	Geico, Safeco
Orlando	97124	$60.00	$60.00	Direct General

6. Plaintiff also contends that its charges are in line with the reimbursement levels in the community. Specifically, Plaintiff has produced an Explanation of Benefits from the Defendant reflecting that the Defendant has approved amounts greater than the charges submitted by Plaintiff for the exact treatment at issue in this case. In addition, Dr. Nguyen testified that Direct General, Geico, Safeco, and Ocean Harbor have reimbursed Plaintiff's charges in full which constitute reimbursement levels in Orlando as that is the community in which Plaintiff is located.

7. Also, Dr. Nguyen testified that she based her charges on the following: consultation with her colleagues in the Central Florida area regarding their fee schedules; local customary prices; the type of treatment, the amount of time spent with the patient, her skill; and, her education and experience. The aforementioned is all information relevant to the reasonableness of Plaintiff's charges and are encompassed in the final factor that can be considered in determining a reasonable charge—other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.

8. Plaintiff asserts it has discharged its burden of proving that there is no genuine issue of material fact regarding the reasonableness of its charges through the aforementioned evidence.

9. In response, Defendant did not timely file any evidence to refute Plaintiff's evidence. Instead, the sole argument raised by Defendant is that Plaintiff failed to meet its burden of establishing that its charges are reasonable because the entirety of the evidence proffered by Plaintiff is inadmissible hearsay.

LEGAL STANDARD

Summary judgment shall be awarded in favor of the moving party "if there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). "Summary judgment is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings, and summary judgment is appropriate where, as a matter of law, it is apparent from the pleadings, depositions, affidavits, or other evidence that there is no genuine issue of material fact and that the moving party is entitled to relief as a matter of law." *Florida Bar v. Greene,* 926 So.2d 1195, 1200 (Fla. 2006) [31 Fla. L. Weekly S212a]. In applying the new summary judgment standard, the Florida Supreme Court echoed the Eighth Circuit Court of Appeals' observation that the movant's initial burden of production in this circumstance is "far from stringent" and that it can be "regularly discharged with ease." *Bedford v. Doe,* 880 F.3d 993, 996 (8th Cir. 2018).

To that end, at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* This originates from the fundamental similarity between the summary judgment standard and the directed verdict standard. *Id.* at 251 (noting that "the inquiry under each is the same" and, "summary judgment should be granted where the evidence is such that it would require a directed verdict for the moving party"). Both standards focus on "whether the evidence presents a sufficient disagreement to require submission to a jury." *Anderson,* 477 U.S. at 251-52. If it does not, the moving party is entitled to summary judgment as a matter of law. *Id.* at 250.

"It is not sufficient in defense of a motion for summary judgment to rely on the paper issues created by the pleadings, but it is incumbent upon the party moved against to submit evidence to rebut the motion for summary judgment and affidavits in support thereof or the court will presume that he had gone as far as he could and a summary judgment could be properly entered." *Holl v. Talcott,* 191 So.2d 40, 43 (Fla. 1966), (*quoting Hardcastle v. Mobley,* 143 So.2d 715, 717 (Fla. 3d DCA 1962)).

ANALYSIS

Before the Court is Plaintiff's Motion for Summary Judgment wherein Plaintiff seeks Final Summary Judgment regarding the reasonableness of the charges at issue in this case. This is the sole remaining issue in this case as all other issues have been disposed of throughout the pendency of this action. The Defendant did not timely file any evidence opposing Plaintiff's Motion. As a result, if Plaintiff meets its summary judgment burden of establishing that there is no genuine issue of material fact regarding the reasonableness of its charges, Plaintiff is entitled to final summary judgment as there is no evidence to rebut the same. Thus, the issue before the Court is simply whether Plaintiff met it summary judgment burden regarding the reasonableness of its charges, which is dispositive of the Motion before the Court.

The Defendant issued a policy of insurance provided Personal Injury Protection ("PIP") benefits to Leslie Bell ("Bell") for an accident that occurred on July 3, 2011. Bell sought treatment at Nguyen Wellness Center ("Nguyen") from from April 23, 2012 through September 26, 2012, and there is no dispute that the treatment was related and necessary as a result of the injuries Bell suffered in the subject motor vehicle accident. Thereafter, Plaintiff submitted its bills to Defendant, which Defendant reimbursed at a reduced amount. Defendant's reduction gave rise to the instant lawsuit wherein Plaintiff alleges that Defendant breached its policy of insurance and violated Florida's No-Fault Statute by reimbursing Plaintiff less than a reasonable amount for its charges.

There is no dispute that Florida's No-Fault Statute includes certain factors to be considered in determining the reasonableness of Plaintiff's charges and that the subject policy elected to utilize the same. The Florida Supreme Court has held that there are two separate and distinct payment mechanisms for calculating reasonableness: 1) §627.736(5)(a)(1)[21] (hereinafter "subsection 5(a)(1)" or "fact-dependent inquiry"), and; 2) §627.736(5)(a)(2)[22] (hereinafter "subsection 5(a)(2)" or "permissive payment methodology"). *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147, 158 (Fla. 2013) [38 Fla. L. Weekly S517a]. Also, the Supreme Court mandated that an insurer clearly and unambiguously elect the permissive payment methodology in order to rely on it. *Id.* at 158 (citing *Kingsway Amigo Ins. Co. v. Ocean Health, Inc.,* 63 So. 3d 63, 67-68 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1062a]). Here, it is undisputed that Defendant's policy failed to clearly and unambiguously elect §627.736(5)(a)(2) as its methodology for calculating PIP reimbursements. Instead, Defendant's Policy states that it will pay:

> **1. Medical Expenses.** 80% of the reasonable charges incurred for necessary:
>
> a. medical, surgical, X-ray, dental, ambulance, hospital, professional nursing, and rehabilitative services.

See Defendant's policy at 12. The Policy then goes on to list the following regarding how Defendant will determine what a "reasonable charge" is:

> To determine whether a charge is reasonable ***we may consider usual and customary charges and payments accepted by the provider, reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply***. We will not pay any charge that the No-Fault Act does not require us to pay or the amount of any charge that exceeds the amount the No-Fault Act allows to be charged.

See Amendatory Endorsement 6910.3 at 3-4. As such, it is undisputed that Defendant elected the fact dependent inquiry to determine the reasonableness of Plaintiff's charges because its policy did not elect to utilize the schedule of maximum charges.

Therefore, to determine whether Plaintiff' charges were reasonable in price, the Court must look to the following factors included in Florida No-Fault Statute and Defendant's policy:

> a. Usual and customary charges and payments accepted by the provider involved in the dispute;
>
> b. Reimbursement levels in the community; and
>
> c. Various federal and state medical fee schedules applicable to motor vehicle and other insurance coverages;

See Fla. Stat. §627.736(5)(a)(1)(2011).

Plaintiff submitted the deposition testimony of Dr. Thuy Nguyen, Dr. Nguyen's Affidavit, bills and medical records for treatment rendered to Mr. Bell, as well as Explanations of Benefits from PIP Insurance Carriers in support of the above-mentioned factors. First, Plaintiff produced Dr. Thuy Nguyen as its Corporate Representative regarding the reasonableness of its charges and she testified that: the charges reflected in Mr. Bell's bills are the same for the entire timeframe within which Plaintiff provided treatment to Mr. Bell; the amounts reflected in the bills are the usual and customary payment accepted by Plaintiff as Geico, Safeco, Direct General and Ocean Harbor reimbursed the charges reflected in the bills in full; Plaintiff's charges are also based on Dr. Nguyen's education, experience, and consultation with her colleagues in the Central Florida area, though she did not recall the identity of her colleagues.

Plaintiff also submitted the Affidavit of Dr. Nguyen wherein she attested: as to the authenticity of the entirety of the bills for treatment rendered to Mr. Bell and laid the business exception to hearsay for the same; that the treatment was in accordance with accepted standards of medical practice, appropriate in terms of type, frequency, extent, site, and duration and were in line with the symptoms and injuries Mr. Bell suffered in the subject motor vehicle accident; the charges included in the bills represent the usual and customary charges that Plaintiff billed for the services rendered, were based upon local and customary prices as well as the type of treatment, the amount of time spent with the patient and the skill of the professional treating the patient.

In addition, Plaintiff submitted Explanations of Benefits ("EOB") from Defendant wherein Defendant approved amounts in Orange County greater than the amounts billed by Plaintiff for a portion of the services at issue in this case. Plaintiff also produced EOBs from Direct General, Geico, and Safeco wherein Plaintiff's charges for the same

services at issue in this case were approved in full.

In response to the above-mentioned evidence, Defendant contends that the entirety of the same is inadmissible hearsay for summary judgment purposes and cannot be considered by the Court.

Regarding the admissibility of Dr. Nguyen's deposition testimony, the Court finds Fla. R. Civ. P. 1.510 and 1.330 instructive. First, Rule 1.330(a) addresses the use of depositions in Court Proceedings and holds that "At trial or upon the hearing of a motion. . .any or all of a deposition may be used against any party who was present or represented at the taking of the deposition or had reasonable notice of it so far as admissible under the rules of evidence applied as though the witness were then present. . ." Moreover, Rule 1.510(c)(1)(a) specifically contemplates that depositions may be used to carry a party's summary judgment burden. *See* Fla. R. Civ. P. 1.510(c)(1)(a) (stating that a party asserting the absence of a genuine issue of fact must support the asserting by citing to particular materials in the record, including depositions). Furthermore, a witness' testimony is admissible where they testify from personal knowledge. *Roberts v. Direct Gen. Ins. Co.,* 47 Fla. L. Weekly 737b (Fla. 2d DCA 2022) (affirming summary judgment finding that the witness' testimony was admissible because she was competent to testify based on her personal knowledge); *Desvarieux v. Bridgestone Retail Operations, LLC,* 300 So.3d 723, 727 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D188b] (holding that it is well-settled that a witness may testify as to any matters of which they have personal knowledge).

Here, Dr. Nguyen's testimony regarding the reasonableness of Plaintiff's charges is based on her personal knowledge. Specifically, she appeared for deposition as Plaintiff's Corporate Representative pursuant to Rule 1.310(b)(6) regarding Defendant's areas of inquiry as to the reasonableness of Plaintiff's charges.[23] At deposition, Dr. Nguyen confirmed that she was designated as the Corporate Representative regarding the areas of inquiry and Defendant never challenged whether she was competent to testify to the same. As to the basis for her knowledge: she attested that she owned Nguyen Wellness Center and was responsible for setting Plaintiff's charges; Plaintiff's charges for the services at issue in this case remained the same for the entire timeframe within which Mr. Bell received treatment; Plaintiff was reimbursed the full amount billed for the charges at issue in this case from PIP carriers such as Safeco, Geico, Direct General and Ocean Harbor, and Plaintiff relied on these reimbursements in setting its charges; Plaintiff charges were also based on Dr. Nguyen's education, experience, and consultation with her colleagues in the Central Florida area regarding their fee schedules though she could not recall her colleagues' names. When viewed in totality, this Court finds that Dr. Nguyen's testimony is admissible as it was based on her personal knowledge, thus she was competent to testify as to the reasonableness of Plaintiff's charges. Also, Defendant never contested whether Dr. Nguyen was competent to testify to the areas of inquiry listed in its deposition notice.

As to Dr. Nguyen's Affidavit, the standard for admissibility of the same is similar to her deposition testimony as Fla. R. Civ. P. 1.510(c)(4) states in pertinent part that: An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. See Fla. R. Civ. P. 1.510(c)(4).

In this case, Dr. Nguyen attested to the following in her Affidavit: she is the sole owner of Nguyen Wellness Center and she oversees all activities including billing, patient care, and medical recordkeeping; she reviewed the medical records, treatment notes, and billing records for Mr. Bell attached to her Affidavit, which were made at or near the time of the event, by someone with personal knowledge of the same, are kept in the course of regularly conducted business, and are regularly made in the court of Plaintiff's business activities; based on her review of the documents, she prescribed a treatment program to Mr. Bell consistent with his complaints which were in accordance with generally accepted standards of medical practice, appropriate in terms of type, frequency, site and duration; the charges for the services represented the usual and customary charges Plaintiff billed for the services rendered, were based upon local, reasonable, and customary prices as well as the type of treatment, the amount of time spent with the patient and the skill of the professional treating the patient; and, the charges were comparable to other like facilities' charges which were located in the same geographical area as Plaintiff.

This Court finds that Dr. Nguyen laid the appropriate predicate for the admissibility of the contents of her Affidavit because she attested that: she is the sole owner of Nguyen Wellness Center, responsible for Plaintiff's billing; laid the business records exception for Mr. Bell's bills attached to the Affidavit; the charges reflected in the bills are the usual and customary charges that Plaintiff billed for the services at issue in this case; and were based on local, reasonable, and customary prices, as well as the skill of the professional providing treatment and time spent with the patient. *See Defendant Mut. Auto. Ins. Co. v. CEDA Health of Hialeah, LLC,* No. 16-151 AP, 27 Fla. L. Weekly Supp. 14a (Fla. 11th Cir. App. Mar. 6, 2019) (finding that the Affidavit of the Chiropractor attesting to the reasonableness of the medical provider's charges sufficient to establish the reasonableness of the charges at summary judgment).

Turning to the Explanations of Benefits proffered by Plaintiff from Defendant, Direct General, Geico and Safeco, the Court finds that the EOB's from Direct General, Geico and Safeco are hearsay but they do not preclude Dr. Nguyen from attesting to the reasonableness of Plaintiff's charges including the identity of PIP carriers that have allowed Plaintiff's bills in full. This issue was considered in *Roberts v. Direct Gen. Ins. Co.,* 47 Fla. L. Weekly D737b (Fla. 2d DCA 2022) wherein the Second DCA held that the witness' testimony was admissible notwithstanding the inadmissibility of certain hearsay documents because she established that she had personal knowledge regarding the matters she attested to. *See Roberts v. Direct Gen. Ins. Co.,* 47 Fla. L. Weekly D737b (Fla. 2d DCA 2022). Likewise, in this case as discussed above, Dr. Nguyen established that she is competent to testify regarding the reasonableness of Plaintiff's charges notwithstanding the EOB's.

Furthermore, Plaintiff has proffered an EOB from Defendant reflecting that Defendant reimbursed the treatment at issue in this case at amounts higher than Plaintiff's charges. Defendant objected to this EOB as hearsay, which is dubious at best, as the EOB is printed on Defendant's letterhead, includes Defendant's address and office, as well as the TIN number and zip code for the medical provider to whom payments were issued and their location in Orange County, Florida.

Moreover, the United States Eleventh Circuit has held that a court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form. *Macuba v. DeBoer,* 193 F.3d 1316, 1323 (11th Cir. 1999). This Court finds Macuba persuasive as the new iteration of Florida's Summary Judgment Rule is to be interpreted through the overall body of case law interpreting federal rule 56. *In re: Amendments to Fla. Rule of Civil Procedure 1.510.,* 317 So.3d 72, 76 (Fla. 2021) [46 Fla. L. Weekly S95a]. As such, though the EOB's are hearsay, they could certainly be reduced to admissible evidence.

In response to the above mentioned evidence, the Defendant did not timely file any evidence to contradict the same, thus this Court need only determine whether the aforementioned evidence establishes Plaintiff's burden regarding the reasonableness of Plaintiff's charges.

In doing so, it is undisputed that this Court must consider the factors enunciated in Florida No-Fault Statute and Defendant's policy. The factors are ***usual and customary charges and payments accepted by the provider, reimbursement levels in the community and various federal and state medical fee schedules applicable to automobile and other insurance coverages, and other information relevant to the reasonableness of the reimbursement for the service, treatment, or supply.***

In this case, Plaintiff has submitted its bills reflecting the charges at issue in this case and testified at deposition and through Affidavit that those charges reflect the usual and customary charges and payments accepted by Plaintiff as the charges did not change and those charges have been allowed in full by PIP carriers including Geico, Safeco, Direct General and Ocean Harbor. Moreover, these approvals of Plaintiff's bills in full reflect reimbursement levels in the community. Also, Plaintiff has attested that the charges are based on Dr. Nguyen's education and experience, as well as the time spent with the patient, the skill of the professional providing the service, and were based on local, reasonable and customary prices, which can be attributed to the final "catch all" factor regarding any other information relevant to the reasonableness of Plaintiff's charges.

When viewed in totality,[24] the aforementioned is sufficient to carry Plaintiff's burden of establishing that there is no genuine issue of material fact regarding the reasonableness of its charges pursuant to the factors enunciated in §627.736(5)(a)(1) Fla. Stat. (2011) and Defendant's policy. In arriving at this conclusion, the Court considered Florida's new summary judgment standard observing that, the movant's initial burden of production in this circumstance is "far from stringent" and that it can be "regularly discharged with ease." *Bedford v. Doe,* 880 F.3d 993, 996 (8th Cir. 2018). Also, the Court is mindful of the similarity between the summary judgment standard and directed verdict standard as the inquiry under each is the same and summary judgment should be granted where the evidence is such that it would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986). In the instant matter, there is no evidence to oppose Plaintiff's evidence. As such, the entry of a directed verdict would be proper whereby warranting the entry of summary judgment in favor of Plaintiff.

Accordingly, it is **ORDERED AND ADJUDGED,** that Plaintiff's Motion for Final Summary Judgment is hereby **GRANTED.**

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[1]*See* a copy of the policy of insurance and declarations page previously filed with this Court on or about May 6, 2015.

[2]*See* a copy of the policy of insurance and declarations page previously filed with this Court on or about May 6, 2015, at p. 3-4 Of Amendatory Endorsement 6910.3.

[3]*See* a copy of the Order entered by this Court on March 24, 2016.

[4]*See* a copy of Nguyen Wellness' bills as well as State Farm's Explanations of Benefits issued in response attached hereto as Exhibit "A."

[5]*See* a copy of Nguyen Wellness' bills as well as State Farm's Explanations of Benefits issued in response attached hereto as Exhibit "A."

[6]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 7-8.

[7]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 12-13.

[8]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 42.

[9]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 42, 85.

[10]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 43.

[11]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 43-44.

[12]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 85 .

[13]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 85.

[14]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 87.

[15]*See* a copy of the deposition transcript of Dr. Thuy Nguyen previously filed with this Court on October 1, 2018 at p. 87.

[16]See a copy of the Affidavit of Dr. Thuy Nguyen filed with this Court on May 6, 2015.

[17]*See* a copy of the Explanation of Benefits from Direct General previously filed with this Court on March 7, 2022.

[18]*See* a copy of the Explanation of Benefits from Direct General previously filed with this Court on March 7, 2022.

[19]*See* a copy of the Explanation of Benefits from Direct General previously filed with this Court on March 7, 2022.

[20]*See* a copy of the Explanation of Benefits from Direct General previously filed with this Court on March 7, 2022.

[21]The Florida Supreme Court characterized §627.736(5)(a)(1) as a "fact-dependent inquiry" whereby an insurer could determine the reasonableness. *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147, 155-56 (Fla. 2013) [38 Fla. L. Weekly S517a].

[22]The Florida Supreme Court characterized §627.736(5)(a)(2) as a "permissive" way for an insurer to calculate reimbursements to satisfy the PIP statute's reasonable medical expense mandate. *Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.,* 141 So. 3d 147, 156 (Fla. 2013) [38 Fla. L. Weekly S517a].

[23]State Farm listed the following areas of inquiry regarding Nguyen's charges and Dr. Nguyen was designated as the Corporate Representative to respond to the same:

- Each amount charged and billed by the Plaintiff for services and/or supplies rendered to the patient;
- Usual and customary charges and payments accepted by the Plaintiff;
- Any information regarding reimbursement levels in the community for the same services and/or supplies at issue in the Plaintiff's Complaint;
- For 2011 to the present, and for the same medical services rendered to all patients as are at issue in this lawsuit, the usual and customary charges and payments accepted by the Plaintiff.

[24]The Court may consider the entire record at summary judgment. Fla. R. Civ. P. 1.510(c)(3).

* * *

Insurance—Personal injury protection—Discovery—Depositions—Motion for protective order to bar depositions of insurer's claims adjuster and desk adjuster is denied where insurer specifically named adjusters as persons having knowledge and involvement in claim—Insurer's unilateral substitution of corporate representative in lieu of fact witnesses for deposition is improper—Work product privilege—There is no "claim file" privilege—Claim file material created during investigation and routine claim handling of medical provider's bill prior to provider's decision to initiate litigation is not work product

UNIVERSITY DIAGNOSTIC INSTITUTE WINTER PARK, PLLC, a/a/o Maria Velez Cancel, Plaintiff, v. GEICO INDEMNITY COMPANY, Defendant. County Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-SC-050776-O. May 3, 2022. Eric H. DuBois, Judge. Counsel: Michael B. Brehne, Law Offices of Michael B. Brehne, P.A., Altamonte Springs, for Plaintiff. William Austin Shaw, Law Office of Kelly L. Wilson, Orlando, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL DEPOSITIONS and DENYING DEFENDANT'S MOTION FOR PROTECTIVE ORDER

This matter came before the Court on April 19, 2022, on Plaintiff's Motion to Compel Depositions and Defendant's Motion for Protective Order, the Court having reviewed the file and otherwise being fully advised in the premises, the Court makes the following findings of fact and conclusions of law:

FACTS

1. This is a case to recover personal injury protection (PIP) benefits for services Plaintiff rendered to Defendant's insured.

2. On August 4, 2021, Plaintiff served Defendant its pre-suit demand letter pursuant to Fla. Stat. 627.736 (10) 2017.

3. On August 31, 2021, Defendant's adjuster, Stacey Kuhner, responded to Plaintiffs pre-suit demand letter by denying additional payment.

4. As a result, Plaintiff filed suit and began the discovery process.

5. Plaintiff has requested the depositions of the fact witnesses of

Defendant's employees who had involvement with the investigation, adjusting, processing, or handling of this claim including Stacey Kuhner and the adjuster who issued the original payment and provided the Explanation of Benefits explaining the payment.

6. On February 3, 2022, Defendant filed a Motion for Protective regarding the deposition of Stacey Kuhner and "the adjuster who received the plaintiff's bill and issued the Explanation of Review and made payments for the date of service in this matter (desk adjuster)."

7. In its motion for protective order, Defendant makes the following claims and assertions:

a. That any information or documentation prepared by or known by Stacey Kuhner and the desk adjuster are work product privileged.

b. That the corporate representative of Defendant would be the person with the most knowledge and that depositions of the other witnesses would be unnecessary and cumulative.

c. That the depositions of these witnesses would be unduly burdensome and harassing.

CONCLUSIONS OF LAW

I. PROTECTIVE ORDER

Pursuant to Fla. R. Civ. P. 1.310, a party may, after commencement of the action, take the testimony of *any* person, including a party, by deposition upon oral examination. Pursuant to Fla. R. Civ. P. 1.280(c), a court may enter an order to protect any party or person "from annoyance, embarrassment, oppression, or undue burden or expense." In order for the court to mandate that the discovery not be had, that the discovery only be had on specified terms or conditions, including a designation of time or place, or that certain matters not be inquired into, the prerequisite of Fla. R. Civ. Pro. 1.280(c) must be met.

It is the responsibility of the party seeking a protective order to demonstrate good cause for the issuance of such a protective order. *Towers v. City of Longwood,* 960 So. 2d 845, 847 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1658c]. Here, Plaintiff is attempting to inquire of relevant witnesses what involvement in the claim they had and why they made the decisions or took the actions that they took in denying Plaintiff's claim for benefits under the policy.

Because Defendant specifically named these individuals as having knowledge and involvement of the claim, the statutory requirements for protection do not exist. Further, it is not enough for an opposing party or non-party to offer a corporate representative in lieu of named witnesses merely because a corporate representative has information about the matter.

As stated by the court in *Towers*:

"It may be when all is said and done that [an individual] has nothing to contribute that is germane to the issues before the trial court.

Absolutely barring [the individual] from taking [a] deposition, however, is <u>*simply wrong*</u> based on the allegations of the complaint and the liberality of discovery. Litigants would never be able to take a non-party deposition if all the non-party had to do to get out of it is to say that he or she has nothing relevant to say.

See, *Towers v. City of Longwood,* 960 So. 2d 845, 849 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D1658c].

The Court finds that the identified witnesses may have relevant information that may lead to the discovery of admissible evidence and that Defendant has failed to show good cause to satisfy the requirements necessary for protection. The Court also finds that unilaterally substituting a corporate representative in lieu of fact witnesses for a deposition when not requested by opposing counsel is improper.

II. <u>WORK PRODUCT / "CLAIM FILE" PRIVILEGE</u>

Pursuant to Fla. R. Civ. P. 1.280(b)(1), "Parties may obtain discovery regarding *any matter,* not privileged, *that is relevant* to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

There is no privilege under Florida law that automatically attaches to "claims file material." *Avatar Prop. & Cas. Ins. Co. v. Flores,* 320 So. 3d 840, 843 (Fla. 2d DCA 2021) [46 Fla. L. Weekly D884a] (*citing, Homeowners Choice Prop. & Cas. Ins. Co. v. Avila,* 248 So. 3d 180, 184-85 (Fla. 3DCA 2018) [43 Fla. L. Weekly D885a]).

While work product is broadly defined, documents can only be protected as work product if they have been compiled in response to some event which foreseeably could have been made the basis of a claim (lawsuit). *Avatar,* at 843. Therefore, even preliminary investigative materials are not privileged if they are not compiled in response to some event which foreseeably could be made the basis of a claim. *Id.*

Even if some documents within the claim file are "work product," these documents are sometimes discoverable. Being there is no such thing as a "claim file" privilege, most documents "placed" in an insurer's claim file are not "work product" at all. "[W]hat constitutes 'work product' is incapable of concise definition adequate for all occasions." *Surf Drugs, Inc. v. Vermette,* 236 So. 2d 108, 111 (Fla. 1970).

Not all material in the claims file is made in anticipation of litigation and cannot be said to be "work product." The work product doctrine only protects documents *created in anticipation litigation. Avatar,* at 844. Thus, the burden shifts to the party claiming privilege to show that the withheld material was made in anticipation of litigation.

The Florida Supreme Court stressed the importance of insuring that the withheld material was *actually* prepared in anticipation of litigation before preventing it from disclosure to another party. *Surf Drugs, Inc. v. Vermette,* 236 So. 2d 108, 112 (Fla. 1970).

In this case, Defendant wishes to prevent its adjuster from disclosing their efforts and involvement in this claim; however, Defendant is unable to show the Court that the information being requested by Plaintiff was "made in anticipation of trial or litigation."

This Court finds instructive the holding in *Coutts v. Fla. Peninsula Ins. Co.,* 2016 Fla. Cir. LEXIS 6124, *16 [23 Fla. L. Weekly Supp. 1012b] (*citing, Udelson v. Nationwide Insurance Company of Florida,* 20 Fla. L. Weekly Supp. 1176a (11th Jud. Cir., April 15, 2013)).

In *Coutts,* the court stated:

It is clear, however, that every document generated as part of an insurance company's ordinary business of adjusting a loss is not work product. Like every other litigant, an insurance company withholding evidence on a claim of work product privilege must show that the material was prepared "in contemplation of litigation."

. . .

Put simply, an insurance company, like all other litigants, must show that the subject materials were prepared in anticipation of litigation, as opposed to a part of an investigation "conducted during the normal business of evaluating the claim" made by its insured. *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192 (Fla. 4th DCA 1991). Insurance companies are in the business of issuing policies and adjusting claims, not the business of litigating them, and the vast majority of claims submitted by their insureds do not result in adversary proceedings. And while it is theoretically "possible" that any claim submitted by an insured will wind up in litigation, every document generated as part of an insurer's adjustment activities is not

immune from discovery.

The bottom line is that documents in an insurance carrier's file—like documents in any litigant's file—that are relevant or reasonably calculated to lead to the discovery of admissible evidence are discoverable unless, and only unless, privileged. *See*, Fla. R. Civ. P. 1.280(b)(1). It makes no difference whether the document in the insurer's file is an "activity log," "claims manual," "photograph" of the damaged property, or anything else. Nor does it matter how the material is labeled by the carrier, or where it is located within the insurer's "file." Such material is protected by the work product privilege if, and only if, it is prepared "in anticipation of litigation." *See*, Fla. R. Civ. P. 1.280(b)(3). The law, quite simply, does not recognize a "claims file" privilege.

Id. at 16-18.

The work product privilege attaches to statements and materials prepared by a insurer *only if these were prepared in contemplation of litigation. Cotton States Mut. Ins. Co. v. Turtle Reef Assocs., Inc.,* 444 So. 2d 595, 596 (Fla. 4th DCA 1984).

Plaintiff argued that some of the documents were created well before litigation was contemplated and was merely part of routine claims handling. Defendant has not shown and cannot show that all documents requested to be present at the depositions were made in anticipation of litigation.

Because it is unclear whether the materials were assembled in the ordinary course of business or requirements unrelated to litigation, the materials are excluded from work product. *Cotton States Mut. Ins. Co.,* at 596. Here, Plaintiff is requesting to question the adjuster about information learned and documents that were created during the investigation and routine claims handling of the bill Plaintiff submitted to Defendant. This information was learned and obtained prior to denial of the claim and prior to Plaintiff's decision to initiate litigation.

The key inquiry when determining whether material is "work product," is whether the probability of litigation is "substantial and imminent." *See*, *Liberty Mut. Fire Ins. Co. v. Bennett*, 883 So. 2d 373, 374 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2190a]. It cannot be based on mere speculation or a blanket statement that "all claims could end up in litigation." This showing has not been made.

Defendant relies on *Nationwide Ins. Co. v. Demmo*, 57 So. 3d 982 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D707a] in support of its motion for a blanket protection against disclosure of claim file material. However a careful reading of *Demmo* notes,

[a]s this court did in *Mastrominas,* 6 So. 3d at 1258 n.2, we emphasize that [o]ur opinion should not be read as precluding appropriate discovery to the extent specific materials are discoverable. *See, Am. Home Assur. Co. v. Vreeland,* 973 So. 2d 668, 672 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D469a].

Although a claims file is generally not discoverable, to the extent that materials contained therein are relied on at trial, those items may be discoverable. (*See, Northup v. Acken,* 865 So. 2d 1267, 1271 (Fla. 2004) [29 Fla. L. Weekly S37a] (holding that materials reasonably expected or intended to be used at trial are subject to discovery)). *Demmo,* at 984 n.2.

Because Defendant, at this time, is unable to show that disclosure of the documents requested by Plaintiff would result in irreparable harm and because this information and testimony is relevant and reasonably intended to be used a trial, documents relied on in responding to the pre-suit demand letter and issuing payment is discoverable. (*See, Northup v. Herbert W. Acken, M.D., P.A.,* 865 So. 2d 1267, 1271 (Fla. 2004) [29 Fla. L. Weekly S37a], "All materials reasonably expected or intended to be used at trial, including documents intended solely for witness impeachment, are subject to proper discovery requests . . . and are not protected by the work product privilege.").

Here, Plaintiff is seeking to conduct relevant discovery and it is allowed the freedom to do so without being limited to what is speculated to be admissible or inadmissible in court. Plaintiff is allowed to use discovery as a channel to determine information that could be used at trial and/or is reasonably calculated to lead to evidence that is admissible at trial.

It is therefore ORDERED AND ADJUDGED:

1. Plaintiff's Motion to Compel Depositions is hereby GRANTED.

2. Defendant's Motion for Protective Order is hereby DENIED.

3. The deposition of Stacey Kuhner and the adjuster who received and reviewed this claim, Plaintiff's bill(s), and issued the Explanation of Review and/or payments in this matter, shall be scheduled within 30 days and to occur within 60 days from April 19, 2022.

* * *

Real property—Easements—Jurisdiction—County court cannot exercise jurisdiction over action seeking declaration that plaintiffs are entitled to erect fence or gate across 40-foot boundary line between their property and defendants' adjacent property notwithstanding easement for purposes of ingress and egress to defendants' property and injunction barring defendants from interfering with or removing any fence erected across boundary where court is unable to determine that potential monetary impact of requested relief on value of defendants' property falls within court's monetary jurisdictional limitation—Although claim for conversion seeking damages related to defendants' removal of fence erected across boundary falls within court's monetary jurisdictional limitation, court declines to exercise jurisdiction over claim because it is inextricably intertwined with controversy in counts over which court has determined it does not have jurisdiction

YOSVANI HERNANDEZ and ESCARLET J. PINEDA, Plaintiffs, v. LAWRENCE WILSON LARABEE, JR., DANIELLE LARABEE, and LAWRENCE WILSON LARABEE, III, Defendants. County Court, 10th Judicial Circuit in and for Polk County, Civil Division. Case No. 2021SC-000428, Section M2. August 31, 2021. Kevin M. Kohl, Judge. Counsel: Jose A. Morera, II, Dezayas Law Group, LLC, Lakeland, for Plaintiff. Thomas S. Rutherford, Tampa, for Defendant.

ORDER OF DISMISSAL

This matter came before the Court July 13, 2021 for a final hearing on Plaintiffs' Complaint. Present before the Court were the Plaintiffs, Yosvani Hernandez and Escarlet J. Pineda, with their counsel, Jose A. Morera, Esq., and the Defendants Lawrence Wilson Jr., Danielle Larabee, and Lawrence W. Larabee, III, with their attorney, Thomas S. Rutherford, Esq. The Court having examined the pleadings, reviewed the evidence presented, considered the arguments of the parties, and being otherwise advised, FINDS:

1. The parties are owners of adjacent parcels of real property and this dispute stems from the erection of a fence across the boundary line between the two properties.

2. It is undisputed that there is an easement which exists for the purpose of ingress and egress to the Defendants' property across a forty ("40") foot boundary line of the Plaintiffs' property (hereafter "40-foot boundary").

3. The Plaintiffs erected a fence along the 40-foot boundary but did leave a space for the Defendants to cross over the easement.

4. The Defendants objected to the erection of the fence, contending that the easement allows them ingress and egress onto their property at any point along the 40-foot boundary. More specifically the Defendants seek access to a section of the boundary that coincides with an area where they intend to install a driveway.

5. The Plaintiffs contend that the easement only requires ingress and egress to the Defendants' property at some point along the 40-foot boundary which does not unreasonably does not grant the Defendants the right to cross over the entirety of the 40-foot boundary at any point of their choosing.

6. In furtherance of the dispute between the parties Defendants removed the fence believing that they were entitled as it was infringing on their rights under the easement.

7. Following the removal of the fence the Plaintiffs filed their three count Complaint seeking the following relief:

- Count I—Declaratory Judgment: requesting the Court to enter a declaratory judgment finding that the Plaintiffs were entitled to erect, construct, or maintain a fence or gate across their property, so long as the fence was constructed in such a way as to not unreasonably interfere with the right of passage to the Defendants' property.
- Count II—Conversion: seeking damages in the amount of $3,520.00 related to the removal of the fence.
- Count III—Injunctive Relief: requesting that the Defendants be permanently enjoined from interfering with, damaging, altering, or tearing down any fence constructed across the 40-foot boundary.

JURISDICTION OF THE COURT

8. § 34.01, Florida Statutes states in relevant part:

(1) County courts shall have original jurisdiction:

. . .(c) Of all actions at law, except those within the exclusive jurisdictions of the circuit courts, in which the matter in controversy does not exceed, exclusive of interest, costs, and attorney fees:

. . .2. If filed on or after January 1, 2020, the sum of $30,000.00.

. . .(4) Judges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida.

(5) A county court is a trial court.

9. § 86.011, Florida Statutes states:

The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

(1) Of any immunity, power, privilege, or right; or

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

10. Where an action for declaratory and injunctive relief does not reach the threshold jurisdictional amount of the circuit court, a plaintiff may choose either court, each court having concurrent jurisdiction. *Sea Breeze, Video, Inc. v. Federico,* 648 So. 2d 226, 228 (Fla. Dist. Ct. App. 1994).

11. In *Alexdex Corp. v. Nachon Enterprises, Inc.* the Florida Supreme Court held that *"the legislature intended to provide concurrent equity jurisdiction in circuit courts,* ***except that equity cases filed in county courts must fall within the county court's monetary jurisdiction, as set by statute*** *[emphasis added]." Id.* 641 So. 2d 858, 862 (Fla. 1994).

Counts I and III

12. There was no allegation contained in the Complaint which would establish the monetary value or financial impact of the requested declaratory and injunctive relief sought by the Plaintiffs.

13. There was no evidence presented during the trial which could establish the monetary value or financial impact of the requested declaratory and injunctive relief sought by the Plaintiffs.

14. The Plaintiffs argue that because this court has jurisdiction to address declaratory and injunctive relief and because count II seeks monetary damages in the amount of $3,520.00 that this action falls within the jurisdiction of this Court.

15. The Court notes that granting the declaratory and injunctive relief sought by the Plaintiffs could impact the value of the Defendants' property in perpetuity. Although there was no evidence or testimony presented to establish the potential monetary impact of the requested relief, the possibility exists that said impact could be in excess of the jurisdictional limitations of this Court.

16. As held by the Florida Supreme Court, although county courts do have concurrent jurisdiction to address these claims, that jurisdiction is conditioned upon a determination that the equitable claims fall within the county court's monetary jurisdiction. *See Alexdex Corp.*

17. Since this Court cannot find that the controversy falls within the monetary jurisdictional limitations of this Court it cannot exercise jurisdiction over counts I and III.

Count II

18. On its face the Plaintiffs' claim for conversion seeking damages in the amount of $3,520.00 seemingly falls within the jurisdiction of this Court; however, the relief sought by the Plaintiffs in Count II is inextricably intertwined with the controversy set forth by Counts I and III.

19. The Defendants argue that they are not liable for removing the fence[1] as it was encroaching on their rights granted by the easement.

20. In order to resolve the merits of the conversion claim it is necessary to determine the controversy set forth in Counts I and III, which this Court has determined it does not have jurisdiction to adjudicate. Therefore, this Court likewise declines to exercise jurisdiction over Count II.

IT IS THEREFOERE ORDERED AND ADJUDGED that the above entitled cause be and the same is hereby DISMISSED for lack of subject matter jurisdiction.

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[1]The Defendants contend that the removal of the fence caused no damage to the materials and that the fence materials could be reinstalled. The Plaintiffs testified that the damages being sought ($3,520) represent the entire price of the fence including materials and the labor for installation. The Plaintiffs testified that they do not know if the fence materials can be reused.

* * *

Insurance—Homeowners—Coverage—Insurer's motion for summary judgment on complaint seeking benefits for roof repairs is denied where there is factual issue as to whether roof was damaged during policy period—Changing of date of loss from original complaint to amended complaint does not constitute new claim warranting dismissal of current action—Whether insurer suffered any prejudice from date of loss being corrected by amended complaint is issue for jury—Plaintiff is not required to prove specific date of loss, only that loss occurred during policy period

NOLAND'S ROOFING, INC., a/a/o David Durham, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, a for-profit Florida Corporation, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2021-CC-000549. May 23, 2022. Brandon J. Rafool, Judge. Counsel: Katie Monroe, Hale, Hale & Jacobson, P.A., Orlando, for Plaintiff. Eli M. Marger, Kubicki Draper, P.A., Tampa, for Defendant.

ORDER

THIS CAUSE came before the Court on May 10, 2022, upon consideration of Defendant, Citizens Property Insurance Corporation's Motion for Summary Judgment and Motion for Sanctions (Seq. #68), filed November 16, 2021, and Plaintiff's Response to Defendant's Motion for Summary Judgment (Seq. #86), filed April 19, 2022. Katie S. Monroe, Esquire appeared for the Plaintiff, NOLAND'S ROOFING, INC. A/A/O DAVID DURHAM ("NOLAND'S"). Eli M. Marger, Esquire appeared for the Defendant, CITIZENS PROPERTY INSURANCE CORPORATION ("CITI-

ZENS"). The Defendant's Motion is denied as set forth herein.

I. Background

This lawsuit was commenced by Noland's when it filed its Complaint on October 18, 2019 (Seq. #5). On May 19, 2020 an Amended Complaint was filed by Noland's (Seq. #35).

On July 2, 2021, Citizens filed its Answer to the Amended Complaint which primarily denied the allegations of the Complaint and set forth Affirmative Defenses including that Noland's failed to comply with duties after loss and negated coverage; prompt notice was not provided to Citizens; the Policy does not provide coverage for damage that did not occur in the Policy's term; and Noland's failed to provide certain documents and information upon request (Seq. #60 and #82 withdrawal of certain affirmative defenses by Citizens).

On November 16, 2021, Citizens filed its Motion for Summary Judgment (Seq. #68). On January 25, 2022, Citizens set its Motion for Summary Judgment for hearing held May 10, 2022 (Seq. #79). On April 19, 2022, Noland's filed its Response to Defendant's Motion for Summary Judgment which the Court reviewed and took into consideration (Seq. #86).

There are genuine issues as to the material facts in the above-entitled action and that Citizens is not entitled to a judgment as a matter of law based on the Amended Complaint (Seq. #35), Citizens Answer and Affirmative Defenses (Seq. #60), Depositions of David Durham (Seq. #88, dated April 19, 2022) and Jolie Demay—Citizens' Corporate Representative (Seq. #87, dated April 19, 2022), Citizens' Motion for Summary Judgment (Seq. #68), Noland's Response to Defendant's Motion for Summary Judgment (Seq. #86), and Noland's Second Amended Notice of Filing Policy of Insurance by Interlineation filed on May 11, 2022 - Seq. #90. The Court notes the following:

A. Noland's Second Amended Notice of Filing Policy of Insurance by Interlineation filed on May 11, 2022 - Seq. #90 (at the Request of the Court since the initial filing was digitized April 18, 2022, Seq. #85) establishes that Insured David Durham was insured by Citizens from October 29, 2018 to October 29, 2019 under Policy Number 01313060 which was the same insurance company and policy number for the year prior (Exhibit "A"—Affidavit of Citizens' Corporate Representative, Seq. #68).

B. Damages alleged to have occurred to the property owned by David Durham and insured Citizens pursuant to policy number 01313060. (Exhibit "A"—Affidavit of Citizens' Corporate Representative, Seq. #68).

C. On or about May 15, 2019, Noland's and Durham executed an assignment of benefits (AOB) arising out of the subject loss as reported to Citizens. (Exhibit "A"—Affidavit of Citizens' Corporate Representative, as well as Exhibit "B"—Assignment of Benefits, Seq. #68).

a. The Assignment reads in the first paragraph:

For valuable consideration, I hereby assign and transfer any and all rights, benefits and causes of action to Noland's Roofing, Inc. . . . such sums as may be due and owing for all damages payable under the subject contract of insurance.

It was dated May 15, 2019, referenced the Claim# and Policy#, but did not reference nor set forth on the Assignment of Benefits any date of loss.

D. On or about August 1, 2019, Citizens denied the underlying claim, stating the investigation was prejudiced due to the late reporting of the loss and the failure of Durham and/or his representatives to provide requested information to Citizens. (Exhibit "A" —Affidavit of Citizens' Corporate Representative, Seq. #68).

E. On or about January 27, 2020, Noland's asserted storm damage to the roofing structure as a result of a wind/hail storm that occurred on or about December 20, 2018. (Exhibit "D", Noland's Answers to Interrogatories, Paragraph 2, Seq. #68 and #23).

F. On or about May 19, 2020, Noland's filed its Amended Complaint. *Therein, Noland's alleged a date of loss of November 2, 2018.* (Amended Complaint, attached as Exhibit "G" in Sec. 68, and Seq. 35).

a. In Paragraph 7 of the Amended Complaint it is alleged "*A policy of homeowners insurance, including the coverage to protect Plaintiff's assignor against loss by damage caused from wind, hail and water, was issued by Defendant and was in full force and effect as to Plaintiff's assignor when his home was damaged by wind, hail and water on or about November 2, 2018. A copy of the policy is attached hereto as Exhibit "A".*" To which Citizens Answered by stating "*Denied. The attached policy does not cover a November 2, 2018 date of loss because its term ends on October 29, 2017.*" (Defendant Citizen's Property Insurance Corporation's Answer and Affirmative Defenses to Plaintiff's Complaint—Sequence #60, dated July 2, 2021).

b. The Court denied a Motion to Dismiss Count I and required Noland's to file the correct Policy of Insurance (2018-2019) by Interlineation, which Noland's did timely file. A dispute for trial is whether there is a loss during the policy period from October 29, 2018 through October 29, 2018 (Order entered June 3, 2021, Seq. #58, and Policy filed July 7, 2021, Seq. #62).

G. The Depositions taken and filed in this matter establish the following:

a. Deposition of Jolie Demay, Corporate Representative Taken on Behalf of the Plaintiff, Noland's Roofing, Inc. a/a/o David Durham—Sequence #87, dated April 19, 2022

Page 13, Lines 18 - 25

Q. When was this loss first reported to Citizens?

A. The loss was reported to Citizens May 15th, 2019.

Q. And do you know who reported the loss to Citizens?

A. The file reflects that David Durham reported the loss.

* * * * *

Page 14, Lines 23 - 25, Page 15, Line 1

Q. And when David Durham reported the loss, was he asked for a specific date of loss?

A. The claim file does not reflect what transpired in the first notice of loss phone call.

b. Deposition of David Durham - Sequence #88, dated April 19, 2022

Page 11, Lines 21 - 25

Q. And how about after the strong winds in January of 2018, did anyone inspect the roof, to the best of your knowledge?

A. No. It was—except for the insurance adjuster that came out. Well, he wasn't an insurance

* * * * *

Page 12, Line 1 - 9

adjuster. The roof inspector that Citizens had requested their service. I had nothing to do with that except pay the (technical difficulty) between $700 and $1,000.

I had nothing to do with picking or choosing the company that did the inspection. The insurance company is the one that assigned the inspection company and the man. All I did was pay his fee for doing the inspection.

II. Legal Standard

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fla. R. Civ. P.* 1.510 (a). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202

(1986).

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996) (citing *Hairston v. Gainesville Sun Publ'g Co.,* 9 F.3d 913, 918 (11th Cir. 1993)). A fact is material if it may affect the outcome of the suit under the governing law. *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Hickson Corp. v. N. Crossarm Co.,* 357 F.3d 1256, 1260 (11th Cir. 2004) [17 Fla. L. Weekly Fed. C195a] (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "When a moving party has discharged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White* Sox, Inc., 64 F.3d 590, 593-94 (11th Cir. 1995) (quoting *Celotex,* 477 U.S. at 324). If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation,* 344 F.3d 1161, 1164 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C1067a]. If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judgment. *Samples ex rel. Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988).

III. Analysis

Citizens argues that summary judgment is appropriate because Noland's has asserted a claim of loss for a date other than July 19, 2017, and Citizens has not had an opportunity to investigate the loss claim. The Court disagrees since Citizens was apprised of the November 2, 2018 date of loss in the Amended Complaint and a December 20, 2018 date of loss in discovery before the Amended Complaint was filed. Citizens filed its Answer denying the claim along with its Affirmative Defenses therein, and there appears to have been a roof inspection done on the property per the Deposition of David Durham (pages 11-12). It is undisputed that Citizens insured the property from October 29, 2016 to October 29, 2017 (Seq. #68), and then again from October 29, 2018 to October 29, 2019.

There is evidence of a genuine dispute of material fact regarding whether the roof was damaged by winds during the policy period from October 29, 2018 through October 29, 2019 (Seq. #90).

Standing to foreclose is determined at the time the lawsuit is filed and can be demonstrated by the filing of an assignment or the original note with a special endorsement in favor of the plaintiff or a blank endorsement. *McLean v. JP Morgan Chase Bank,* 79 So.3d 170, 173 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D334b]. An insurance policy is a contract like a Note. Based upon the Assignment of Benefits executed on May 15, 2019, the Plaintiff had standing to file suit for the roof damage from that date forward which predates the initial Complaint that was filed on October 18, 2019 (Seq., #5). Florida law is that the right to recover is freely assignable after loss and that an assignee has a common-law right to sue on a breach of contract claim. *Lexington Ins. Co. v. Simkins Indus., Inc.,* 704 So. 2d 1384, 1386 n.3 (Fla. 1998) [23 Fla. L. Weekly S41a] ("[A]n insured may assign insurance proceeds to a third party after a loss, even without the consent of the insurer." (citing *Better Constr., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 651 So. 2d 141, 142 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D420a])). Assignment is defined as "a transfer of rights or property." Assignment, *Black's Law Dictionary* (9th ed. 2009). An assignment, then, is defined as a voluntary act of transferring a right or an interest.

In litigation involving an insurance claim, the burden of proof is assigned according to the nature of the policy. *Mejia v. Citizens Property Ins. Corp.,* 161 So. 3d 576, 578 (Fla. 2d DCA 2014) [39 Fla. L. Weekly D2471a]; *Sec. First Ins. Co. v. Czelusniak,* 305 So. 3d 717 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1151b], *review denied,* SC20-1092, 2020 WL 6708664 (Fla. Nov. 16, 2020) *citing Jones v. Federated Nat. Ins. Co.,* 235 So.3d 936, 941 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D164a]. An insured claiming under an insurance policy must only prove that the insured property suffered a loss while the policy was in effect. The burden then shifts to the insurer to prove that the cause of the loss was excluded from coverage under the policy's terms. *Mejia* at 578. Noland's is entitled to present to a jury that damage occurred during the policy period, which Noland's asserts in its Amended Complaint is November 2, 2018. Citizens is on notice of the loss/claim as its own Motion stated, "changing of the date of loss from the original Complaint to the Amended Complaint does not constitute a new claim." Furthermore, Citizens' own Certified Policy Request form has the claim number 001-00-209506 with a date of loss as November 2, 2018 (Seq. #90).

Under Florida law, "[t]he elements of a breach of contract action are (1) a valid contract; (2) a material breach; and (3) damages." *Beck v. Lazard Freres & Co., LLC,* 175 F.3d 913, 914 (11th Cir. 1999). "[A]n insured seeking coverage pursuant to an 'all risks' policy must prove that a loss occurred to the property during the policy period." *Citizens Prop. Ins. Corp. v. Munoz,* 158 So. 3d 671, 674 (Fla. 2nd DCA 2014) [40 Fla. L. Weekly D64a] As the policy period in this case lasted between October 29, 2018, to October 29, 2019 30, 2018 (*Id.* at Ex. A, Seq., #68), November 2, 2018 falls within that time period as to when the roof damage is alleged to have occurred to establish the breach of contract claim against Citizen's as alleged in the Amended Complaint. *Security First Insurance v. Czelusniak,* 305 So. 3d 717, 718 (Fla. 3rd DCA 2020) [45 Fla. L. Weekly D1151b] sets forth that with an all-risk policy, the insured is only required to prove that damage occurred during the policy period. *Jones v. Federated Nat. Ins. Co.,* 235 So. 3d 936, 941 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D164a]. Subsequently, the burden shifts to the insurer to prove that one of the policy exclusions bars coverage. *Id.* If the insurer does not meet its burden, the insurer must cover the loss. *Id.* Noland's has alleged that the windstorm loss occurred during the policy period of October 29, 2018 to October 29, 2019. Plaintiff does not have the burden of proving the claimed damages, occurred on July 19, 2017 or November 2, 2018, but rather the claimed damages occurred, during the policy period.

"Conditions. A Policy Period" states "This policy applies only to loss which occurs during the policy period." Nowhere within the policy, or law, is there a requirement or condition for an insured to report a specific date of loss. As the policy has been in effect for numerous years and Citizens was on notice of a windstorm loss to the property, whether Citizens suffered any prejudice from the date of loss being corrected is an issue for the jury. Duties after loss are for the insured to provide prompt notice and send "a sworn proof of loss within 60 days after our request which sets forth, to the best of your knowledge and belief: a. The time and cause of loss. . ." (Policy p. 10—Seq. #90 and #68).

ORDERED, ADJUDGED, and DECREED that Citizens' Motion for Summary Judgment (Seq. # 68) is hereby **DENIED**. The Court therefore agrees with Noland's that there are disputed issues of fact that require a trial in this matter.

* * *

Insurance—Personal injury protection—Coverage—Lawfully rendered treatment—Court has jurisdiction to determine whether treatment was lawfully rendered under licensing requirements of Health Care Clinic Act—Plaintiff's medical charges are not compensable where medical director for clinic violated Act by failing to agree in writing to accept legal responsibility for specific clinic activities at time she became director, allowing certified chiropractic physician's assistants to perform tasks beyond what they could lawfully perform, and failing to ensure compliance with Act's recordkeeping requirements

MEDIMAX INC., a/a/o Jose Jesus Prendes, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2007-002629-CC-26, Section SD03. June 15, 2022. Gloria Gonzalez-Meyer, Judge. Counsel: Maria E. Corredor, for Plaintiff. Maury L. Udell and Katherine E. Arnholt, Beighley Myrick Udell + Lynne, Miami, for Defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on Plaintiff's Amended Motion for Summary Judgment Regarding Affirmative Defense of Alleged Violation of Florida Statute *400.9935* and Defendant's Motion for Summary Judgment Regarding Violation of Florida Statute § *400.9935,* having heard argument of counsel, having fully reviewed the record and being otherwise fully advised in the premises therein, it is hereby

ORDERED AND ADJUDGED as follows:

Factual Background

This is a suit for Personal Injury Protection ("PIP") benefits stemming from an automobile crash that allegedly occurred on November 14, 2006, and purportedly involved Jose Jesus Prendes ("Prendes"). Medimax, Inc. ("Plaintiff" or "Medimax") has filed suit against State Farm Mutual Automobile Insurance Company ("Defendant") alleging breach of contract for non-payment of bills for services it claims to have rendered to Prendes as a result of the aforementioned crash. On April 19, 2022, the parties came before the Court on competing motions for summary judgment on the Defendant's medical director defense. After reviewing the summary judgment motions filed by both parties, Defendant's Supplemental Memorandum of Law, all summary judgment evidence, and after hearing argument of counsel, this Court finds that Defendant is entitled to final summary judgment in its favor.

Under the new standard, the party seeking summary judgment bears the initial burden of informing the court of the basis of its motion and identifying the portions of the declarations (if any), pleadings, and discovery that demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party meets its initial burden, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. *Matushita,* 475 U.S. at 586. The non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts—it must come forward with specific facts which show that there is a *genuine issue for trial*. *Id.* at 586-587.

Under the old Florida summary judgment standard, the "existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." *In re: Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d at 193 (citations omitted). By contrast, the Supreme Court has described the federal test, which is the basis for the new Florida standard, as whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* quoting *Anderson*, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id*. quoting *Anderson,* 477 U.S. at 249-50 (citations omitted). A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id*. citing *Matsushita*, 475 U.S. at 586. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a].

The Court finds that the pleadings on file and record evidence submitted in the instant case conclusively demonstrate that no genuine dispute as to any material fact exist and Defendant is entitled to final summary judgment.

Conclusions of Law

I. This Court Has Jurisdiction

This Court's jurisdiction over this matter is not precluded by the Agency for Health Care Administration ("AHCA"). Several courts have rejected the argument that Florida law does not provide a judicial remedy when a health care clinic fails to comply with the Health Care Clinic Act and that failure of a medical director to perform his or her duties renders all charges non-compensable and unenforceable. *See State Farm Fire & Casualty Company v. Silver Star Health and Rehab,* 739 F.3d 579 (11th Circuit 2013) [24 Fla. L. Weekly Fed. C834a] (finding that although the Health Care Clinic Act does not "expressly refer to a judicial remedy, it provides that 'all charges or reimbursement claims made by or on behalf of a clinic that is required to be licensed under this part, but that is not so licensed, or that is otherwise operating in violation of that part, are unlawful charges, and therefore, are non-compensable and unenforceable, and that because courts are traditional forums for determining the lawfulness, compensability, and enforceability of claims, it would make no sense to read into a statute a provision that courts lack the authority to decide crucial questions on which the lawfulness, compensability, and enforceability of a claim depends).

In *Active Spine Centers, LLC v. State Farm Fire & Casualty Co.*, where State Farm denied claims for medical treatment on the grounds that the clinic did not comply with Florida's licensing Statute, the Court held that the clinic's failure to comply with the registration requirement under Fla. Stat. § *400.9935* rendered the treatment unlawful, and not compensable. 911 So. 2d 241, 244 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2286a]. Likewise, in *Allstate v. Vizcay,* the United States Court of Appeals, Eleventh Circuit, reaffirmed its position in *Silver Star* that there is a judicial remedy for a clinic's violation of the licensing requirements of the Health Care Clinic Act and found that the evidence presented at trial supported the jury's finding that the medical director did not substantially comply with the Act's requirements, and as a result the claims submitted by the clinic to Allstate were non-compensable and unenforceable. 826 F. 3d 1326 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C435a].

In *State Farm v. B&A Diagnostic, Inc*., summary judgment was granted in favor of the insurer when it was found that neither of the clinic's medical directors fulfilled his duties where the Court found no genuine issue of material fact that one of the X-ray technicians held a basic machine operator license, which is a license that requires direct supervision which was not occurring. *Id*. at 1164-1165. Instead, the technician carried on as if he held the higher license of a general radiographer. *Id.* This Court finds *State Farm v. B&A Diagnostic* instructive to the facts of this case where Mixon was diagnosing patients and developing treatment plans for patients despite the fact that she was not actually licensed as a chiropractor at the time. Instead, Mixon was licensed as a CCPA, and as Dr. Wood explained, she was

not permitted to diagnose patients or develop treatment plans.

In *Government Employees Ins. Co. v. Quality Diagnostic Health Care, Inc.,* the Court held that a clinic was out of compliance with the Health Care Clinic Act where its medical director has failed to fulfill his duties. 369 F. Supp. 3d at 1296. That Court found that the plain language of Fla. Stat. § *400.9935* makes it clear that a claim for reimbursement made by a clinic that is not properly licensed or that is otherwise operating in violation of the Act constitutes an unlawful charge that is "non-compensable and unenforceable." *Id.*

Most recently, on February 10, 2022, the United States Court of Appeals, Eleventh Circuit, released an opinion affirming United States District Court Judge Robert Scola who granted summary judgment in favor of an insurer on this very issue. *See State Farm Mutual Automobile Insurance Company, State Farm Fire & Casualty Company v. Beatriz Muse, et al.,* 2022 WL 413417 (11th Cir. 2022). This Court finds that both the opinion of the Eleventh Circuit, as well as the underlying order from the Southern District under review, are instructive and persuasive on the issues in the instant matter. Copies of both were filed by Defendant as part of its Supplemental Memorandum of Law (Docket #138). As there is no conflicting binding precedent from the courts of Florida, the well-reasoned decisions of the federal courts on this issue are persuasive authority which may be followed without violating the principle of stare decisis. *See State v. Dwyer,* 332 So. 2d 333, 335 (Fla. 1976).

II. **Florida Health Care Clinic Act**

It is undisputed that under the Health Care Clinic Act, Plaintiff was required to appoint a medical director who would accept legal responsibility for certain activities of the clinic, and fulfill a number of delineated duties. The purpose of this requirement is to protect the public welfare by ensuring someone with appropriate medical licensure is intricately involved with clinic matters to ensure their compliance with the law. *See Active Spine Centers, LLC v. State Farm Fire & Cas. Co.*, 911 So. 2d 241, (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2286a] (explaining that "[t]he registration statute was enacted . . . because unregulated clinics could "endanger the health, safety, and welfare of the public").

Pursuant to Florida Statute § *400.9935,*

> 1. Each clinic shall appoint a medical director or clinic director who shall agree in writing to accept legal responsibility for the following activities on behalf of the clinic. The medical director of the clinic shall:
>
> a. Have signs identifying the medical director or clinic director posted in a conspicuous location within the clinic readily visible to all patients.
>
> b. Ensure that all practitioners providing health care services or supplies to patients maintain a current active and unencumbered Florida license.
>
> c. Review any patient referral contracts or agreements executed by the clinic.
>
> d. Ensure that all health care practitioners at the clinic have active appropriate certification or licensure for the level of care being provided.
>
> e. Service as the clinic records owner as defined in s. 456.057.
>
> f. Ensure compliance with the recordkeeping, office surgery, and adverse incident reporting requirements of chapter 456, the respective practice acts, and rules adopted under this part and part II of chapter 408.
>
> g. Conduct systematic reviews of clinic billings to ensure that the billings are not fraudulent or unlawful. Upon discovery of an unlawful charge, the medical director or clinic director shall take immediate corrective action. . . .

Florida Statute § *400.9935*(3), states that "[a] charge or reimbursement claim made by or on behalf of a clinic that is required to be licensed under this part but that is not so licensed, or that is otherwise operating in violation of this part, regardless of whether a service is rendered or whether the charge or reimbursement claim is paid, is an unlawful charge and is non-compensable and unenforceable." Additionally, Florida Statute § 627.736(5)(b)(1)(b) provides that "[a]n insurer or insured is not required to pay a claim or charges. . [f]or any service or treatment that was not lawful at the time rendered." Lawful is defined as "in substantial compliance with all relevant applicable criminal, civil, and administrative requirements of state and federal law related to the provision of medical services and treatment." Fla. Stat. § 627.732(11).

III. **Plaintiff's Medical Director Failed to Fulfill Statutory Duties**

In support of summary judgment in its favor (and in opposition to Plaintiff's Motion), Defendant relied upon the following evidence, all filed as exhibits to Defendant's Motion (Docket #130) and Defendant's Response to Plaintiff's Motion (Docket #127):

A. Deposition of Christina Lapp taken March 20, 2009
B. Deposition of Christina Lapp taken January 29, 2014
C. Deposition of Dr. Kevin Wood, D.C. taken October 27, 2020
D. Affidavit of David Aguiar
E. Deposition of David Aguiar taken May 3, 2021

In support of summary judgment in its favor, Plaintiff relied upon the following evidence, either filed as exhibits to Plaintiff's Motion (Docket #98) or separately with the Court:

A. Affidavit of David Aguiar
B. Deposition of Christina Lapp taken January 29, 2014
C. Licenses for practitioners at Medimax
D. Deposition of David Aguiar taken December 3, 2009

It is undisputed that Christina Lapp ("Lapp") was Plaintiff's medical director at all times relevant to this lawsuit, at which time she was a licensed chiropractor in the State of Florida. Upon review of the summary judgment evidence put forth by the parties, it is undisputed that Lapp failed in multiple ways to fulfill her statutorily required duties.

1. **Plaintiff Required to Appoint Medical Director Who Shall Agree in Writing to Accept Legal Responsibility for Specific Activities on Behalf of Clinic**

As to this first issue, Defendant relies upon the Affidavit of David Aguiar (*Exhibit "D" to Defendant's Motion, Docket #130*), which states that Lapp was its medical director "from approximately June 10, 2005 through July 23, 2007," and that Lapp and Plaintiff "signed a Medical Director Agreement on or about June 10, 2007." However, attached as exhibits to the affidavit in question is a written agreement purportedly notarized on June 10, 2005, and another document which indicates she started as medical director on March 11, 2005. No evidence was put forth or cited to explain these discrepancies. What the evidence shows, however, was that Plaintiff and Lapp were not in compliance, as she began her role months before the first agreement was signed on or around June 10, 2005, as the records proffered by Aguiar's affidavit suggest. *See Affidavit of David Aguiar and Deposition of David Aguiar, Exhibits "D" & "E" to Defendant's Motion (Docket #130).*

2. **Ensuring Practitioners Were Licensed & Acting Within Scope of License**

The Court also finds that Lapp failed to ensure all practitioners were licensed and acting within the scope of their license. According to Lapp, in addition to Plaintiff, she served as the medical director for numerous clinics during the period relevant to this lawsuit, and would staff those clinics with certified chiropractic physician assistants ("CCPAs") she would indirectly supervise. *See Depositions of Christina Lapp, Exhibits "A" & "B" to Defendant's Motion (Docket*

#130). Lapp did not actually treat patients herself very often. *See Deposition of Christina Lapp, Exhibit A to Defendant's Motion (Docket #130), page 16:23-25.*

One of the CCPAs she assigned to Medimax was Sha'meka Mixon ("Mixon"). *See Deposition of Christina Lapp, Exhibit "A" to Defendant's Motion (Docket #130), page 18:4-6.* The uncontroverted evidence establishes that Mixon was an authorized CCPA under Lapp's license at all times relevant to this matter, and not a physician. *See Depositions of Christina Lapp, Exhibit "A" to Defendant's Motion (Docket #130), pages 10:8-11; 13:3-11; 18:4-6; and Exhibit "B," pages 10:13-12:2; 33:22-34:6; 36:20-37:18.* Lapp explained that, for one reason or another, Mixon and her other CCPAs were "not licensed yet" as chiropractors. *See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), page.*

The Court finds that the testimony of Lapp reveals that she failed to ensure compliance with Fla. Stat. § *400.9935*(1)(b) and (d):

Q. Who set up the course of treatment for the patients, would that be you or the CCPA?

A. Whoever saw the patient at the examines. Most of the time it was the CCPA.

See Deposition of Christina Lapp, Exhibit "A" to Defendant's Motion (Docket #130),, page 34:3-7.

Q. Okay. And this is the same Dr. Mixon who allegedly treated these two patients, is that correct?

A. Yes. For the follow-ups and the final exam.

Q. Okay. Was Dr. Mixon authorized to do anything other than exams for you?

. . .

A. **Under her CCPA license, she was allowed to do exams, order physical therapy, order X-rays and other diagnostic testing. She could have done any of the therapy if she wanted to. She was not allowed to actually take X-rays, and she was not allowed to do chiropractic adjustments.**

See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), pages 33:19-34:6.

According to the undisputed testimony, Lapp could not even identify who performed the initial exam of the claimant, and could only say it was not her but that she did "sign off" on the exam. *See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), page 14:15-19.* Lapp was able to recognize Mixon's signature on the follow-up exams which she also "signed off" on, with the exception of the final exam which only bore Mixon's signature and not even a date of the purported exam. *See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), pages 16:7-17:1.* Additionally, the diagnosis form only bore the signature of Mixon. *See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), page 17:6-8.* According to Lapp, she never actually saw the claimant. *See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), page 20:10-14.*

Plaintiff's expert, Dr. Kevin Wood, D.C., provided the following relevant testimony:

Q. Are you familiar with a CCPA? I think it's a certified chiropractic physician's assistant?

A. I am familiar with what they are. They—

Q. Okay.

A. They—a certified chiropractic physician's assistant is someone who actually went to school and received a certificate or degree for that, and they are—have to be—basically they're licensed by the state, and so they pay a higher fee.

Then you have what's called a registered chiropractic assistant, which can be anybody. Any layperson, you can take and train them. They have to be directly supervised, whereas the CP— CCPA does not have to be. And a CCPA can also take X-rays. And so a registered chiropractor's—if you want to. You don't have to do it. The State or the board kind of recommends you do. I know I did it in my practice.

. . .

Q. Okay. And now you mentioned that a CCPA, you said, can do X-rays. Do you mean actually take the X-rays or prescribe X-rays?

A. Nobody can prescribe X-rays in the State of Florida other than a doctor.

. . .

She cannot decide what X-rays to take. She cannot decide what diagnosis for the reasoning of ordering those X-rays, but she can take them based on my orders.

. . .

Q. Okay. And then what else can a CCPA do?

A. A CCPA can actually perform exams on a patient. They can assess the patient. They cannot diagnose them, but they can note the findings. They can do therapies on a patient. The big thing with the CCPA is they don't have to be directly supervised in rendering their care to a patient. Anybody else, like, that's just a registered chiropractic or a layperson would have to have a direct supervision of a CCPA or the doctor in the clinic. And "direct" means the doctor has to be present in the clinic, not in every single room that they're treating somebody.

Q. Okay. So that was a lot of information there, so I just want to unpack it a little bit.

A. Okay.

Q. You said that they can—they cannot diagnose, but they can do exams and note findings. So do they—they do the exam, they note their findings, and they consult with the chiropractor? Or how does that work?

A. Well, I mean, that's usually what happens. I—I can tell you most CCPAs are not performing examinations. I mean, most doctors will do it themselves.

. . .

A. **So if he has a CCPA, he can leave them there to supervise the other people. You know, again, when it comes down to diagnosing and actually rendering a treatment plan, only a doctor can do that.**

. . .

A. **Now, again, they cannot make the diagnosis and order those therapies. That has to originally come from a doctor, but they can render them without direct supervision.**

See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), page 35:25-40:2.

After reviewing the testimony of Lapp and Dr. Wood in its entirety, the Court finds that the arrangement between Lapp, Mixon (and other CCPAs under Lapp's supervision), and Plaintiff clearly involved CCPAs performing tasks beyond what they could lawfully do, such as diagnosing patients and developing the treatment plan. In fact, according to Dr. Wood's testimony, Lapp did not even understand the limitations of a CCPA license, let alone ensure he/she was not practicing beyond the scope of the license.

Plaintiff filed an affidavit from its owner, David Aguiar ("Aguiar") to try to establish that "[a]ll health care practitioners at Medimax had active appropriate certification or licensure for the legal [*sic*] of care that was provided." *See Affidavit of David Aguiar, Exhibit "D" to Defendant's Motion (Docket #130) and Exhibit "1" to Plaintiff's Motion (Docket #98).* Aguiar was later asked in deposition how he knew this, and was only able to say that "[m]assage therapist has to have the massage therapist license and the therapist—and a chiropractor has to have a chiropractor's license," that each therapy has a specific code for billing, and that he is the owner and "knows." *See Deposition of David Aguilar, Exhibit "E" to Defendant's Motion*

(Docket #130), pages 32:17-36:13.

The Court does not find that this testimony is sufficient to establish compliance by Lapp, or even create a genuine issue of material fact. It is well established that affidavits which are based entirely upon speculation, surmise, and conjecture are insufficient to create a disputed issue of fact in opposition to a motion for summary judgment. *See Morgan v. Continental Cas. Co.,* 382 So. 2d 351 (Fla. 3d DCA 1980) citing *Food Fair Stores, Inc. v. Trusell,* 131 So. 2d 730 (Fla. 1961). Additionally, under the new summary judgment standard, the Supreme Court has explained that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *In re: Amendments to Florida Rules of Civil Procedure 1.510,* 309 So. 3d 192, 193 (Fla. 2020) [46 Fla. L. Weekly S6a] quoting *Scott v. Harris*, 550 U.S. 372 (2007) [20 Fla. L. Weekly Fed. S225a].

Likewise, the Court is not persuaded by Plaintiff's arguments that Lapp approved a diagnosis, treatment plan, and/or X-rays over the phone. A careful review of the evidence reveals only a hypothetical situation discussed with Dr. Wood during his deposition, but no evidence that is what actually occurred. *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), pages 42:7-43:22.* Looking to Lapp's testimony, she only stated that she "had to be available by phone during all hours that [her CCPA's] were working," *See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), page 41.* Simply put, the evidence established that (1) one of Lapp's CCPAs would examine the patient and set up the course of treatment; (2) Lapp would later "sign off" on the treatment, typically when she received the first set of bills; and (3) Lapp was required to be on call when her CCPAs were working. *See Depositions of Christina Lapp, Exhibit "A" to Defendant's Motion (Docket #130), page 34, and Exhibit "B," pages 21 and 40-41.* Nothing in the evidence—specifically in Lapp's testimony or the actual medical records—reveals that Lapp was actually called and approved a diagnosis or treatment plan. Yes, Dr. Wood said that such a situation would be permissible, hypothetically speaking, but there is no evidence that is what actually occurred.

3. **Recordkeeping**

A medical director's duties also include serving as the owner of the clinic records and supervision over and compliance with statutory record keeping requirements. *Government Employees Ins. Co. v. DG Esthetic and Therapy Center, Inc.,* 2019 WL *1992930* (S.D. Fla. 2019). In order for a service to be lawfully rendered and therefore compensable under the PIP statute, it must be in "substantial compliance with all relevant applicable criminal, civil, and administrative requirements of state and federal law related to the provision of medical services or treatment." Fla. Stat. § 627.736(5)(b)(1)(b); Fla. Stat. § 627.732(11). Failure to comply with record keeping rules set by an administrative rule is a basis for rendering a provider's charges unlawful. *State Farm Mut. Auto. Co. v. Gables Ins. Recovery, Inc.,* 21 Fla. L. Weekly Supp. 489a (11th Jud. Cir. Appellate Div. 2014).

When Lapp was deposed on January 29, 2014, she was asked about ownership of the clinic records:

Q: Okay. How about the actual possession of the ownership of the medical records? Did you agree to act as the owner of medical records pursuant to your medical director licensorship?

A: No.

. . .

A: Sorry. No. It was my understanding that the owner of the clinic was the record custodian.

See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), page 27:5-13.

Q. Okay. Did you review, as your title as medical director for Medimax, did you review the patient records and notes to determine whether or not they were proper with respect to medical recordkeeping under the chiropractic statute?

A. You know, I don't remember like comparing them to anything, if that's what you're asking. I knew what documents were required. As far as—are you talking about like regular paperwork for the clinic, or are you talking about my actual like the therapy notes and the exam notes that would be under my responsibility?

Q. Correct.

A. Okay. So did I review them?

Q. Yeah. Would you review them as part of your job title as a medical director to make sure that they were in compliance with chiropractic standards of medical recordkeeping?

A. I didn't know that there was a standard of medical recordkeeping.

See Deposition of Christina Lapp, Exhibit "B" to Defendant's Motion (Docket #130), pages 28:15-29:21.

Lapp was tasked with ensuring compliance with record keeping requirements, but the evidence shows that she did not even know they existed. There are, in fact, minimal recordkeeping standards which are delineated in Fla. Admin. Code R. 64B2-17.0065. Fla. Admin. Code R. 64B2-17.0065(2) states that [m]edical records are maintained for the following purposes:

a. To serve as a basis for planning patient care and for continuity in the evaluation of the patient's condition and treatment.

b. To furnish documentary evidence of the course of the patient's medical evaluation, treatment, and change in condition.

c. To document communication between the practitioner responsible for the patient and any other health care professional who contributes to the patient's care.

d. To assist in protecting the legal interest of the patient, the hospital, and the practitioner responsible for the patient.

The standards apply to all licensed chiropractic physicians and certified chiropractic assistants, and require that all records include a patient history, symptomology and/or wellness care, examination(s) findings, including X-rays when medically or clinically indicated, diagnosis, prognosis, treatment plan and treatment provided. Fla. Admin. Code R. 64B2-17.0065(4)(a)-(h). "All entries made into the medical records *shall be accurately dated.* The *treating physician must be readily identifiable* either by signature, initials, or printed name on the record. *Late entries are permitted, but must be clearly and accurately noted as late entries and dated accurately when they are entered into the record*." Fla. Admin. Code R. 64B2-17.0065(5) (emphasis added). "The medical record shall be legibly maintained and *shall contain sufficient information to identify the patient,* support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, *patient histories*; examination results; test results; records of drugs dispensed or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient. Initial and follow-up services (daily records) shall consist of documentation to justify care. If abbreviations or symbols are used in the daily recordkeeping, a key must be provided." Fla. Admin. Code R. 64B2-17.0065(3) (emphasis added).

In deposition, Dr. Wood was questioned about allegations he made in an affidavit that Medimax was in compliance with the recordkeeping requirements. He acknowledged that he did not in fact know the ownership entities of Medimax, did not know how they

handle their services, whether they are still open and where they are storing records, how the records were maintained, or who had access. *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), pages 28:5-29:1.* Dr. Wood explained that the rules for clinics could vary depending on different circumstances, and acknowledged that he did not know which ones would apply to Medimax. *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), page 32:5-17.* Dr. Wood also acknowledged that he could not find any medical history for this patient. *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), pages 48:25-50:9.* Finally, Dr. Wood's testimony was based on the assumption that Lapp, as a chiropractor, examined the claimant on all but a final examination that may or may not have occurred. *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), pages 51:19-55:18.* Lapp's deposition testimony however, clearly shows that she did not in fact examine the patient. *See Depositions of Christina Lapp, Exhibits "A" & "B" to Defendant's Motion (Docket #130).* As to the mysterious final examination report, Dr. Wood indicated that he was not sure if it was "somebody else's record that got thrown in here or if it relates to Mr. Prendes and just wasn't billed." *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), page 55:16-18.* According to Dr. Wood, because there was no record of the date or the patient's name, it "does not meet the standards for this record to be qualified as being a record that suffices the recordkeeping standards for this one." *See Deposition of Dr. Wood, Exhibit "C" to Defendant's Motion (Docket #130), page 26:11-17.*

The evidence establishes and the Court finds that Lapp's failure to ensure compliance with the recordkeeping requirements was a violation of Florida Statute § *400.9935*(1)(f). Lapp was unaware of the requirements, and the medical records and the testimony from Lapp and Dr. Wood reveal they were not in compliance. The records included entries that were not dated, did not readily identify the treating physician, and did not include patient histories. Dr. Wood's testimony was based on his assumption, after reviewing the records, that Lapp was the treating physician. Lapp's testimony revealed she was not, and could not even identify who was in some instances. Furthermore, late entries such as Lapp "signing off" on the work of a CCPA were not identified as such.

Fla. Stat. § *400.9935*(1)(f) explicitly requires a medical director to ensure compliance with all recordkeeping requirements, including those provided for in Fla. Admin. Code R. 64B2-17.0065. This Court disagrees with Plaintiff's contention that only chapter 456 of the Florida Statute applies based on the plain reading of Fla. Stat. § *400.9935*(1)(f) as well as the guidance of the precedent to be discussed below. As discussed above, there were numerous circumstances identified through the depositions of Lapp and Dr. Wood, including the fact that Lapp could not identify who treated the patients on some occasions, that at least one record lacked a date, patient histories were lacking and/or incorrect, and Dr. Wood believed, after his review of the records, that Lapp examined the patient, which she did not.

IV. **Defendant is Entitled to Summary Judgment in its Favor**

In the *Muse* case, State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company ("State Farm") filed suit against multiple clinics, as well as numerous individuals associated with the clinics, including the medical directors. 2022 WL 413417; *see also, United States District Court for the Southern District of Florida case number 18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment, entered March 4, 2020.* The district court found that the defendants: (1) employed LMTs that performed services outside the scope of their license; (2) failed to comply with Florida record-keeping requirements; (3) gave invalid prescriptions; and (4) made insufficient efforts to collect co-payments and deductibles. *See Muse,* 2022 WL 413417; *see also, United States District Court for the Southern District of Florida case number 18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment, entered March 4, 2020.* The district court also found that the medical director failed to comply with his statutory duties to ensure services were lawfully rendered and billed, awarded State Farm $2.9 million in damages, and also granted declaratory relief, holding that the outstanding bills submitted to State Farm were non-compensable. *See Muse,* 2022 WL 413417; *see also, United States District Court for the Southern District of Florida case number 18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment, entered March 4, 2020.*

In its lengthy and detailed omnibus order, the district court discussed numerous examples of how the medical directors failed to ensure the clinics were operating lawfully, thereby rendering the bills submitted to State Farm non-compensable. *18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment.* One issue identified was the fact that employees were rendering services beyond the scope of their license, and that the clinics were submitting bills to State Farm seeking reimbursement for non-compensable services. *18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment*. Likewise, in the instant matter, the testimony of Lapp and Plaintiff's expert, Dr. Wood, revealed that, not only was its medical director unaware of the limitations of a certified chiropractic physician assistant license, but that individuals were not working within those limitations, and doing things like prescribing X-rays and diagnosing patients. *See Defendant's Motion, Docket #130, Ex. B, pages 16:7-17:8, 20:10-14, 33:19-34:6; and Ex. C, pages 35:25-40:2.*

Additionally, the district court in *Muse* found that the clinics and their medical directors were non-compliant with their recordkeeping, noting how one of the medical directors was not even aware of the recordkeeping policies and procedures of the clinic, and was unfamiliar with any of Florida's recordkeeping laws. *18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment*. It also determined that patients had received unlawful prescriptions, because under Florida law, a prescription must justify the course of treatment to be valid and lawful. Physicians are required to keep legible records that justify the course of treatment, including but not limited to, patient histories, examination results, test results, records of drugs prescribed, dispensed, or administered, and reports of consultations and hospitalizations. *18-23125-Civ-Scola, Omnibus Order on Motions for Summary Judgment*. The *Muse* order notes that "[t]here are many recordkeeping requirements in Florida that apply to healthcare clinics . . ." and specifically discusses violations of Fla. Admin. Code. 64b2-17.0065. For that reason, this Court is not swayed by Plaintiff's argument that said provisions are irrelevant here.

Similarly, Lapp could not identify from the records who performed some of the exams of the patient, despite having "signed off" on the exam, and testified that she was not aware that there was a standard of recordkeeping. Additionally, based on the records, Plaintiff's expert Dr. Wood believed that the medical director was the one to examine that patient, which she established was not the case. *See Defendant's Motion, Docket #130, Ex. B, pages 14:15-19, 27:5-29:21; and Ex. C, pages 51:19-55:18.* Also, the records for Prendes contained a final examination report which Dr. Wood indicated he was not sure if it was "somebody else's record that got thrown in here or if it relates to Mr. Prendes and just wasn't billed." *See Defendant's Motion, Docket #130, Ex. C, pages 55:16-18.*

Ultimately, the district court concluded that the clinics and their medical directors operated in violation of numerous Florida laws,

rules and regulations which were promulgated specifically to protect patients, including the most basic and fundamental aspects of rendering healthcare services, such as using appropriately licensed practitioners and maintaining adequate medical records. The Eleventh Circuit agreed, noting that under Florida's medical director statute, clinics are required to appoint medical directors who are legally responsible for ensuring that treatments are administered lawfully, that recordkeeping obligations are met, and that billing is not fraudulent or unlawful. *See Muse,* 2022 WL 413417.

Because the medical directors in *Muse* failed to perform their duties, the services at issue were non-compensable. Likewise, this Court finds that there is no genuine issue of material fact to refute the fact that Plaintiff's medical director failed to perform her statutory duties and allowed Plaintiff to submit bills to Defendant for unlawful and non-compensable services. Defendant has met its burden by showing, through its summary judgment evidence discussed above, that there is no genuine issue of material fact to be determined by a jury. The evidence relied upon by Plaintiff does not reveal a genuine issue of material fact, and much of Plaintiff's argument relies upon speculation that is not supported or substantiated by the actual evidence.

Lapp's lack of memory does not create a genuine issue of fact as Plaintiff argues. Lapp was deposed twice during the pendency of this matter, and at times was unable to recall specific facts. However, she was clear when she could not recall something, and would qualify certain statements when she was not completely certain. Despite that, she was able to clearly provide uncontroverted testimony as to what she did know to be certain as far as her duties and performance as Plaintiff's medical director. The Court also notes that she had and was testifying from the medical records for Prendes. The fact that she could not say for certain who performed certain exams, or when they may have occurred, only supports the Defendant's position that she failed to ensure that the records were properly maintained. Because she could not say with certainty if she actually examined a patient or not based on her own failure to properly annotate the records when she "signed off," and/or her failure to ensure that records were in compliance with the recordkeeping requirements.

For the above and foregoing reasons, Defendant's Motion for Final Summary Judgment Regarding of Violation of Florida Statute § *400.9935* is hereby GRANTED, and Plaintiff's Amended Motion for Summary Judgment Regarding Affirmative Defense of Alleged Violation of Florida Statute § *400.9935* is DENIED. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

* * *

Insurance—Property—Coverage—Water mitigation—Where assignment of benefits gave plaintiff that removed water from insured's property authority to perform water emergency mitigation only, not restoration work, plaintiff did not have standing to request payment in excess of policy cap for "reasonable emergency measures"—Plaintiff cannot avoid mitigation cap by adding word "restoration" to assignment and claiming that it approached water removal job with dual intent to mitigate damage and restore property where only mitigation services were provided

PROJEKT PROPERTY RESTORATION, INC., a/a/o Rhonda Hojadiov, Plaintiff, v. CITIZENS PROPERTY INSURANCE CORPORATION, Defendant. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No 2019-004837-CC-05, Section CC08. May 10, 2022. Luis Perez-Medina, Judge.

ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE VERDICT AND/OR RENEW ITS MOTION FOR DIRECTED VERDICT

THIS CAUSE came before this Court on April 13, 2022, on Plaintiff's Motion to Set Aside Verdict and/or renew its Motion for Directed Verdict pursuant to Florida Rule of Civil Procedure 1.480, and the Court having heard arguments from counsel, having reviewed the Motion, the parties Memorandums of Law, the court file, the trial transcript, and being otherwise sufficiently advised in the premises, hereby enters this Order **GRANTING** Defendant's Motion for Directed Verdict.

PROCEDURAL HISTORY

On February 15, 2022, a jury returned a verdict in favor of Plaintiff, Projekt Property Resonation, Inc., ("Projekt") and against Defendant, Citizens Property Insurance Corporation ("Citizens") on a Breach of Contract claim for services provided for water mitigation and/or restoration to the Property belonging to Rhonda Hojadiov ("Insured") pursuant to an Assignment of Benefits ("AOB").

The questions posed to the Jury were.

> 1. Did PLAINTIFF PROJEKT PROPERTY RESTORATION, INC. prove by the greater weight of the evidence that the services that it provided to the property were not done **solely** to protect covered property from further damage?
>
> 2. What is the amount of money that would fairly and adequately compensate 'PLAINTIFF PROJEKT PROPERTY RESTORATION, INC. for the work that it provided?

Verdict Form (emphasis added). The jury answered "YES" to the first question and awarded $4,330.59 in compensation.

At the close of Plaintiff's evidence, Defendant moved for a directed verdict on two issues. The Court initially reserved ruling on both issues but subsequently granted the motion on the first issue, finding that Plaintiff failed to present any evidence that a request was sent asking for permission to exceed the $3,000 cap for reasonable emergency measures.

The second issue, which is also the basis of this Motion, centered on Plaintiff's failure to provide evidence that they had authority from the Insured to engage in any restorative work or that any restorative work was actually done. Because the only service provided by Plaintiff was water damage emergency mitigation, Plaintiff's payment was limited to the $3,000 cap for reasonable emergency measures.

Plaintiff countered that removing the water from the property fulfilled two overlapping purposes. Removing the water protected the Property from further damage while simultaneously restoring the property to its pre-loss condition. As Plaintiff's representative testified, there was always a dual intent to the service performed. According to Plaintiff, the policy cap of $3,000 would only apply to mitigation services to prevent additional harm to the Property Restoring the Property to its pre-loss condition should not be limited to $3,000. Any funds owed to Plaintiff in excess of $3,000 would come from the Policy's coverage A limit of $50,000.

According to Defendant, there was no evidence of any dual intent of restoring the property because the testimony was clear that no work was done to repair the Property. Plaintiff's intent to engage in restoration did not necessarily intimate that any restoration was done. In addition, Defendant argued that a request for additional funds for repairs exceeded the scope of the AOB signed by the Insured.

It is undisputed, that Plaintiff's witness never testified that any repairs were done to the Property. The witness did, however, testify that he took the job with the dual intent of mitigating the loss and restoring the Property to its pre-loss condition.

In the present Motion for a Directed Verdict, Defendant renews the arguments made at the conclusion of Plaintiff's case.[1]

DISCUSSION

Under Florida law, the right to receive benefits under an insurance contract can be assigned by an insured. *Schuster v. Blue Cross & Blue Shield of Fla., Inc.,* 843 So. 2d 909, 911 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D505a]. "The intent of the parties determines the existence

of an assignment." *Citizens Prop. Ins. Corp. v. Ifergane,* 114 So. 3d 190, 195 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2205a]. "Any words or transaction which show an intention on one side to assign, and an intention on the other to receive, if there is valid consideration, will operate as an effective equitable assignment." *Brown v. Omega Insurance Company,* 322 So. 3d 98 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1694b] (quoting *McClure v. Century Ests., Inc.,* 96 Fla. 568, 120 So. 4, 9 (1928)).

"In construing a contract, the intent of the parties should be determined from the words of the contract as a whole . . . . The court also should consider the conditions and circumstances surrounding the parties and the objects to be obtained by executing the contract." *Nicon Construction, Inc. v. Homeowners Choice Property and Casualty Insurance Co.,* 249 So. 3d 681, 682-83 (Fla. 2d DCA 2018) [43 Fla. L. Weekly D1076a] (quoting *City of Tampa v. Ezell,* 902 So. 2d 912, 914 (Fla. 2d DCA 2005) [30 Fla. L. Weekly D1406a]). "In construing the language of a contract, courts are to be mindful that 'the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.' " *Murley v. Wiedamann,* 25 So. 3d 27, 29 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D2332a] (quoting *Taylor v. Taylor,* 1 So. 3d 348, 350 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D229a]). A contract should be interpreted in a manner consistent with reason and probability. *BKD Twenty-One Mgnt. Co. v. Fisher,* 16 So. 3d 1028, 1031 (Fla. 4th DCA 2009). "A single term or group of words must not be read in isolation." *Perez-Gurri Corp. v. McLeod,* 238 So. 3d 347, 350 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D2487c] (quoting *American K-9 Detection Servs., Inc. v. Cicero,* 100 So. 3d 236, 238-39 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D2563a]). The Court is constrained by law to construe a contract as a whole so as to give effect to all provisions of the agreement if it can be reasonably done. *Id.*

In *Nicon,* an insured property owner who suffered property damage issued an assignment to two firms from benefits derived from an insurance policy. 249 So. 3d 681, 682. Both firms sued the insurer claiming that the insurer failed to pay all the benefits due under the policy. *Id.* The trial court granted summary judgment for the insurer on the basis that Nicon's assignment was invalid. *Id.* The trial judge agreed with insurer that when the insured assigned his rights to Nicon, he had already assigned all the benefits of the loss to another firm. *Id.* The basis of the court's decision was the language in the assignment to the first firm which stated that the insured/owner was assigning "any and all insurance rights, benefits, and causes of action under my property insurance policy." *Id.* The Second District reversed the trial judge concluding that the court erred by isolating "a phrase in the assignment rather than viewing it in the context of the entire agreement." *Id.* at 683. When "read in the context of the entire assignment and the purpose for which it was entered into, it is evident that [insured] was assigning all his rights under the policy to payment for services" actually performed and not to "all his rights to payment for the entire covered claim. *Id.*; *see also Sidiq v. Tower Hill Select Ins. Co.,* 276 So. 3d 822, 826-27 (Fla. 4th DCA 2019) [44 Fla. L. Weekly D1969a] (trial court incorrectly focused on first sentence of AOB, rather than analyzing the entire text, when it deprived insured standing to bring a claim for repair work not done by water mitigation company); *Brown,* 322 So. 3d at 102 ("purpose of the assignment was to enable ERG to be paid directly by the insurer for services performed).

In reviewing the terms of the AOB in this case, the clear purpose of the assignment was to enable Plaintiff to be paid directly by the Defendant for actual services performed. Plaintiff obliged itself to perform repairs for mitigation/remediation services only. The use of the word restoration as a heading on the second page did not give Plaintiff standing to sue Defendant for restoration work that was never done.

The top of the first page of the AOB contained the following language:

> Instructions: Check the box to perform specific services and initial for authorization.
> ___ Water Damage Emergency Mitigation
> ___ Fire Damage Emergency Mitigation
> ___ Mold Remediation

The box "Water Damage Emergency Mitigation" was the only box checked. This line did not include the word "Restoration". Mitigation, is defined by Merriam-Webster, dictionary as "the process or result of making something less severe, dangerous, painful, harsh, or damaging" while restoration is defined as "bringing back to a former position or condition" or to "put back something to a former state."

The paragraph that followed gave Plaintiff the authority to perform the "Water Damage Emergency Mitigation" checked above. The AOB stated that the Insured assigned "any and all Insurance rights, benefits, proceeds, and causes of action" under the policy, to Plaintiff, "as consideration for **any repairs and/or remediation services performed** by [Plaintiff]." (emphasis not added). Thus, the scope of the service Plaintiff could perform, pursuant to the AOB, was for "Water Damage Emergency Mitigation", remediation, and/or repairs. Restoration was not in the description of work to be done.

It is only at the top of the second page of the AOB that the word "Restoration" first appeared under the heading "Water Damage Emergency Mitigation/Restoration". While the word "Restoration" was used in the heading, the description that followed did not address any "Restoration" services. The paragraph contained the following language:

> Water Damage Emergency Mitigation/**Restoration** includes but is not limited to water and sewage extraction, removal of wet or damaged material, removal of baseboards, opening hole in materials to allow ventilation, use of drying equipment such as dehumidifiers and air movers, hydroxyl treatment, installing a roof tarp, proper containment of moldy materials, use of air filtration devises, cleaning, decontamination etc. (emphasis added).

By the terms of its own agreement, Plaintiff was not authorized to perform any restoration work. Plaintiff was only authorized to perform "Water Damage Emergency Mitigation". Simply because the word restoration was added to a heading did not change the context of the entire agreement. *Nicon,* 249 So. 3d at 682. Consequently, Plaintiff did not have standing to request payment under an assignment that was never given.

The Insurance Policy issued by Defendant, which was introduced as evidence, provided coverage for Reasonable Emergency Measures, paying:

> up to the greater of $3,000 or 1% of your Coverage A limit of liability for the reasonable costs incurred by you for necessary measures taken **solely** to protect covered property from further damage, when the damage or loss is caused by a Peril Insured Against." (emphasis added).

The $3,000 mitigation/remediation limit could be exceeded if Plaintiff requested approval from Defendant before any work commenced. *All Ins. Restoration Services, Inc. v. Citizens Prop. Ins. Corp.,* 328 So. 3d 1057 (Fla. 3d DCA 2021) [46 Fla. L. Weekly D2193a].

While the use of the word "solely", under this policy provision, limited the $3,000 cap to only mitigation/remediation repairs, Plaintiff could not bypass the $3,000 limit by simply adding the word restoration to the AOB and claiming that Plaintiff approached the job with the dual intent of providing both services while only engaging in mitigation/remediation repairs.

In *Certified Priority Restoration v. Citizens Prop. Ins. Corp.,* 324

So. 3d 5, 7 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D1546a], Certified Priority Restoration ("CPR") received an assignment of benefits for water-loss mitigation under an insurance policy issued to the insured condominium unit owner. CRT filed suit against the property insurer for the difference between insurer's $3,000 payment for coverage of "reasonable emergency measures" and the remainder of assignee's unpaid invoice for water removal and remediation services. *Id*. The Fourth District Court held that assignee failed to submit valid request to insurer to exceed the policy's $3,000 cap on "reasonable emergency measures." *Id*. at 10 The court also held that the removal of damp, moldy drywall, in the condominium unit as part of the contractor's water removal and remediation services did not amount to "debris removal" under the terms of the insurance policy, but rather, was part of contractor's performance of water mitigation services that were subject to $3,000 cap. *Id*. Although the drywall damaged by water loss and demolition during repair may have caused "debris," that demolition was not itself "debris removal" but "fell under CPR's performane of water mitigation services." *Id*.

In *Damage Services, Inc. v. Citizens Prop. Ins. Corp.,* 328 So. 3d 996, 997 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2245b], the assignee of the insured sued the property insurer for breach of contract for failing to pay assignee for its water extraction services that it performed following a flooding event at insured's property. Assignee argued that its invoice was for both water extraction and remediation, and that remediation could be for improvement, outside the emergency measures policy provision. *Id*. at 997-98. The Fourth District Court rejected this argument as the assignee had not provided any evidence that it had performed any work other than water extraction. *Id*. at 998. Furthermore, the AOB only assigned the insured's right to payment regarding water extraction and dry out services, mold remediation, and/or smoke damage. *Id*. "To the extent that DSI performed other services, it was not assigned the right to collect payments from Citizens for that work, including any work done under Coverage A. Repayment for the damage to the property under Coverage A, if any, would be made to the insured, not [assignee]." *Id*.

During trial, Plaintiff called only one witness, Joseph Amir, the owner and corporate representative for Projekt Property Restoration. The only three questions Plaintiff's attorney asked the representative regarding restoration were the following:

Q. All right. Did Projekt go to the property with the intent to restore it to its pre-loss condition?

A. Yes, always.

Q. Did Projekt go the property to also attempt to prevent further damage?

A. Yes.

Q. You did both intentions, you had both intentions at the same time?

A. Correct.

During cross examination Mr. Amir testified that the work was completed on January 1st or 2nd, an estimate was prepared on January 10th, and the bill was sent to Defendant on January 15th. He also testified that Plaintiff did not paint the walls on the property, did not repair any flooring, did not repair drywall, and did not paint or repair the ceiling, even though he previously testified that the ceiling contained visible water stains.

According to Mr. Amir, by removing the extra moisture that was coming from the ceiling, Plaintiff was attempting to restore the unit to how it was before the plumbing leak. However, Mr. Amir could not even recall ever visiting the Property or meeting the Insured. There was absolutely no evidence presented at trial that Plaintiff actually succeeded in its attempt to restore the ceiling to how it looked before the plumbing leak.

At no point during Mr. Amir's testimony did he identify any "restoration" work done by Plaintiff. Although Mr. Amir testified that Plaintiff went to the property with the dual intent to restore the property to its pre-loss condition and he used the word 'restoration' freely, the specified answers he gave for the work done on the Property confirmed that Plaintiff only did a dry-out on the Property. In addition, the bill submitted did not include a charge for any restorative work.

The argument by Plaintiff that providing services for water mitigation also simultaneously restores the property, defeats the purpose behind Defendant's notification requirement and depletes funds which rightly belongs to the Insured. The fact that Plaintiff did not request permission from Defendant to exceed the coverage limit means that the $3,000 limit for Reasonable Emergency Measures applies to entire invoice submitted by Plaintiff.

Accordingly, this Court now grants Defendant's Motion for a Directive Verdict after having reserved on the motion during trial.

1. A verdict is entered in favor of Defendant, Citizens Property Insurance Corporation, as to Count I of the Amended Complaint for the breach of contract.

2. Based on this Court's findings, Plaintiff's invoice is not entitled to compensation under Coverage A of the Insured's Policy. Plaintiff's invoice is therefore limited to $3,000 under the Reasonable Emergency Measures Policy cap.

3. The evidence at trial proved that Citizens paid $3,000 as required by its Policy. Accordingly, Plaintiff's Petition for Declaratory Relief found in Count II of the Amended Complaint is DISMISSED.

4. Plaintiff shall take nothing from this case and Defendant shall go hence without day.

5. The Court reserves jurisdiction to grant Defendant attorney fees and costs if the proper motion is filed.

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[1]The Court did not consider Defendant's current arguments based on the language in the Amended Complaint and Plaintiff's Corporate Representative deposition. These arguments were never raised during trial.

* * *

Consumer law—Federal Odometer Act—Florida Deceptive and Unfair Trade Practices Act—Affirmative defenses that are not properly pled in form of confession and avoidance and lack requisite specificity are stricken—Statutory damages under FOA are not subject to offset claimed by defendants—Reservation of "right" to amend affirmative defenses is improper

AUDREY JULIE CHARLES, Plaintiff, v. DRIVEMAX MOTORS (LLC), et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2021-021904-CC-23, Section ND06. June 1, 2022. Ayana Harris, Judge. Counsel: Joshua Feygin, Joshua Feygin, PLLC, Hallandale, for Plaintiff. Carlos Santisteban, Jr., for Defendants.

ORDER ON PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES

THIS CAUSE, having come before this Honorable Court on MAY 26, 2022 on the Plaintiff, AUDREY CHARLES, an individual ("Plaintiff") Motion to Strike Affirmative Defenses ("Motion"). Plaintiff was represented at the hearing by Joshua Feygin, Esq. . Defendants were represented by Carlos Santisteban, Esq. After hearing argument of counsel and being otherwise fully advised in the premises, the Court hereby finds as follows:

1. In the operative complaint at bar before this Court, Plaintiff has alleged claims under the Federal Odometer Act, 49 U.S.C. §32701 ("Odometer Act") against DRIVEMAX MOTORS, LLC and its principal, DARIAN RODRIGUEZ (hereinafter collectively the "Defendants"), which prohibits the disconnection, resetting or alteration of odometers with the intent to change the number of miles indicated thereon. In addition, Plaintiff has raised ancillary claims for violation of Florida Statute §501.201, *et sequi*, Florida's Deceptive

and Unfair Trade Practices Act, Fraud, Negligent Misrepresentation, Fraudulent Inducement, and Breach of Express Warranty under Sec. 2-313 of the Uniform Commercial Code.

2. On April 28, 2022, Defendants filed identical Answers and Affirmative Defenses in this action.

3. Defendants have interposed three purported affirmative defenses:

i. "At all times material, DEFENDANT acted in good faith in conducting business with Plaintiff" ("First Affirmative Defense").

ii. "Plaintiff (sic) purchase of the subject vehicle was "AS-IS," accordingly, Plaintiff is estopped from claiming any damages as a result ("Second Affirmative Defense").

iii. Plaintiff's damages, if any, are reduced by the fair market value of the subject vehicle ("Third Affirmative Defense").

4. Furthermore, Defendants have included a purported reservation of rights to amend and/or add additional affirmative defenses upon discovery and subsequent proffer.

5. Properly pled, "[a]ffirmative defenses are in the nature of confession and avoidance." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Benton*, 467 So.2d 311, 312 (Fla. 5th DCA 1985). "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse. *St. Paul Mercury Ins. Co. v. Coucher*, 837 So.2d 483 (Fla. 5th DCA 2002) [28 Fla. L. Weekly D131b].

6. The pleader of an affirmative defense cannot simply state conclusions without alleging ultimate facts, which would support the defense alleged. *Zito v. Washington Federal Savings & Loan Assoc. of Miami Beach*, 318 So.2d 175 (Fla. 3d DCA 1975), cert denied, 330 So.2d 23 (Fla. 1976).

7. With respect to the First Affirmative Defense, the Court finds that it is not properly plead in the form of a confession and avoidance and lacks the requisite specificity.

8. With respect to the Second Affirmative Defense, the Court finds that it is not properly plead in the form of a confession and avoidance and lacks the requisite specificity.

9. With respect to the Third Affirmative Defense, the Court finds that it is not properly plead in the form of a confession and avoidance and lacks the requisite specificity. Moreover, to the extent that the Plaintiff is entitled to recover statutory damages of $10,000 on her Odometer Act Claim pursuant to 49 U.S.C. §32710, the same would not be subject to any set-off claimed by the Defendants.

10. Lastly, Pursuant to Rule 1.190 the Court may grant leave to amend affirmative defenses. However, whether leave to amend is granted is solely at the discretion of this Court. Defendant cannot merely claim a "right" to amend and thereby usurp the Court's authority in this regard. As such, Defendant's "reservation of rights" found within their Affirmative Defenses is improper.

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

1. Plaintiff's Motion is hereby **GRANTED**.

2. For the reasons stated above, each affirmative defense is hereby **STRICKEN**.

3. Defendants' reservation of rights to amend affirmative defenses is hereby **STRICKEN**.

4. Defendants shall have 15 (FIFTEEN) days to amend their affirmative defenses.

* * *

Small claims—Dismissal—Lack of prosecution—Dismissal is mandatory where there has been period of more than six months without record activity in small claims case—"Oversight" does not constitute good cause for lack of prosecution

CITIBANK, N.A., Plaintiff, v. MARTIN VARLEY, M.D., Defendant. County Court, 12th Judicial Circuit in and for Sarasota County. Case No. 58-2020-SC-003323-XXXASC. June 13, 2022. Phyllis R. Galen, Judge. Counsel: Drew Linen, RAS Lavrar, Plantation, for Plaintiff. Arthur Rubin, We Protect Consumers, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DIMISS FOR LACK OF PROSECUTION

THIS CAUSE, having come before the Court at a hearing on June 8, 2022 on Defendant's Motion to Dismiss, at which counsel for both Plaintiff and Defendant appeared and presented argument, and the Court being fully informed in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Court finds that all of the prerequisites required by Small Claims Rule 7.110(e) to the Court dismissing a lawsuit for lack of prosecution are present in this lawsuit and so this Court does not have the discretion to grant or deny Defendant's Motion to Dismiss as dismissal is mandatory pursuant to that Rule.

2. Plaintiff's counsel acknowledged at the hearing that there was a gap of more than 6 months in this lawsuit during which there was no record activity and Plaintiff's counsel did not argue that there was non-record activity.

3. Plaintiff's counsel argued that there was good cause for the 6-month gap because of an "oversight".

4. Counsel for Defendant submitted Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss Based Upon Lack of Prosecution. In that Memorandum of Law, counsel for Defendant cited multiple cases where an "oversight" or mere negligence or lack of diligence was not sufficient to support a finding of good cause. In fact, good cause requires that there be some compelling reason why the lawsuit was not prosecuted such as a calamity or a disabling illness.

5. Based upon the case law cited by counsel for Defendant, this Court finds that Plaintiff has failed to show good cause for the 6-month gap in time.

6. Accordingly, Defendant's Motion to Dismiss for Lack of Prosecution is GRANTED.

7. This lawsuit is hereby dismissed.

8. The Court reserves jurisdiction for the purpose of awarding prevailing party attorney fees and costs to the Defendant.

* * *

Contracts—Attorney's fees—Amount—Hours claimed by plaintiff's attorneys are reduced to exclude excessive, duplicate, and unauthorized charges and hours that were not property detailed or supported by timesheets or testimony of fee expert—Invoices never sent to defendants to allow them to prepare for attorney's fee hearing are disallowed

TREKKER TRACTOR, LLC, Plaintiff, v. BUTTERFLY ENTERPRISES, LLC, et al., Defendants. County Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. 2019-008406-SP-05, Section CC06. May 21, 2022. Luis Perez-Medina, Judge.

ORDER ON PLAINTIFF'S AMENDED MOTION FOR ATTORNEYS' FEES AND/OR SANCTIONS AGAINST DEFENDANTS

THIS MATTER having come to be heard before this Court on May 6, 2022, upon Plaintiff, TREKKER TRACTOR, LLC's Amended Motion for Attorneys' Fees and/or Sanctions against Defendants, BUTTERFLY ENTERPRISES, LLC AND KARYN L. DEKKER. The Court having carefully considered the Motion, the arguments of counsel, the expert witness testimony, all the documents presented at the evidentiary hearing, and all relevant portions of the case file make the following findings of fact and law.

FACTUAL BACKGROUND

On May 23, 2021, a Final Default Judgment was entered against Defendants, Butterfly Enterprises, LCC, as borrower, and Karyn L. Dekker, as guarantor, of a loan issued by Plaintiff, Trekker Tractor,

LLC ("Trekker"). The Final Default Judgment totaled $7,523.79, which included a $3,861.00 debt, $3,169.20 in interest, $493.50 in court costs, and a reservation as to attorney fees.

The credit application signed by Defendants contained a clause giving Trekker the authority to collect "all invoices" within "thirty (30) days after date of sale." Delinquent invoices would be assessed "at the rate of 1.5% per month, together with any court costs, attorney's fees and costs of collection that [Plaintiff] "may incur while enforcing the terms of this agreement." In addition, the "Termination of Agreement" clause in the rental contract required Defendants to pay "all costs and expenses, including, without limitation, reasonable attorneys' fees incurred by [Plaintiff] in exercising any of its rights and remedies hereunder."

On May 19, 2021, Plaintiff filed an Affidavit as to Reasonable Attorney Fees signed by its expert, Peter Rowell. In the Affidavit, dated January 29, 2021, Mr. Rowell attested that he "analyzed this matter" and estimated that "the number of hours necessarily and reasonably expended by Plaintiff's attorney in this litigation [were] 39, that a reasonable hourly rate for such services [was] $350.00[1] and that the reasonable value of the services rendered by Plaintiff's attorney [was] the sum of $13,650." Plaintiff never submitted a contemporaneous hourly breakdown of the fee requested.

On May 23, 2021, the Court issued an Order Preliminary to Hearing on Motion to Tax Costs and Award Attorney Fee ("Fee Hearing Order"). The Order required Plaintiff, within ten (10) days of the Order, to make available to opposing party a copy of all "attorney time records evidencing services for which the party seeks payment." The Order further stated:

> Counsel and the parties are directed to exercise good faith in complying with the terms of this Order. The Court may consider appropriate sanctions with regard to unreasonable requests for taxation of costs, and requests for attorney's fees, objections thereto, or failure to comply with this Order.

After the Order was issued, Plaintiff set the case several times for a hearing. Plaintiff, however, never provided this Court with the required "attorney time records."

On June 3, 2021, Plaintiff allegedly sent Defendants an "account ledger" for the dates of service January 23, 2017, through March 19, 2021. It is unclear from Plaintiff's Notice of Compliance if the "account ledger" actually included time records evidencing the services sought for payment as required by this Court's Order.

On May 5, 2022, the day before the scheduled fee hearing, and a year after the fee hearing order was issued, Plaintiff mailed Defendants, by first class mail to Fort Pierce, Florida, the required time records for dates January 23, 2017, through May 3, 2022. The fee hearing was held the following day, on May 6, 2022.

A new Amended Affidavit as to Reasonable Attorney Fee signed by Peter Rowell on May 5, 2022, sought $19,598.00 in "reasonable" fees. The Affidavit included a final account ledger which listed each invoice sent by Plaintiff's Law Firm to its client Trekker. According to the affidavit, Attorney Jessica A. Goldfarb billed $6,240.50 for 19.20 hours at various hourly rates culminating at a maximum rate of $295.00 for the year 2022. Attorney Jose A. Llerena billed $12,692.00 for 46.50 hours with a maximum rate of $295.00. Invoices totaling $665.50 were billed for paralegal Yesenia Torres for 5.10 hours at a maximum rate of $135.00.

Defendants, who were self-represented, were forced to defend a claim for fees which had grown from $13,650.00 on May 19, 2021, to $19,598.00 without having time to review the reasonableness of the hours spent prosecuting the suit or the reasonable hourly rate charged by each attorney. Defendants were also not given sufficient time to seek the advice of counsel or to review the complicated law dealing with attorney fees. On the day of the hearing, all that Defendants could say was the amount being requested was "unreasonable." The Court agrees.

ANALYSIS

To determine what is "a reasonable sum as fees or compensation," this Court must first determine the number of hours reasonably expended by Plaintiff in "prosecuting the suit" and then multiply that figure by a reasonable hourly rate. *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145, 1150-51 (Fla. 1985). The resulting amount is "the lodestar, which is an objective basis for the award of attorney fees." *Id.* at 1151. That said, Rule 4-1.5(c) of the Rules Regulating the Florida Bar, states:

> In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in the rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from the application of only the time and rate factors.

The following factors are set forth in Rule 4-1.5(b) and were considered by this Court in evaluating Plaintiff's request for reasonable attorney's fees.

> (A) The time and labor required, the novelty, complexity, difficulty of the question involved, and the skill requisite to perform the legal service properly;
>
> (B) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (C) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (D) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (E) The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
>
> (F) The nature and length of the professional relationship with the client;
>
> (G) The experience, reputation, diligence, and ability of the lawyer or lawyers performing the services and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (H) Whether the fee is fixed or contingent, and, if fixed as to the amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Rule 4-1.5(b) of the Rules Regulating the Florida Bar.

When deciding what constitutes a reasonable sum as compensation, Judges are not required to abandon their common sense or what they learned as lawyers. *Ziontz v. Ocean Trail Unit Owners Ass'n, Inc.,* 663 So. 2d 1334, 1335 (Fla. 4th DCA 1993). Irrespective of the expert opinions presented at a fee hearing, Courts will "closely scrutinize attorney fee awards to ensure their reasonableness" and will not abandon their own experience or common sense. *Seminole Cty. v. Clayton,* 665 So. 2d 363, 364 (Fla. 5th DCA 1995) [21 Fla. L. Weekly D62a]. Even when there is evidence supporting the award of attorney's fees, "[n]o court is obliged to approve a judgment which is so obviously contrary to the manifest justice of the case" and would "obviously offend even the most hardened appellate conscience." *Nunez v. Allen,* 292 So.3d 814, 821 (Fla. 5th DCA Oct. 11, 2019) [44 Fla. L. Weekly D2511a] (citing *Fla. Nat'l Bank of Gainesville v. Sherouse,* 86 So. 279, 279 (1920)); *see also In re Estate of Platt,* 586 So. 2d 328, 333-34 (Fla. 1991) (in determining the number of hours that have been reasonably expended, a court must consider the time that would ordinarily have been spent by lawyers in the community to resolve this particular type of dispute, which is not necessarily the number of hours actually expended by counsel in the case at issue); *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreraa,* 633

So. 2d 1103, 1110-11 (Fla. 3d DCA 1994) (under the "hour setting" portion of a fee award it is important to distinguish between the "hours actually worked" and the "hours reasonably expended," because the hours actually worked is not the issue); *Mercy Hospital, Inc. v. Johnson,* 431 So. 2d 687, 688-89 (Fla. 3d DCA 1983) ("In deciding upon amounts to be awarded as attorney's fees, a trial court must consider not only reasonableness of the fees charged but the appropriateness of the number of hours counsel engaged in performing his services as well."); *Ziontz,* 663 So. 2d at 1335 (Fla. 4th DCA 1993) (finding $60,000.00 in fees awarded in connection with litigation regarding an outstanding $100.00 assessment was manifestly unjust, refusing to abandon as Judges what was learned as lawyers or common sense).

The first step in considering the number of hours expended is whether there is adequate documentation to support the number of hours claimed by Plaintiff's counsel. *Rowe,* 472 So. 2d at 1150. "Florida Courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee." *Id*. When determining a reasonable hourly rate, the Court must look to the documentation presented supporting the number of hours claimed. *Id*. Counsel is expected to claim only those hours that could be properly billed to his client. *Id*. "Inadequate documentation may result in a reduction in the number of hours claimed, as will a claim for hours that the Court finds to be excessive or unnecessary." *Id*. The "novelty and difficulty of the question involved" is to be reflected in "the number of hours reasonably expended on the litigation." *Id.*

While providing adequate and current records supporting the number of hours claimed is the first step in the inquiry, judges should reduce the hours when the claims are: (a) excessive, redundant, or otherwise unnecessary. *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983); (b) duplicative of charges by multiple attorneys working on the same case. *North Dade Church of God, Inc. v. JM Statewide, Inc.,* 851 So. 2d 194, 196 (Fla. 3d DCA 2003) [28 Fla. L. Weekly D1434b]; (c) spent on simple ministerial tasks such as reviewing documents or filing notices of appearance. *Id.* (b); charged as flat fees and the proponent of the fee is unable to demonstrate its reasonableness. *Amanzimtoti Properties, LLC v. OCWEN Loan Servicing, LLC,* 204 So. 3d 468 (Fla. Dist. Ct. App. 2016) [41 Fla. L. Weekly D1475a]; (e) billed for the preparation of writs of garnishment, which is not compensable by law. *See Paz v. Hernandez,* 654 So. 2d 1243, 1244 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1122a] (Plaintiff may not collect attorney fees for garnishment based on F.S 57.105); (f) pertain to issues in which the moving party was unsuccessful. *Baratta v. Valley Oak Homeowners' Ass'n, Inc.,* 928 So. 2d 495, 499 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D1348c].

When the basis for awarding attorney's fees is an underlying contract, and the contract language is "broad enough to encompass fees incurred in litigating the amount of fees," a litigant may claim attorney's fees incurred in litigating the amount of attorney's fees. *Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC,* 88 So. 3d 386, 389 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D1178b] (holding that agreement which authorized the award of attorney's fees for "any litigation" between the parties was "broad enough to encompass fees incurred in litigating the amount of fees"); but see *Nazarova v. Nayfeld,* No. 3D21-1940, 2022 WL 1560679, at *1 (Fla. 3d DCA May 18, 2022) [47 Fla. L. Weekly D1089b] (attorney's fee provision which allowed for the suit "to enforce the lease" was found not broad enough to encompass recovery of fees for litigating the amount of fees to be awarded); *Pretka v. Kolter City Plaza II Inc.,* No. 09-80706-CIV-MARRA, 2013 WL 12080754 at *1 (S.D. Fla. Dec. 10, 2013) (contract provision authorizing recovery of fees for "litigation to enforce" the terms of an agreement did not allow for fees on fees); see also *Eisman v. Ross,* 664 So.2d 1128 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1593b] (F.S. 57.105 cannot be uses as a means to litigate the amount of fees owed). The language found in Trekker's billing contract which allows for recovery of "attorney's fees, and costs of collection" that Plaintiff "may incur while **enforcing the terms of this agreement**" or "**in exercising any of its rights and remedies**" is not broad enough to allow for Plaintiff to collect fees on fees. *Pretka,* No. 09-80706-CIV-MARRA, 2013 WL 12080754 at *1.

After painstakingly reviewing the time records Plaintiff provided to this Court on the day of the hearing, the Court adjusted the following hourly rates:

A. **Charges for Jessica A. Goldfarb**

Invoice No.	Hrs Charged	Amount	Rev. Hours	Basis for Reduction
64634	1.00	$ 100.00	0.00	Flat Fee
71713	1.00	$ 200.00	0.00	Flat Fee
73123	1.10	$ 275.00	0.00	Duplicate (73561)[2]/Excessive
73561	1.30	$ 325.00	0.00	Duplicate (73561) /Excessive
73561	.80	$ 200.00	0.00	Duplicate (73561) /Excessive
73561	1.30	$ 325.00	0.50	Corr. With Client /Excessive
73561	2.90	$ 725.00	1.00	Look at claim /Excessive/Vague
75425	.70	$ 175.00	0.50	Analyze Docs / Excessive/Vague
76066	1.20	$ 300.00	0.00	Duplicate (73561) / Excessive
76066	.90	$ 225.00	0.90	Allowed
79622	.70	$ 175.00	0.50	Conf w Client / Excessive
80376	.60	$ 150.00	0.50	Conf w Client / Excessive
81069	.60	$ 165.00	0.60	Allowed at rate of $250 per hour
83874	1.00	$1,000.00	0.00	Garnishment/Flat Fee/Post Judg
84229	.30	$ 82.50	0.00	Fee for Fees/ Due Process
84633	.40	$ 110.00	0.00	Fee for Fees/ Due Process
86004	1.00	$1,000.00	0.00	Garnishment/Flat Fee/Post Judg
86314	1.20	$ 354.00	0.00	Garnishment/Post Judg
86314	.40	$ 118.00	0.00	Fee for Fees/ Due Process
No Invoice	.80	$ 236.00	0.00	Fee for Fees/ Due Process
Total Hours Allowed			**4.50 hours**	

B. **Charges for Jose A. Llerena**

Invoice No.	Hrs Charged	Amount	Rev. Hours	Basis for Reduction
73561	1.60	$ 400.00	1.60	Allowed
73561	.30	$ 75.00	0.30	Allowed
73561	.50	$ 125.00	0.50	Allowed
73561	.30	$ 75.00	0.30	Allowed
73561	1.50	$ 375.00	1.50	Allowed
73561	.50	$ 125.00	0.50	Allowed
73561	.10	$ 25.00	0.10	Allowed
73561	2.20	$ 550.00	0.20	Pretrial Hearing- Excessive
73561	.10	$ 25.00	0.10	Allowed
73561	.20	$ 50.00	0.20	Allowed
73561	.20	$ 50.00	0.20	Allowed
73886	.80	$ 200.00	0.40[3]	Unsuccessful Issue / Excessive
73886	1.50	$ 375.00	0.00	Unsuccessful Issue / Excessive
73886	.60	$ 150.00	0.00	Unsuccessful Issue / Excessive
73886	.40	$ 100.00	0.40	Allowed
74246	.60	$ 150.00	0.60	Allowed
74246	.20	$ 50.00	0.20	Allowed
74246	.20	$ 50.00	0.20	Allowed

75425	2.60	$ 650.00	1.00	Prep Hrg Mtn to strike/Excessive
75425	3.60	$ 900.00	2.00	Discovery request/Excessive
75425	.80	$ 200.00	0.80	Allowed
76066	1.40	$ 350.00	1.40	Allowed
76066	.60	$ 150.00	0.60	Allowed
76902	.40	$ 100.00	0.20[4]	Rev Mtn to withdraw /Excessive
76902	.30	$ 75.00	0.10	Mtn to appr by phone/Excessive
77271	.60	$ 150.00	0.20	Confer on Mtn /Excessive
77271	1.30	$ 325.00	0.20	Hrn Mtn to withdraw /Excessive
76902	.20	$ 50.00	0.10	Rev Oder on Mtn /Excessive
78502	.60	$ 150.00	0.60	Allowed
78876	1.20	$ 300.00	0.50	Motions to Compel/Excessive
79247	.30	$ 75.00	0.00	Unknown Charge / Vague
79247	.40	$ 100.00	0.40	Allowed
79622	1.40	$ 350.00	0.20	Zoom 5 M Mtn Cal / Excessive
79622	.10	$ 25.00	0.10	Allowed
79622	2.90	$ 725.00	1.00	Adm Order MSJ Mtn /Excessive
79622	.80	$ 200.00	0.80	Allowed
80730	.60	$ 150.00	0.60	Allowed
80730	.20	$ 50.00	0.20	Allowed
80730	.20	$ 50.00	0.00	Duplicated fee
81069	1.10	$ 302.50	1.10	Allowed
81069	1.00	$ 400.00	0.00	Flat Fee at $250.00 per hour
81069	1.70	$ 467.50	1.70	Allowed at $250.00 per hour
81069	.30	$ 82.50	0.30	Allowed at $250.00 per hour
81069	.20	$ 55.00	0.20	Allowed at $250.00 per hour
82503	.30	$ 82.50	0.00	Inv never sent to Def/Due Process
82503	1.00	$ 800.00	0.00	Flat Fee
82503	.20	$ 55.00	0.00	Due Process
82750	1.10	$ 302.50	0.00	Pst Judg/Fee for Fee/Due Proc
83118	2.10	$ 577.50	0.00	Pst Judg/Fee for Fee/Due Proc
84633	.10	$ 27.50	0.00	Pst Judg/Fee for Fee/Due Proc
84633	.60	$ 165.00	0.00	Pst Judg/Fee for Fee/Due Proc
84633	1.10	$ 302.50	0.00	Pst Judg/Fee for Fee/Due Proc
84960	.30	$ 82.50	0.00	Pst Judg/Fee for Fee/Due Proc
86314	1.20	$ 354.00	0.00	Garnishment/Post Judg.
86314	.50	$ 147.50	0.00	Garnishment/Post Judg.
86314	.30	$ 88.50	0.00	Garnishment/Post Judg.
86314	.40	$ 118.00	0.00	Pst Judg/Fee for Fee/Due Proc
No Invoice	.70	$ 206.50	0.00	Pst Judg/Fee for Fee/Due Proc
Total Hours Allowed			**21.60 hours**	

After reviewing the Court records and the timesheets submitted by Plaintiff's attorney, this Court finds that the request for 70.80 hours included excessive, duplicate, and unauthorized charges. In addition, multiple invoices were never sent to Defendants to allow for the preparation of the hearing, in violation of Defendants' due process rights.

This Court also finds that many of the hours claimed were not properly detailed or supported by the timesheets provided or the testimony of Plaintiff's fee expert. *Fla. Birth-Related Neurological Injury Comp.,* 633 So. 2d at 1110-11 (under the "hour setting" portion of a fee award it is important to distinguish between the "hours actually worked" and the "hours reasonably expended."). In short, Plaintiff was unable to prove to this Court that the 70.80 hours requested was a reasonable charge for a simple breach of contract case seeking liquidated damages.

This Court finds that 26.40 hours is a reasonable number of hours expended by Plaintiff's attorney in the prosecution of this case. This Court finds that a reasonable hourly rate for Jessica A. Goldfarb is $250.00 per hour. Evidence was presented at the hearing that this was a reasonable hourly rate. This Court, based on the same evidence produced and presented at the hearing, finds that a reasonable hourly rate for Jose A Llerena is $250.00 per hour and that a reasonable hourly rate for paralegal Yesenia Torres is $100.00 per hour.

This Court finds that Peter Rowell, Plaintiff's expert, expended 2 hours reviewing the timesheets and testifying in this case. Based on the evidence presented at the fee hearing, this Court finds that Peter Rowell is entitled to an hourly rate of $300.00 per hour.

After reviewing the entire file, hearing testimony from witnesses on the issues involved in the case and the rates customarily charged in this particular locality for similar legal services, this Court finds the following number of hours and reasonable rates for the lawyers who worked on the case:

Attorney	# of Hours	Hourly Rate	Lodestar
JESSICA A. GOLDFARB	4.50	$250.00	$1,125.00
JOSE A. LLERENA	21.60	$250.00	$5,400.00
YESENIA TORRES	.30	$100.00	$ 30.00

It is therefore, **ORDERED AND ADJUDGED:**

1. The Court awards Plaintiff a lodestar of $ 6,555.00.

2. The $830.00 in costs requested by Plaintiff lacks specificity for this Court to determine if the costs are permitted by the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. Accordingly, this Court will not grant additional cost to Plaintiff other than the costs included in the Final Default Judgment.

3. Plaintiff shall recover his fee expert, Peter Rowell, Esq.'s cost at a loadstar of $600.00 based on the hourly rate of $ 300.00 per hour for 2 hours.

4. Plaintiff shall also be entitled to pre-judgment interest on Plaintiff's attorney's fees from May 23, 2021, through the filing date of this order at the statutory rate of 4.31% as found in Florida Statute section 55.03(1). The total award for prejudgment interest is $282.52.

5. Plaintiff shall recover the total attorney's fees, costs, expert costs, and prejudgment interest in the amount of $7,437.52 from Defendants, Butterfly Enterprises, LLC. and Karyn L. Dekker, for which let execution issue.

6. This Court will issue an Amended Final Default Judgment which will include the amount of attorney fees detailed in this Order. The Court will also calculate the post judgment interest for the balance of the judgment amounts according to Florida Statute section 55.03(1).

7. Plaintiff is precluded from charging Defendants any additional attorney fees or costs without first obtaining leave of this Court.

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[1]For the full year 2021, Plaintiff's Law Firm actually invoiced their client at a maximum hourly rate of $275.00 rather than the $350.00 claimed. That equates to an overage of $75.00 which Plaintiff attempted to overcharge Defendants.

[2]While there is nothing inherently unreasonable about a client having multiple attorneys, "it is the fee applicant's burden to show that the time spent by those attorneys reflects the distinct contribution of each lawyer to the case." *Comercio Y Servicios De Transporte Privado PBA S.A. De C.V. v. RDI, LLC,* No. 8:17-CV-1038-TGW, 2020 WL 364784, at *5 (M.D. Fla. Jan. 22, 2020) (quoting *American Civil Liberties Union of Georgia v. Barnes,* 168 F.3d 423, 437 (11th Cir. 1999). Plaintiff failed to differentiate the distinct work done by each attorney. This Court will therefore eliminate a total of $800.00 and $300 in duplicate charges by Jessica A Goldfarb.

[3]The three charges under Invoice 73886 were for preparation and litigating Defendants' Motion to Vacate Default. Plaintiff was unsuccessful in defending the Motion and it was obvious from the record that the default was entered in error. The Court will allow a total .40 hours for all three charges.

[4]A motion to withdraw is not complicated and is readily granted by any Court. Plaintiff's overall charge of 2.80 hours is excessive. Plaintiff charged 1.30 hours for attending a hearing on the motion. The hearing was heard during the 5-minute motion calendar. There were only 4 cases on calendar that day and the hearing was held on Zoom. Charging 1.30 hours to attend this hearing is excessive. Such a hearing could not

have taken longer than .20 hours. Therefore, the 1.30 hours for attending the hearing is reduced to .20 hours. In addition,.20 hours is allowed to confer with opposing counsel, .20 hours to review the motion to withdraw, .10 hours to review motion to appear by telephonically, and .10 hours to review the court order.

* * *

Insurance—Personal injury protection—Examination under oath—In-person attendance—COVID-19 precautions—Confession of judgment—Declaratory action seeking determination as to whether insurer can compel plaintiff to appear for EUO in person—Insurer's post-suit decision to rescind requirement that insured attend the EUO caused suit to become moot with an outcome in the insured's favor—As a matter of law, insurer confessed judgment when it rescinded the requirement that insured attend the EUO post suit

TYLER HILCHEY, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-023122, Division L. June 30, 2022. Michael C. Baggé-Hernández, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff. Neil Andrews and Hector Muniz, for Defendant.

ORDER GRANTING PLAINTIFF'S SECOND AMENDED MOTION FOR SUMMARY JUDGMENT, ORDER DENYING PLAINTIFF'S JUDGMENT ON THE PLEADINGS AS MOOT, AND ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION/CLARIFICATION AND/OR MOTION FOR AMENDMENT OF ORDERS DENYING DEFENDANT'S AMENDED AND SECOND MOTIONS FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court at a hearing on June 8, 2022, on Plaintiff's Second Amended Motion for Summary Judgment filed on March 18, 2022, (Doc. 116), Plaintiff's Motion for Judgment on the Pleadings, (Doc. 113), and Defendant's Motion for Reconsideration/Clarification and/or Motion for Amendment of Orders Denying Defendant's Amended and Second Motions for Final Summary Judgment filed March 23, 2022, (Doc. 119). Having reviewed and considered the motions, the supporting memoranda, the summary judgment evidence presented, the relevant materials in the court file, the arguments of counsel, and the applicable law, and being otherwise fully advised, the Court finds as follows:

I. BACKGROUND

A. Factual Background

On January 27, 2020, Plaintiff, an individual, sustained injuries from a motor vehicle accident, for which he sought personal injury protection (PIP) benefits through a policy of insurance issued by Defendant. Doc. 117, pg. 1. The Defendant, an insurance company, had insured Plaintiff at the time of the motor vehicle accident. Doc. 118, pg. 6. Subsequent to the accident, Plaintiff sought medical attention, and the medical provider sent invoices directly to the Defendant, Defendant received these invoices on approximately February 18, 2020. *Id*. at pg. 7.

On March, 16, 2020, Defendant sent a letter to Plaintiff that stating that, "Progressive is currently verifying coverage and/or the facts of the accident." *Id*. at pg. 11. Defendant subsequently requested that Plaintiff attend an examination under oath (EUO). Doc. 117, pg. 1. On April 1, 2020, Attorney Victor Bobet, who no longer represents Plaintiff, contacted Defendant to arrange for the EUO to be conducted remotely due to concerns surrounding close, in-person contact and the risk of infection of COVID-19. *Id*. Defendant's adjuster, Heather Hilliard stated that the EUO would be conducted in line with the CDC guidelines, but that no guarantees would be made that the EUO would be conducted remotely. *Id*.

After the telephone call between Mr. Bobet and Ms. Hilliard, on April 1, 2020, Ms. Hilliard sent an email to Mr. Bobet confirming April 28, 2020, as the EUO date, but the email did not mention if the EUO would be conducted in person or remotely. *Id*. Upon receipt of the email, Mr. Bobet wrote a letter to Defendant expressing his concerns of having the EUO conducted in person during the COVID-19 pandemic and reiterating his request to have the EUO conducted remotely. *Id*. at pgs. 1-2.

On April 6, 2020, Defendant sent a letter to the Plaintiff confirming the EUO for April 28, 2020. *Id*. at 2.

The EUO letter stated in relevant part:

> "The EUO will provide you the opportunity to explain the details of the claim and provide supporting information and/or documentation.
>
> Per our conversation, we have scheduled your EUO and you are hereby required to appear for it on the date and time listed below. If you need the assistance of an interpreter, you should let us know immediately, and one will be provided to you at no cost. Should you fail to inform us of this need prior to the EUO, the EUO will be canceled despite your appearance on the scheduled date.
>
> **4/28/2020**
>
> **10:00 am - Remote. The directions for dial in & video login will be provided at a later date.**
>
> In order to ensure our customers' safety, we are currently monitoring the status of COVID-19 and Progressive is following the recommendations from the Centers for Disease Control and Prevention (CDC) as well as the guidelines set forth by state and local officials, including practicing social distancing. **If the CDC and/or state and local officials continue to recommend social distancing at the time of your scheduled EUO, we may proceed with a video or telephonic meeting in lieu of an in-person appearance. We will contact you prior to your scheduled examination under oath and an additional notice will be sent confirming your in-person, video or telephonic appearance at the examination under oath.**
>
> In addition to appearing for this EUO, we require that you provide the following items and documents for review and copying at the time of the EUO. We may need to request additional information or documentation later that will assist us in resolving the claim.
>
> 1. Legal photo identification such as driver's license or passport.
> 2. Any medical supplies or equipment given for in home use by a medical provider.
> 3. Please provide copies of any prescription receipts related to medical treatment from this accident.
>
> The EUO will be taken before a court reporter. You will be required to read and sign your statement if it is transcribed. We will provide you with a copy of the final statement once it has been transcribed and you have returned the original signed statement to us.
>
> **Failing to appear for the EUO or failing to produce the documentation as required may be treated as a violation of the terms and conditions of the insurance policy and could result in a denial of the claim.**

Id. at 8 (emphasis added).

The EUO letter was signed, "Heather N. Hilliard for Eva Rodriguez" *Id*. at 9.

On April 7, 2020, Plaintiff filed a Petition for Declaratory Judgment alleging a doubt as to whether or not Defendant could force Plaintiff to attend an in-person EUO during the COVID-19 pandemic, with safer-at-home guidelines in place from various state and federal authorities. Doc. 1, pg. 3. Plaintiff did not receive any clarification from Defendant about his obligation to attend an in person EUO prior to filing suit. Doc. 117, pg. 2. On July 15, 2020, in its Answer and Affirmative Defenses to the Petition, Defendant's First Affirmative

Defense asserts Defendant does not require the Plaintiff to attend any EUO, and therefore Plaintiff's Petition is moot. Doc. 28, pg. 3.

B. Procedural Background

As noted *supra*, Plaintiff instituted this action *sub judice* on April 7, 2020. In the Petition, Plaintiff alleges that Defendant improperly sought an in-person examination under oath (EUO) of Plaintiff, contrary to the COVID-19 pandemic federal, state, and local guidelines in place. Doc. 1. Plaintiff's action seeks entry of a declaratory judgment determining whether Defendant can compel Plaintiff to appear for the EUO in person, and the Petition asserts that Plaintiff is entitled to attorney's fees and costs pursuant to § 627.428 Fla. Stat. and § 57.104 Fla. Stat. *Id*. Also as noted *supra*, Defendant filed an Answer and Affirmative Defenses averring that Defendant is no longer requiring Plaintiff to attend an EUO, therefore the issue is moot. Doc. 28, pg. 3.

During the course of the litigation, the parties have filed numerous motions, including various motions for summary judgment. The instant motions under consideration stem from the Court's December 30, 2020, denial of Plaintiff's Motion for Summary Judgment filed on August 24, 2020, (Doc. 36), and the denial of Defendant's Amended Motion for Summary Final Judgment filed October 8, 2020, (Doc. 40). Doc. 49. In denying the motions, the Court explained that there was a genuine issue of material fact surrounding the scheduling of the EUO, and that there was a genuine issue of material fact as to "whether the subsequent extension of coverage for the subject claim constitutes a confession of judgment given the circumstances surrounding the filing of this action and whether the filing 'forced' the extension of coverage." *Id*. at pg. 3.

The parties filed additional motions for summary judgments. The Plaintiff filed an Amended Motion for Summary Judgment on June 23, 2021, (Doc. 61), and the Defendant filed its Second Amended Second Motion for Summary Judgment (Doc. 65) on June 30, 2021. The Court denied both motion for summary judgment on January 21, 2022, because the Court determined that the parties had not overcome their burden as to the issue of material fact *inter alia*, and the Court disagreed as to the matters of law advanced by the parties. Doc. 86.

After the Court's order denying the motions for summary judgment, the parties filed the motions currently under consideration. In Plaintiff's Second Amended Motion for Summary Judgment, Plaintiff argues that the Defendant's actions after Plaintiff filed suit equate to a confession of judgment pursuant to *O'Malley v. Nationwide Mutual Ins. Co.*, 890 So. 2d 1163, 1164 (Fla. 4th DCA 2004) [30 Fla. L. Weekly D5b]. Doc. 116, pg. 3. Essentially, Plaintiff argues that since the Defendant abandoned the request for the EUO, it provided precisely what Plaintiff was seeking and therefore, acts as the equivalent of a confession of judgment. Plaintiff's Motion for Judgment on the Pleadings advances a similar argument. See Doc. 113.

In Defendant's Motion for Reconsideration/Clarification and/or Motion for Amendment of Orders Denying Defendant's Amended and Second Motions for Final Summary Judgment, Defendant argues that the Court should reconsider denying Defendant's Motion for Summary Judgment. Doc. 119. pg. 1. Defendant argues that it overcame its initial burden in its summary judgment motion, the issue under the current cause of action is moot, since Defendant informed Plaintiff that Defendant rescinded the need for a EUO, and coverage is not an issue in the instant action. Doc. 119 at pg. 6.

Furthermore, Defendant argues that the Court's reliance on *O'Malley v. Nationwide Mut. Fire Ins. Co.*, is misplaced as to the issue of confession of judgment. *Id*. Defendant advances this position by arguing that "*O'Malley* stated [that] a judgment of coverage is considered a benefit to qualify under Fla. Stat. 627.428; however, as previously stated by the Court, 'the Plaintiff's action seeks no damages whatsoever.' " *Id*. According to the Defendant, since Plaintiff did not receive any "benefit" from the filing of this lawsuit, Defendant did not confess judgment when it rescinded the need for an EUO. *Id*. at pgs. 7-8. Defendant claims that the instant matter parallels the facts in *Progressive Am. Ins. Co. v. Rural Metro Corp.*, 994 So. 2d 1202 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2649a].

Defendant did not file any responses to Plaintiff's Second Amended Motion for Summary Judgment.[1] *See* Fla. R. Civ. P. 1.510(c)(5) and (e); *see also Lloyd S. Meisels, P.A. v. Dobrofsky*, __ So. 3d __, 2022 WL 2057777, at *3 (Fla. 4th DCA June 8, 2022) [47 Fla. L. Weekly D1239a]

II. DISCUSSION

A. Plaintiff's Second Amended Motion for Summary Judgment

i. Standard

The Florida Supreme Court recently amended Florida Rule of Civil Procedure 1.510 to imitate the federal summary judgment standard. *See In re: Amendments to Fla. R. Civ. P. 1.510*, 309 So. 3d 192, 192 (Fla. 2020) [46 Fla. L. Weekly S6a] (adopting the federal summary judgment standard); *In re: Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 74 (Fla. 2021) [46 Fla. L. Weekly S95a] (largely replacing the text of existing rule 1.510 with the text of Federal Rule of Civil Procedure 56).

The amendment became effective on May 1, 2021, and "govern[s] the adjudication of any summary judgment motion decided on or after that date, including in pending cases." *In re: Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 77 (Fla. 2021) [46 Fla. L. Weekly S95a]. In this case, the Plaintiff's Second Amended Motion for Summary Judgment is being decided after the effective date of the amendment. Therefore, the amended rule applies.

Under the amended rule, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a) (2021). In applying the amended rule, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d at 75 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[A] party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.").

Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to present evidence showing a genuine issue of material fact that precludes summary judgment. *Celotex*, 477 U.S. at 323-25. A party cannot defeat a motion for summary judgment by resting on the conclusory allegations in the pleadings. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id*. at 252.

As the Florida Supreme Court explained:

> Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 . . . (2007) [20 Fla. L. Weekly Fed. S225a]. In Florida it will no longer be plausible to

maintain that "the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d at 75-76.

Additionally, the amended rule requires the nonmoving to serve a response to the motion for summary judgment. *Lloyd S. Meisels, P.A.* at *3. Rule 1.510(c)(5) states that "the nonmovant must serve a response." There is no wiggle room in the word "must." *Lloyd S. Meisels, P.A.* at *3. That word makes the filing of the response mandatory. *Id*. On a motion for summary judgment, by requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion. *Id*. Failure of the nonmoving party to file a response, permits the trial court to consider the facts set forth in the moving party's motion for summary judgment as "undisputed for purposes of the motion." *Id*. citing Fla. R. Civ. P. 1.510(e)(2).

ii. Analysis

In *Higgins v. State Farm Fire and Casualty Company*, the Florida Supreme Court concluded the following portions of chapter 86, Florida Statutes (2003) "applicable to declaratory judgment actions regarding insurance coverage":

> **86.011 Jurisdiction of trial court.**—The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. . . . The court may render declaratory judgments on the existence, or nonexistence:
>
> (1) Of any immunity, power, privilege, or right; *or*
>
> (2) *Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future.* . . .
>
> **86.021 Power to construe.**—Any person claiming to be interested or who may be in doubt about his or her rights under a . . . contract . . . or whose rights, status, or other equitable or legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under such . . . contract . . . or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.
>
> . . . .
>
> **86.051 Enumeration not exclusive.**—The enumeration in ss. 86.021, 86.031 and 86.041 *does not limit or restrict the exercise of the general powers conferred in s. 86.011* in any action where declaratory relief is sought. . . .
>
> . . . .
>
> **86.071 Jury trials.**—*When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending*. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. . . .
>
> . . . .
>
> **86.101 Construction of Law.**—*This chapter* is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and *is to be liberally administered and construed.*

Higgins v. State Farm Fire & Cas. Co., 894 So. 2d 5, 10-11 (Fla. 2004) [29 Fla. L. Weekly S630a] (emphasis in original).

1. Mootness

"The purpose of a declaratory judgment statute is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." *Martinez v. Scanlan,* 582 So. 2d 1167, 1170 (Fla. 1991). Parties who seek declaratory relief must show that

> there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. *These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.*

Id. (alteration in original) (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla.1952)). Thus, absent a bona fide need for a declaration based on present, ascertainable facts, "the court lacks jurisdiction to render declaratory relief." *Martinez*, 582 So. 2d at 1170 (citing *Ervin v. Taylor,* 66 So. 2d 816 (Fla. 1953)).

Additionally, it is well settled that, "Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.' " *LaBella v. Food Fair, Inc.,* 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981) (quoting *Williams v. Howard,* 329 So. 2d 277, 283 (Fla. 1976)); *see also American Indemnity Co. v. Southern Credit Acceptance, Inc.,* 147 So. 2d 10, 11 (Fla. 3d DCA 1962) (holding that, in a declaratory action case, "courts may not be required to answer a hypothetical question or one based upon events which may or may not occur").

Additionally, if the issues as framed in the Plaintiff's Complaint become moot during the course of the litigation, the trial court lacks jurisdiction to grant declaratory relief. *Florida Dept. of Ins. v. Guarantee Tr. Life Ins. Co.*, 812 So. 2d 459, 461 (Fla. 1st DCA 2002) [27 Fla. L. Weekly D523b]. An issue becomes moot " 'when the controversy has been so fully resolved that a judicial determination can have no actual effect.' " *GEICO Cas. Co. v. Barber,* 147 So. 3d 109, 111 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1727a] (quoting *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992)).

Accordingly, when Defendant rescinded its requirement that the Plaintiff sit for an EUO as noted in the Defendant's Answers and Affirmative Defenses, the issues between the parties, as framed by the pleadings, became moot because this Court could not provide any further substantive relief to the Plaintiff. *See Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992). Thus, absent a bona fide need for a declaration based on present, ascertainable facts, the Court lacks jurisdiction to render declaratory relief, and the instant case is ordered disposed of accordingly.

2. Confession of Judgment

As noted *supra*, Plaintiff argues that Defendant's rescission of the EUO requirement constitutes a Confession of Judgment. Defendant claims that there cannot be a Confession of Judgment if coverage is not at issue.

The Confession of Judgment Doctrine stems from the Florida Supreme Court's interpretation of § 627.428 Fla. Stat. The statute states, in part:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named . . . insured . . . the trial court . . . shall adjudge or decree against the insurer and in favor of the insured . . . a reasonable sum as fees or compensation for the insured's . . . attorney prosecuting the suit in which the recovery is

had.

The purpose of this statute "is to 'discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts.' " *Ins. Co. of N. Am. v. Lexow,* 602 So. 2d 528, 531 (Fla. 1992). The statute permits an award of fees not only when there is a judgment entered against the insurer but also when the insurer "decline[s] to defend its position," resulting in "the functional equivalent of a confession of judgment or a verdict in favor of the insured." *Wollard v. Lloyd's & Cos. of Lloyd's,* 439 So. 2d 217, 218 (Fla. 1983)).

In *Wollard,* an insurer settled a first-party claim brought against it by an insured, but the parties continued to litigate whether the insured should be awarded attorney's fees for the action. 439 So. 2d at 218. The Florida Supreme Court established that an insurer's post-suit payment of a claim in a first party suit (where the insured directly sues the insurer) is "the functional equivalent of a confession of judgment or a verdict in favor of the insured" such that the insured would be considered a "prevailing party" entitled to attorney's fees and costs within the meaning of § 627.428. 439 So.2d at 218. The court reasoned that "[r]equiring the plaintiff to continue litigation in spite of an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, fails to protect any interest . . . and discourages any attempt at settlement." *Id.* (alterations added).

Appellate courts of Florida uniformly have extended the confession of judgment rule beyond the situation in Wollard, which involved the settlement of a first-party suit between the insured and the insurer, to the settlement of a third-party suit and the voluntary dismissal of a related complaint for declaratory relief filed by an insurer against an insured. In *Mercury Insurance Co. of Florida v. Cooper*, 919 So. 2d 491 (Fla. 3rd DCA 2005) [30 Fla. L. Weekly D2648a], *Unterlack v. Westport Insurance Co.,* 901 So. 2d 387 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1228a], and *O'Malley*, 890 So. 2d at 1163, the insurer settled on behalf of the insured a suit brought against the insured by a third party and voluntarily dismissed a complaint for a declaratory judgment filed by the insurer against the insured. *Mercury Ins. Co.,* 919 So. 2d at 492; *Unterlack*, 901 So. 2d at 388; *O'Malley*, 890 So. 2d at 1164. The appellate courts reasoned that the settlement of the third-party claim and voluntary dismissal of the declaratory judgment action constituted a confession of judgment in the declaratory judgment action and entitled the insured to an award of attorney's fees. *Mercury Ins. Co.*, 919 So. 2d at 492-93; *Unterlack*, 901 So. 2d at 389; *O'Malley*, 890 So. 2d at 1164-65.[2]

Though the facts in *Mercury Insurance Co. of Florida, Unterlack,* and *O'Malley*, are not squarely on point with the facts in the instant case, the Court finds that the reasoning used by the appellate courts in these cases should be applied to the instant case. In the instant case, Plaintiff's motion for summary judgment points to uncontroverted evidence that Plaintiff's suit asks the Court to determine if the Plaintiff is required to attend the EUO in person because the Plaintiff is concerned about the issue of coverage.

The Complaint itself states that the Plaintiff has attempted to "perform all conditions precedent under PROGRESSIVE's policy in order for HILCHEY to be entitled to coverage." Doc. 3, pg 3, ln. 14. In the next paragraph, Plaintiff requests the Court to make a determination "whether or not PROGRESSIVE must allow HILCHEY to appear for a video or telephonic EUO based upon the aforementioned Federal, state and local Orders and Guidelines." *Id.* at ln. 15. In Attorney Bobet's affidavit that is cited in Plaintiff's summary judgment motion, Attorney Bobet expresses concern about the Plaintiff's PIP coverage, with respect to Plaintiff's attendance at the EUO. Doc. 117, pg. 2. By the time the Plaintiff filed suit in the instant case, Plaintiff did not know if he could attend the EUO remotely or in person. *Id.* Based on the letter that Defendant sent to Plaintiff, "Failing to appear for the EUO or failing to produce the documentation as required may be treated as a violation of the terms and conditions of' the insurance policy and could result in a denial of the claim." *Id.* at pg. 8.

In essence, when the Defendant decided that Plaintiff no longer needed to have an EUO, that post-suit decision indicated that the insurer gave up the dispute. By giving up the dispute, Plaintiff no longer faces the possibility that his failure to appear to an EUO "could result in a denial of [his] claim" and the insurance company not extending coverage. In the Court's view, the Defendant's change in position post suit parallels the insurance companies' actions in *Mercury Insurance Co. of Florida, Unterlack,* and *O'Malley*, and those post suit actions caused their respective suits to be moot with outcomes in the insureds' favor. Therefore, as a matter of law, Defendant confessed judgment when it rescinded the requirement that Plaintiff attend the EUO.[3]

B. Plaintiff's Motion for Judgment on the Pleadings

The Court finds that the issues presented in Plaintiff's Motion for Judgment on the Pleadings are moot and are denied as moot.

C. Defendant's Motion for Reconsideration/ Clarification and/or Motion For Amendment Of Orders Denying Defendant's Amended And Second Motions

Despite the lack of a specific rule permitting a court to rehear its denial, courts have the inherent authority to reconsider most matters. *See generally Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC,* 109 So. 3d 291, 292 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D553a] (Construing unauthorized motion for rehearing as motion for reconsideration and explaining general ability of trial court to reconsider matters it could not otherwise rehear.) (citing *Monte Campbell Crane Co., Inc. v. Hancock,* 510 So. 2d 1104 (Fla. 4th DCA 1987)); *see also Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla.1998) [23 Fla. L. Weekly S625a]; *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 851 (Fla. 1962) ("[I]t is well settled that a trial court has the inherent authority to control its own interlocutory orders prior to final judgment.").

Federal courts throughout Florida and elsewhere have also recognized that a "reconsideration of a previous order is an extraordinary remedy to be employed sparingly." *Mannings v. School Board of Hillsborough County, Fla.*, 149 F.R.D. 235 (M.D. Fla. 1993) (citing *Taylor Woodrow Construction Corp. v. Sarasota/Manatee Airport Authority,* 814 F.Supp. 1072, 1073 (M.D. Fla. 1993)). "[O]nly a change in the law, or the facts upon which a decision is based," will justify a reconsideration of a previous order. *Mannings*, 149 F.R.D. at 235. "For reasons of policy, courts and litigants cannot be repeatedly called upon to backtrack through the paths of litigation which are often laced with close questions." *Kuenz v. Goodyear Tire & Rubber Company,* 617 F.Supp. 11, 14 (N.D.Ohio, E.D. 1985). There is a "badge of dependability necessary to advance the case to the next stage." *Id.*

Based on its ruling granting Plaintiff's Second Amended Motion For Summary Judgment, the Court declines to exercise its authority to revisit its prior ruling denying Defendant's Second Amended Second Motion for Final Summary Judgment. Therefore Defendant's Motion For Reconsideration /Clarification And /Or Motion For Amendment Of Orders Denying Defendant's Amended And Second Motions For Final Summary Judgment is denied.

III. CONCLUSION

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED**:

1. The Plaintiff's Second Amended Motion for Summary Judgment is hereby **GRANTED**.

2. The Plaintiff's Motion for Judgment on the Pleadings is **DENIED**.

3. The Defendant's Motion For Reconsideration /Clarification And /Or Motion For Amendment Of Orders Denying Defendant's Amended And Second Motions For Final Summary Judgment is hereby **DENIED**.

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[1]Defendant's Motion for Reconsideration/Clarification and/or Motion for Amendment of Orders Denying Defendant's Amended and Second Motions for Final Summary Judgment is not a response pursuant to Fla. R. Civ. P. 1.510(b)(5) because the Motion does not cite to any facts disputed or otherwise in the record.

Though the Defendant has filed a Third Motion for Summary Judgment, filed on February 11, 2022, (Doc. 88), this motion predates the Plaintiff's Second Amended Motion for Summary Judgment filed on March 18, 2022, (Doc. 116), thus Defendant's Motion cannot be a response. *See Lloyd S. Meisels, P.A.* at *3.

[2]The Court notes the Fourth District case of *Basik Exports & Imports, Inc. v. Preferred National Insurance Co.*, 911 So.2d 291, 292-94 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2359a], where the court "limited the reach of the confession of judgment rule by holding that an insured is not entitled to attorney's fees when the insurer settles a third-party complaint, and a related complaint for a declaratory judgment filed by the insured is dismissed as moot." The Court notes that the facts in *Basik* are dissimilar to the facts in the instant case because the *Basik* plaintiffs received what they bargained for before suit was filed, therefore, the *Basik* plaintiffs did not need to file suit, unlike the Plaintiff in the instant case.

[3]Though not challenged in the instant motion for summary judgment, Defendant's Motion for Reconsideration argues that the instant case is similar to the facts in *Progressive Am. Ins. Co. v. Rural/Metro Corp. of Florida*, 994 So. 2d 1202 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D2649a]. Though the Court need not analyze that case in the instant motion for summary judgment since the Defendant did not file a response pursuant to Fla. R. Civ. P. 1.510(c), the Court notes that *Rural/Metro Corp.* is inapplicable to the instant matter, because the insurance company's actions in that case did not constitute a confession of judgment to the defendant. *Id*. at 1207. Additionally, the litigation in *Rural/Metro Corp.* surrounded pre-lawsuit discovery that the parties were not entitled to. *Id*.

* * *

Insurance—Personal injury protection—Coverage—Exhaustion of policy limits—Insurer is entitled to judgment as matter of law where documents submitted by insurer reflect that insurer exhausted benefits in payment of timely and proper bills, and medical provider has not presented any evidence that insurer's conduct constituted bad faith or that any gratuitous payments were made

ADVANCED CHIROPRACTIC & REHABILITATION, INC., a/a/o Crystal Schanley, Plaintiff, v. PROGRESSIVE SELECT INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 20-CC-013251, Division H. May 19, 2022. James Giardina, Judge. Counsel: C. Spencer Petty, Irvin & Petty, P.A., St. Petersburg, for Plaintiff. Roy Kielich, Andrews Biernacki Davis, Tampa, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY FINAL JUDGMENT and FINAL JUDGMENT FOR DEFENDANT

THIS MATTER came before the Court for hearing on February 24, 2022, and May 12, 2022, on Defendant's Motion for Summary Final Judgment filed November 5, 2021 ("Motion"). Having reviewed and considered Defendant's Motion, the summary judgment evidence,[1] the arguments presented by the parties,[2] the applicable law, and being otherwise fully advised, the Court finds:

Background

1. On February 27, 2020, Plaintiff instituted this breach of contract action, as assignee of Crystal Schanley, against Defendant seeking payment of Personal Injury Protection (PIP) benefits alleged to be due Plaintiff for services rendered as a result of injuries allegedly sustained by Crystal Schanley in an automobile accident on July 20, 2019.

2. At the time of the accident, Crystal Schanley was covered under a policy of insurance issued by Defendant which provided $10,000.00 in PIP benefits in conformance with the Florida Motor Vehicle No-Fault Law, Florida Statutes Section 627.736.

3. Defendant pled exhaustion of benefits as an affirmative defense in this matter. *See* Ans. and Affirmative Defenses pp. 2-3 (Mar. 24, 2020). Plaintiff did not file a response or avoidance relative to Defendant's exhaustion of benefits defense. However, Plaintiff's Complaint sets forth a general allegation of improper exhaustion/gratuitous payment. *See* Compl. ¶ 21 (Feb. 27, 2020).

4. On November 5, 2021, Defendant filed its Motion for Summary Final Judgment asserting that Defendant has fully exhausted the limits of PIP benefits in this matter, thereby meeting its contractual responsibility in full, and is not responsible for amounts in excess of the policy limits. As a result, Defendant contends Plaintiff's claim fails as a matter of law.

5. In support of its Motion, Defendant relies on the Declaration and Certification of Business Records of Kimberleen Lozada, which was filed contemporaneously with the Defendant's Motion and serves to authenticate various documents contained in the Defendant's file pursuant to Florida Rule of Civil Procedure 1.510(c)(1)(A), including true and accurate copies of Defendant's Policy of Insurance and Declaration of Coverages page, the medical bills submitted under the subject claims, the corresponding Explanations of Benefits, and the PIP Payment log.

6. Plaintiff did not file any response to Defendant's Motion setting forth its position in accordance with rule 1.510 prior to the hearing on Defendant's Motion.

Summary Judgment Standard

7. As noted by the Florida Supreme Court, " '[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part' of rules aimed at 'the just, speedy and inexpensive determination of every action.' " *In re: Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d at 75 [Fla. 2021, 46 Fla. L. Weekly S95a] (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)) (alteration in original).

8. Florida Rule of Civil Procedure 1.510(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Further, effective May 1, 2021, the summary judgment standard in Florida is to be "construed and applied in accordance with the federal summary judgment standard." Fla. R. Civ. P. 1.510(a). Specifically, this standard encompasses the principles set forth in what is referred to as the *Celotex* trilogy and case law interpreting the federal counterpart to rule 1.510.[3] Fla. R. Civ. P. 1.510 (Court Notes for 2021 Amendment); *In re: Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 75 & 76 (Fla. 2021) [46 Fla. L. Weekly S95a].

9. The focus for determining whether a genuine dispute exists, so as to bar summary judgment, is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Like the standard for directed verdict, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-252.

10. "When the moving party has carried its burden under [the summary judgment rule], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Gargiulo v. G.M. Sales, Inc.*, 131 F. 3d 995, 999 (11th Cir. 1997) (noting that "to oppose [a] properly supported motion for summary judgment, [the opposing party] must come forward with specific factual evidence, presenting more than mere allegations"

(citing *Anderson*, 477 U.S. at 248-249)). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007) [20 Fla. L. Weekly Fed. S225a].

11. In discussing the application of "new" rule 1.510, the Florida Supreme Court indicated:

> In Florida it will no longer be plausible to maintain that 'the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the "slightest doubt" is raised.' Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

In re: Amends. to Fla. Rule of Civ. Proc. 1.510, 317 So. 3d at 75-76 (alteration and emphasis in original).

Analysis

12. In the absence of a showing of bad faith or a gratuitous payment by Defendant, "once the PIP benefits are exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims." *Northwoods Sports Med. and Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a]; *see also Progressive Select Ins. Co. v. Dr. Rahat Faderani, DO, MPA, P.A.*, 330 So. 3d 928 (Fla. 4th DCA 2021) [46 Fla. L. Weekly D2420a] (finding the insurer was not liable for payment in excess of policy limits where improper payment or bad faith were not found); *GEICO Indem. Co. v. Gables Ins. Recovery, Inc.*, 159 So. 3d 151 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2561a] ("adopt[ing] the Fourth District's ruling in *Northwoods* that a showing of bad faith is required before the insurer can be held liable for benefits above the statutory limit"); *Sheldon v. United Servs. Auto. Ass'n*, 55 So. 3d 593, 595 (Fla. 1st DCA 2010) [36 Fla. L. Weekly D23a] (noting "Florida courts have established that, once an insurer has paid out the policy limits to the insured (or to various providers as assignees), it is not liable to pay any further PIP benefits, even those that are in dispute"); *Progressive Am. Ins. Co. v. Stand-Up MRI of Orlando*, 990 So. 2d 3 (Fla. 5th DCA 2008) [33 Fla. L. Weekly D1746a]; *Coral Imaging Servs. v. Geico Indem. Ins. Co.*, 955 So. 2d 11, 15 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D2478a] (indicating payment of an untimely or improper bill is characterized as gratuitous and should not count toward the exhaustion of the policy limits); *Simon v. Progressive Exp. Ins. Co.*, 904 So. 2d 449 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D1156b].

13. "The reason an insurer that has paid out the policy limits may not be held liable on a claim for disputed benefits is that it has already fulfilled its contractual obligation to pay a given amount of benefits, and it cannot be required to pay more than it agreed to pay under the policy." *Sheldon*, 55 So. 3d at 595-596.

14. Defendant argues it has fully and properly exhausted the limits of PIP benefits in this matter through payment of compensable bills, thereby meeting its contractual obligation to the insured. Defendant asserts Plaintiff has not established bad faith or gratuitous payments in this matter so as to potentially expose Defendant to liability beyond the policy limits. As such, Defendant contends the insured, and her assignees, received the bargained for benefit of the insurance policy, no further payments are owed, and Plaintiff's claim fails as a matter of law.

15. In opposition to Defendant's Motion, Plaintiff's argument focuses on the assertion that Defendant has not proven the entire $10,000.00 in PIP benefits has been paid exhausting the available PIP benefits. In support of its position, Plaintiff contends the documents upon which Defendant relies—the Declaration and Certification of Business Records of Kimberleen Lozada—are confusing, inaccurate, and inconsistent, and therefore a factual dispute on the issue of exhaustion exists.

16. The Court disagrees. A review of the documents in support of Defendant's Motion reflects the inaccuracies and inconsistencies cited by Plaintiff are resolved by the documents themselves, and certainly do not rise to the level of creating a genuine dispute of material fact as to whether or not benefits were actually exhausted. For example:[4]

a. Plaintiff's concern of inaccuracy because Defendant's payment amounts on certain explanations of benefits are different than the payments included on the PIP payment log, is resolved by considering all documentation related to the relevant dates of service and accounting for the addition of interest payments. *See, e.g.*, Def.'s Mot. for Summ. Final J. pp. 68-69, 228-230, & 299-302.

b. Plaintiff's claim regarding the documents reflecting multiple possible dates of exhaustion (November 2019, December 2019, and January 2020) is countered by noting the documents reflect that, while benefits for dates of service from November and December 2019 were denied due to exhaustion, the explanations indicating exhaustion (as a basis for non-payment or partial payment) were dated January 2020. *See, e.g.*, Def.'s Mot. for Summ. Final J. pp. 68-69, 129-130, 147-149, & 317-320. Additionally, explanations of benefits dated December 2019 and November 2019 do not reflect an indication by Defendant that benefits were exhausted at that time. *See, e.g.*, Def.'s Mot. for Summ. Final J. pp. 131-133, 144-146, & 150-153.

c. Plaintiff's contention that the PIP log reflects payment after Defendant's asserted January 2020 date of exhaustion is alleviated by observing that the documentation shows the February 20, 2020 payments were not payment of benefits, but rather were payments for interest and postage made to Plaintiff (by way of counsel) in response to counsel's demand letter. *See* Def.'s Mot. for Summ. Final J. pp. 68 & 337-338.

17. The documents in total, not selecting documents in isolation, reflect that the bills for which Defendant made payment were timely and properly submitted, and that the entire $10,000.00 statutory/policy limit for PIP benefits has been paid toward the insured's expenses pertaining to the relevant accident, thereby exhausting the available PIP benefits.

18. Further, while the Complaint makes a general allegation of improper exhaustion or gratuitous payments, Plaintiff, in opposition to Defendant's Motion did not present or point, with specificity, to any record evidence supporting that Defendant's conduct constituted bad faith or that any gratuitous payments had been made so as to indicate the existence of a genuine dispute of material fact as to the exhaustion of benefits in this matter.[5]

19. As such, the Court finds there exists no genuine dispute as to the proper exhaustion of benefits in this matter, and Defendant is entitled to judgment in its favor as a matter of law.

Based on the foregoing, it is hereby **ORDERED and ADJUDGED**:

A. Defendant's Motion for Summary Final Judgment filed November 5, 2021 is hereby **GRANTED**.

B. Final Summary Judgment is entered in favor of Defendant, PROGRESSIVE SELECT INSURANCE COMPANY. Plaintiff shall take nothing by this action and Defendant shall go hence without day.

C. The Court reserves jurisdiction to consider any timely motion relative to entitlement to and amount of attorneys' fees and costs, if applicable.

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[1]The Court notes Plaintiff did not file a response to Defendant's Motion.

[2]This includes consideration of the content of the parties' proposed orders provided after the February 24, 2022, hearing.

[3]*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[4]The listed examples and cited materials are not exhaustive.

[5]The Court again notes in addition that Plaintiff did not file a reply to Defendant's affirmative defenses. *See Progressive Select Ins. Co. v. Dr. Rahat Faderani, DO, MPH, P.A.*, 330 So. 3d at 930 (noting that "[b]ad faith would be considered an avoidance of [insurer's] affirmative defense of exhaustion).

* * *

Insurance—Discovery—Depositions—Work product privilege—Question asking claims representative what information she remembers claimant's attorney reporting in first notice of loss, without asking deponent to read or refer to claim file, does not fall within work product protection—Motion to compel answers to several other questions is moot where deponent eventually answered questions—Request that deponent refresh her recollection from privileged claim file to answer questions is not allowed—Attorney-client privilege—Question asking whether claim file reflects that anyone sought legal advice on claim prior to litigation does not call for attorney-client privileged information and was answered—Where counsel for insurer interposed improper speaking objections but did not instruct deponent not to answer questions, termination of deposition by plaintiff was not warranted—Second deposition will be allowed with restrictions

SASA ZIVULOVIC, Plaintiff, v. METROPOLITAN CASUALTY INSURANCE COMPANY, Defendant. County Court, 13th Judicial Circuit in and for Hillsborough County, Civil Division. Case No. 21-CC-041262, Division J. June 17, 2022. J. Logan Murphy, Judge. Counsel: Timothy A. Patrick, Patrick Law Group, P.A., Tampa, for Plaintiff.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL, OR IN THE ALTERNATIVE STRIKE DEFENSES, AND DENYING MOTION FOR SANCTIONS

BEFORE THE COURT is Plaintiff's Motion to Compel, or the Alternative, Strike Defenses and Motion for Sanctions. Defendant responded, and the parties appeared for hearings on June 2, 2022 and June 7, 2022.

I. INTRODUCTION.

This motion arises from the deposition of Debra Twidwell in her individual capacity. Counsel for Plaintiff Sasa Zivulovic asked Twidwell a series of questions concerning the Metropolitan file for the claim at issue in this case. Counsel for Metropolitan objected to several of the questions, alleging that they sought work product and invaded the attorney-client privilege. Frustrated by the assertion of privilege and what he believed to be improper speaking objections, Zivulovic's attorney terminated the deposition. Zivulovic now moves to compel answers to certain unanswered questions, to continue the deposition, and for sanctions.

II. STANDARD.

Depositions must proceed as an examination would at trial. Fla. R. Civ. P. 1.310(c). Any examination strategies or conduct that "would not be permitted in the presence of a judicial officer . . . are likewise not permitted at deposition." FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE 80 (2021 ed.). That rule applies to objections, which must be "stated concisely and in a nonargumentative and non-suggestive manner," just as they would at trial. Fla. R. Civ. P. 1.310(c). For that reason, "[s]peaking objections to deposition questions are not permitted" because they "are designed to obscure or hide the search for the truth by influencing the testimony of a witness." HANDBOOK at 79. A proper objection states its basis concisely and non-suggestively, allowing the questioner a chance to correct the defect and to allow the deponent to answer. *Id*. at 78.

A party may instruct a deponent not to answer "only when necessary to preserve a privilege." Fla. R. Civ. P. 1.310(c). If the instruction is given, the trial court may be required to conduct an *in camera* hearing to determine whether a question will elicit protected information. *Am. Home Assur. Co. v. Vreeland*, 973 So. 2d 668, 672 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D469a]. Information may be protected by the attorney-client privilege, the work product doctrine, or the so-called "claims file privilege," which protects disclosure of claims and underwriting files in a coverage action. *See State Farm Mut. Auto. Ins. Co. v. Tranchese*, 49 So. 3d 809, 810 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2590a]; *State Farm Mut. Auto. Ins. Co. v. O'Hearn*, 975 So. 2d 633, 637-38 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D708a]; *State Farm Fla. Ins. Co. v. Gallmon*, 835 So. 2d 389, 390 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D330a]; *State Farm Fire & Cas. Co. v. Valido*, 662 So. 2d 1012, 1013 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2514e]. Deposition questioning that elicits information in the claims file is "patently overbroad" and can be restricted in a coverage action. *Owners Ins. Co. v. Armour*, 303 So. 3d 263, 269 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2105a].

There are certain instances, however, when ordinarily protected information may be discovered. When a party asserts a claim or defense based upon an ordinarily privileged matter, that party waives the right to claim privilege if the proof of his claim or defense will necessarily require the privileged matter to be offered into evidence. *See Owners Ins. Co. v. Armour*, 303 So. 3d 263, 267-68 (Fla. 2d DCA 2020) [45 Fla. L. Weekly D2105a]; *Revello Med. Mgmt., Inc. v. Med-Data Infotech USA, Inc.*, 50 So. 3d 678, 680 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D2699a]; *Vreeland*, 973 So. 2d at 672.

Rule 1.310(d) allows a party to terminate a deposition "on a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, or that objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c)." This should be a last resort. "Counsel should exhaust all efforts to resolve a dispute that threatens the ability to proceed with [a] deposition" before terminating it. HANDBOOK at 81.

"All phases of the examination are subject to the control of the court, which has discretion to make any orders necessary to prevent abuse of the discovery and deposition process." HANDBOOK at 82. *See also Racetrac Petroleum, Inc. v. Sewell*, 150 So. 3d 1247, 1251 (Fla. 3d DCA 2014) [39 Fla. L. Weekly D2419a] ("Trial courts are accorded broad discretion in the treatment of discovery problems. . . ."); *Waite v. Wellington Boats, Inc.*, 459 So. 2d 425, 426 (Fla. 1st DCA 1984) ("Trial courts must be accorded broad discretion in the treatment of discovery problems . . . .").

III. DISCUSSION.

Determining whether a question calls for privileged information is a question-by-question task. That task is complicated by Zivulovic's failure to delineate in his motion the questions to which he seeks answers and the specific basis for compelling an answer. At the hearing, however, Zivulovic identified 7 allegedly unanswered questions. Each is addressed in turn, along with the relevant objection or colloquy.

Question 1:

Q. So March 11th would be the first notice of loss, correct.

[A: Yes.]

Q. And what information was reported at the time?

A. Well, it was not reported to me. It was reported by the opposing attorney and it was reported at 1:00 p.m.

Q. And what information was provided at that time?

A. The date of the accident, the parties involved.

Q. And did the—what I'm asking is if you can provide me the totality of information that was provided at that time.

(Depo. at 8:8-18.)

Objection:

Work-product privilege . . . [and] just so we're clear on the record,

she's not going to be reading the claim notes into the record.

(Depo at 8:19-23.)

This question does not seek privileged information, and Twidwell can answer it based on her personal knowledge. Metropolitan is correct that claims files are protected work product or so patently irrelevant that they cannot be sought in coverage disputes. *Seminole Cas. Ins. Co. v. Mastrominas*, 6 So. 3d 1256, 1258 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D559b]; *Gallmon*, 835 So. 2d at 390; *Valido*, 662 So. 2d at 1013; *O'Hearn*, 975 So. 2d at 637-38. But information that Twidwell may remember to have been reported by a claimant's attorney does not fall within this protection. The question does not ask Twidwell to read or refer to the claim notes; she is simply asked to answer the question in her individual capacity.

Question 2:

Does your file reflect that anyone at Metropolitan specifically anticipated litigation notated in the file?

(Depo at 10:1-2.)

Objection:

I'm going to object based on privilege. Also I think you're mischaracterizing the law. I think that we're at a point where we can't argue the specifics of the privileges. Additionally, she's not a lawyer, so she cannot make an assessment of the assertion of the privileges.

(Depo. at 10:3-8.)

Question 3:

So once again, my question is does your file reflect and it's notated in your file that anyone at Metropolitan specifically anticipated litigation?

(Depo. at 10:20-22.)

Objection:

I'm going to object again. If you can answer, I believe you—it's already been asked and answered.

(Depo at 10:23-25.)

I take these questions together because Twidwell eventually answered them. After being asked the question a third time, Twidwell answered (without objection), "We did not anticipate litigation, but the litigation process has taken place." (Depo. at 11:13-14.) I also note that the objections are improper speaking objections because they cross the line into suggestive commentary. Nevertheless, the motion to compel is moot as to questions 2 and 3 because the deponent answered the question.

Question 4:

[D]id anyone at Metropolitan seek out any legal advice during the pendency of this claim prior to litigation?

(Depo. at 11:17-18.)

Objection:

I'm going to object. You noticed her as an individual. It sounds like you're going down the path of corp rep questions.

(Depo. at 11:19-21.)

This is another improper speaking objection. But like questions 2 and 3, Twidwell eventually answers this question in her individual capacity: "I was only involved in the liability aspect of this claim." (Depo. at 12:11-12.) Zivulovic's counsel then moves on.

Question 5:

All right. But you've got the file there in front of you, so I'd ask you to review your file to be able to answer that question.

(Depo. at 12:13-15.)

Objection:

I'm going to object at this point. This notice is not of a corporate rep deposition. She's been noticed as a claim representative. Your initial request for her deposition was provide dates for Debra Twidwell's deposition, not as a corp rep, and you're going down the path of corp rep inquiries. She can only answer questions that are within her personal knowledge and she has access to the claim file as directed but—

(Depo. at 12:17-24.)

Question 6:

Once again, Ms. Twidwell, I'd ask you to review your file and claim notes to determine whether or not anyone at Metropolitan specifically sought out legal advice in this claim prior to the lawsuit being received?

(Depo. at 13:8-11.)

Objection:

I'm going to object. That's attorney-client privilege.

(Depo. at 13:12-13.)

The question does not call for attorney-client privileged information. But it does essentially ask Twidwell to refresh her recollection from a privileged claims file and divulge the contents of the file. That tactic is not allowed. *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So. 2d 116, 117-18 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1699a]. Nevertheless, Twidwell once again answered the question based on her personal knowledge, notwithstanding the objections, after Zivulovic's counsel asked if she was refusing to answer:

Q. Ma'am, are you refusing to answer?

A. As I indicated I was not—the only aspect of the claim that I was involved in was the liability aspect of the claim.

Q. So once again, back to my question, are you refusing to answer my previous question?

A. I believe that I answered your question. I only handled the liability aspect of the claim. The claim was referred over to our counsel and obviously we are in litigation.

Q. But you understand my question was prior to litigation, correct?

A. I understand.

(Depo. at 13:17-14:4.) This is a sufficient response to the question in Twidwell's individual capacity. In any event, Metropolitan's counsel did not instruct Twidwell not to answer, so Zivulovic should have continued with the deposition. Instead of moving on, he asked essentially the same question:

Question 7:

So my question once again is based on your review of your claim file and claim notes, prior to litigation—this is prior. We know a lawsuit happened. We know attorneys got involved later. But prior to litigation, did anyone at Metropolitan specifically seek out legal advice in this claim and if it's notated in your claim file or claim notes?

(Depo. at 14:5-11.)

Objection:

I'm going to object. Attorney-client privilege to that question.

(Depo. at 14:12-13.)

Instead of determining whether the witness would be answering the question, Zivulovic's attorney terminated the deposition. Nevertheless, the attorney-client privilege objection is unwarranted.[1] The question does not seek the "contents of confidential communications" with an attorney. § 90.502(2), Fla. Stat.; *Mobley v. Homestead Hosp., Inc.*, 202 So. 3d 868, 870 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1694d] ("The contents of confidential communications between the attorney and client are privileged and not discoverable, whereas dates, places, and names of consulted counsel are generally not privileged and are discoverable."); *id.* at 871 ("[Q]uestions carefully constructed to determine Mobley's intentions, thoughts, and general motivations for seeking legal counsel—as long as that information was not based upon initial or subsequent communications with counsel—are not protected by the attorney-client privilege and are discoverable."); *Coffey-Garcia v. S. Miami Hosp., Inc.*, 194 So. 3d 533 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D1458a] (allowing questioning into why the

client sought counsel, but not the "contents of advice or information she received from the attorneys"); *Herrera v. Herrera*, 895 So. 2d 1171, 1175 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D461a].

But an answer need not be compelled because Twidwell already answered the question. If Zivulovic was attempting to have Twidwell read from the claim notes to formulate her answer, that would—again—be an impermissible attempt at requiring the deponent to reveal protected information. *Proskauer Rose*, 987 So. 2d at 117-18. *See Mastrominas*, 6 So. 3d at 1258; *Gallmon*, 835 So. 2d at 390; *Scottsdale Ins. Co. v. Camara de Comercio Latino-Americana De Los Estados Unidos, Inc.*, 813 So. 2d 250, 251 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D815a] (holding the restriction on producing claims files "necessarily applies to the testimony that the Scottsdale corporate representative will be asked to provide at his or her deposition").

Even though Metropolitan did not instruct Twidwell not to answer any of the questions, Zivulovic terminated the deposition. Despite Zivulovic's argument (Motion ¶ 1) that "Defendant's counsel improperly instructed [her] client not to answer basic questions," the transcript shows that Metropolitan's counsel did not once instruct the witness not to answer. Yes, she repeatedly interjected improper speaking objections. But, from the Court's cold reading of the transcript, they did not warrant terminating the deposition.

There is fault on both sides here. Zivulovic's counsel improperly terminated the deposition, when he should have continued with questioning, bringing any qualms to the Court's attention after the deposition concluded. And Metropolitan used improper speaking objections throughout the deposition, paired with inapplicable privilege assertions. No one wins from this conduct, and the only appropriate remedy is to start back at zero. I will therefore allow a second deposition of Twidwell, with several restrictions described below.

In doing so, I remind the parties several things: First, Twidwell has *not* been noticed as a corporate representative, and her examination should reflect that fact. Second, the deposition is not the time or place to quibble about the sword-and-shield doctrine. That issue must be preserved and presented to the Court in a detailed motion seeking particularized relief. *See, e,g., Jenney v. Airdata Wiman, Inc.*, 846 So.2d 664, 668 (Fla. 2d DCA 2003) [28 Fla. L. Weekly D1341c]. Third, speaking objections are *absolutely prohibited* except when necessary to preserve a privilege. Fourth, unnecessary commentary in response to what a party believes to be an improper objection is just as suggestive and improper as the objection itself. Finally, the Court will not hesitate to use its armory of sanctions for further discovery violations, including monetary sanctions, restrictions on depositions, waiver of objections, and striking of claims or defenses.

IV. ZIVULOVIC'S MOTION TO COMPEL INTERROGATORY RESPONSES IS DENIED.

Zivulovic also moves to compel interrogatory responses from Metropolitan. Because the motion does not comply with the good faith conference requirement of Rule 1.280(a)(4), and because the issue is now moot, the motion to compel interrogatory responses will be denied.

V. NEITHER PARTY IS ENTITLED TO FEES AND COSTS.

An award of expenses is also warranted. The provisions of Rule 1.380(a) apply to motions brought under Rule 1.310(d). Rule 1.380(a)(4) directs the court to "require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees." The award of expenses is mandatory "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Fla. R. Civ. P. 1.380(a)(4). If the motion is granted in part and denied in part, "the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons." Fla. R. Civ. P. 1.380(a)(4).

Because I am granting the motion in part and denying it in part due to improper conduct by both parties, I find the circumstances would make an award of expenses to either side unjust. Fla. R. Civ. P. 1.380(a)(4). I likewise have no legal basis to strike Metropolitan's defenses.

Accordingly,

1. Plaintiff's Motion to Compel, or the Alternative, Strike Defenses and Motion for Sanctions is GRANTED in part and DENIED in part for the reasons stated above and as described below.

2. Defendant's motion for expenses is DENIED.

3. The parties shall confer within 14 days of this order and schedule a second deposition of Debra Twidwell, in her individual capacity, within 60 days of this order. That deposition will be conducted with the following restrictions:

a. The deposition is limited to one hour.

b. Plaintiff's counsel may not ask Twidwell to read from the claim file during the deposition.

c. Speaking objections are not permitted, except to preserve a particularized protection. Preservations of privilege should be stated on the record, accompanied by an instruction not to answer. An assertion of privilege will not be a basis to terminate the deposition. Any motion to compel an answer over a privilege objection must be reduced to writing and presented to the Court after the deposition.

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[1]Contrary to Metropolitan's argument, counsel did not make a work product or claims file objection to this question.

* * *

Insurance—Venue—Forum non conveniens—Motion to transfer case to Palm Beach County is granted where all parties, site of accident, and treatment and all witnesses are located—Broward County jury should not be burdened with determining case that has no connection to their county

ADVANCED DIAGNOSTIC GROUP, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COINX21069802, Division 61. May 31, 2022. Robert W. Lee, Judge.

Order Transferring Case to Palm Beach County Upon Objection to Venue for Forum Non Conveniens

THIS CAUSE came before the Court on May 19, 2022 for hearing of the Defendant's Objection to Venue, the Court's having reviewed the Motion and entire court file, heard argument, and reviewed the relevant legal authorities, finds as follows:

This case is one of ***literally thousands*** of insurance cases that have been flooding Broward County courts during the past two years that having nothing whatsoever to do with Broward County, other than the fact that Plaintiff's counsel may have an office here, or Plaintiff's counsel simply does not want to file their cases—for whatever reason—in their home county. Indeed, Broward County Court had more than 130,000 civil cases filed in the County Court in 2021, shattering the record of civil cases filed each month, and more than double the amount of the last pre-Covid year, 2019. This case is yet but one exemplar of the forum shopping occurring for these type of cases. Although nothing more than the proverbially drop in the bucket of these cases, the Defendant has in this case objected to venue.

Background:

1. By Plaintiff's own admission at the hearing, nothing in this case happened in Broward County, but rather Palm Beach County. The insurance policy at issue in this case insures a driver residing in Palm Beach County; the auto accident occurred in Palm Beach

County; the occupants of the other vehicle involved in the accident reside in Palm Beach County; the investigating law enforcement agency is in Palm Beach County; and the medical treatment took place in Palm Beach County.

2. The Plaintiff filed this complaint in Broward County, Florida.

3. The Plaintiff did not allege any connections between the facts of the case and the chosen venue.

4. The Defendant is a foreign corporation conducting and licensed to do business in the State of Florida.

5. The Defendant has demanded a jury trial, which is in keeping with the great majority of cases coming before the Court in which an insurance company is a defendant.

CONCLUSIONS OF LAW

The Court finds that the undisputed record in this case establishes that Broward is forum *non conveniens*. The Fourth District Court of Appeal has recently aligned itself with the decision of the Third District Court of Appeal in *Caceres v. Merco Grp. of Palm Beaches*, 282 So.3d 1031 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2802a]. *See Expert Inspections LLC v. State Farm Florida Ins. Co.*, Case No. 4D21-520 (Fla. 4th DCA May 19, 2021) [46 Fla. L. Weekly D1152d]. In *Caceres*, the appellate court relied on decisions which upheld a trial court's decision to transfer a case to another Florida county when the other location was the "location of the majority of witnesses and the site of the alleged contact, noting that 'in the interest of justice' Polk County should not hear a case where the only connection was the location of the lawyer's office," *citing E.I. DuPont de Nemours & Co. v. Fuzzell*, 681 So.2d 1195, 1197 (Fla. 2d DCA 1996) [21 Fla. L. Weekly D2303a].

When venue is otherwise proper, the Florida Legislature has for more than 50 years set forth a simply-stated procedure for transferring the case from one county to another: "For the convenience of the parties or witnesses or in the interests of justice, any court of record may transfer any civil action to another court of record in which it might have been brought." Fla. Stat. §47.122. This Court recognizes that these are in the disjunctive—it is possible that parties will not be inconvenienced, but witnesses will be. It is further possible that both parties and witnesses will not be inconvenienced, but in the interests of justice, the trial court determines that the case should nevertheless be transferred to another county. In the instant case, however, all three components militate against the case remaining in Broward. None of the fact witnesses in this case are in Broward County, but rather Palm Beach County. The Defendant has confirmed that it would be inconvenient for its client to appear in Broward County, as their offices are closer to Palm Beach County. Additionally, it is clearly more inconvenient for the witnesses to appear and to participate in Broward County, rather than their home county. And, the interests of justice strongly compel a decision that the workload of the Broward County Court should not be exponentially increased because attorneys simply want to practice here, and further that Broward jurors be called upon to make decisions in cases that have nothing to do with the county it in which they live. Moreover, the Court notes that the laws in play in the instant case are such that the jurors of the county in which the treatment took place are uniquely in a better position to determine whether the provider's medical charges are reasonable.

The Court agrees that the Plaintiff has chosen an inconvenient and i mproper forum because all the parties, accident, treatment and witnesses reside or took place in Palm Beach County. The substantial contacts in this case all fall in Palm Beach County.

Moreover, considering the interests of justice, a Broward County jury should not be burdened with determining a case that has no connection with Broward County. *See Westchester Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 673 So.2d 958 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1199a] (finding the trial court was correct in transferring a case from Dade County to Hillsborough County as a "Dade County jury, which is both a scarce and precious resource, should not be burdened with determining a case that has no connection with Dade County"). *See also Hall v. R.J. Reynolds Tobacco Company*, 118 So.3d 847 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] (affirming transfer of case from Dade County to Seminole County based upon the fact that Dade County had no relevant connection to the case); *Pep Boys v. Montilla*, 62 So.3d 1162, 1166 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D1171a] (stating that the interest of justice weighs in favor of Sarasota County . . . "Broward County's connections to the case are that the plaintiff's attorney is from there and the tire had been sold and installed there. Broward County is a larger, more populous county, has crowded dockets, and the community has virtually no connection to the case"). *See Hall v. R.J. Reynolds Tobacco Company*, 118 So.3d 847, 848 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1370a] and cases cited therein; *Stamen v. Arrillaga*, 169 So.3d 1209, 1210 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1638a]. (This Court recognizes that under recent decisions of the Fourth DCA, this third factor is of almost no significance when neither party agrees to the transfer. However, in the instant case, the Defendant is requesting the transfer, and it was not initiated by the Court. Nevertheless, in light of the *Hall* and *Stamen* decisions that would allow the trial court to raise *forum non conveniens sua sponte*, this Court respectfully suggests that the more recent decisions of the Fourth DCA offer little guidance as to the meaning of those former holdings.)

Simply put, this case is a Palm Beach County case that belongs in Palm Beach County. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Transfer Case is GRANTED. The Clerk shall transfer this case to Palm Beach County. Under the clear facts of this case that Broward County has absolutely no connections with this case, the Court exercises its discretion to require the Plaintiff to bear the costs of transfer. Fla. Stat. §47.191. Failure to pay the cost of transfer within 30 days shall result in this case being dismissed without further notice or hearing.

* * *

Landlord-tenant—Commercial property—Eviction—Failure to timely pay rent—Inequitable forfeiture—Although landlord did not receive rent until after 3-day notice had expired, court exercises its inherent power to relieve tenant from a forfeiture of the property—Weighing the entire set of circumstances, the court finds that the equities are with the tenant where landlord had a significant role in creating the lack of urgency by setting in place a property manager who was not actually under contract; by not replying promptly to the tenant's repeated requests for payment information; by providing the tenant an undefined week to get the check in the mail; and by requesting a check be mailed which would be subject to the vicissitudes of the postal delivery system—Additionally, the court further notes the tenant has been operating a successful restaurant under the lease for more than 6 years, with many years remaining on the lease; tenant has made substantial improvements to this property; and the business employs more than 60 people who would become unemployed if the lease were forfeited

BR LEO LLC, Plaintiff, v. SKY BEACH HALLANDALE LLC, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COCE22006264, Division 53. June 28, 2022. Robert W. Lee, Judge.

Final Judgment for Defendant

This cause came before the Court for trial on June 14 and 22, 2022. Based on the greater weight of competent, credible evidence, the Court finds as follows:

FINDINGS OF FACT. At its simplest, this is a commercial

eviction action in which the Landlord (plaintiff) alleges that the Tenant (defendant) failed to timely pay its rent, while the Tenant alleges that it sent the rent by check before the 3-day notice was effective, but that, through no fault of the Tenant, the rent was not received by the Landlord until after the 3-day notice had expired. The Tenant's position is that there has been no material breach of the lease, and further that it would be inequitable to forfeit the Tenant's interest in the lease.

The property at issue is a successful and popular restaurant operated in the city of Hallandale Beach, employing more then 60 persons and beginning operation about six years ago. At the end of 2021, the Tenant was advised that the property was being sold and that the Tenant would have to begin paying the new Landlord (the plaintiff) rent beginning January 2022. At that time, the Tenant was current with its rent obligations under the lease. While there is some dispute precisely when the Tenant was advised that there would be a new owner, it is undisputed that it knew by December 22, 2021 at the latest, about a week before rent would be due for January 2022.

The new Landlord, based in California, took title on December 20, 2021. The evidence established that on December 22, 2021 the principals of both Landlord (Brian Anav) and Tenant (Alejandro Ferllen) had a telephone discussion involving how payments should be made, followed up by an email (Pl. Ex. 3). Testimony established that the prior landlord had the practice of coming to the restaurant to pick up the rent check. The new Landlord asked the tenant to coordinate payment of rent with its incoming property manager. The following chain of events then took place:

December 23, 2021—Landlord (Anav) emails Tenant (Ferllen) introducing Tenant to the incoming new property manager (Wynn). The subject line notes "New Landlord Introduction." Tenant's manager (Cecchi) and accounting manager (Cucu) are copied on the email. Ferllen advises that Cucu will be coordinating payments with Landlord (Pl. Ex. 4). In a response to the email, Cucu requests that Wynn provide her account and routing information so that ACH payments can begin. Cucu also requests an advance monthly invoice (which the evidence established had been their means of determining payment each month due to fluctuating taxes and CAM payments). Ferllen, Anav and Cecchi were also copied on this email (Pl. Ex. 5). The testimony and other evidence at trial demonstrated that the Tenant was willing and able to promptly make its rent payment.

December 29, 2021—Having still not received any invoice or payment information from the Landlord, Cucu reaches out again to Wynn for an invoice and routing information so that an ACH payment can be made (Pl. Ex. 12).

December 30, 2021—Anav responds that Wynn has been removed and that the Tenant should instead deal directly with him for the time being. Anav advises Cucu, Ferllen and Cecchi that the ACH process could be set up for "next month," but asks that Tenant wire the rent "this one time." Anav attaches wire instructions, but further advises that "*[i]f you are not able to wire I will provide you with* ***an address to send the check to***" (Pl. Ex. 13). Cucu promptly responds asking to please provide an address so that the check can be mailed (Pl. Ex. 14). In less than an hour, Anav responds, "Please provide the following information to your bank for ACH." The instructions include an address for the bank, as well as an address for the Landlord (Pl. Ex. 15). Cucu understands this email to mean that the Tenant is to start ACH payments the "next period," but she still has not received an invoice "to proceed with check releasing" for the current month (Pl. Ex. 16).

January 2, 2022—The Landlord still not having provided the requested invoice, Cucu initiates an email to Anav, copying Ferllen and Cecchi, again requesting an invoice "to proceed with check releasing" (Pl. Ex. 17). Anav does not demand immediate payment, but responds instead that the "invoice and address [should be sent] out to you early this week" (Pl. Ex. 18).

January 5, 2022—Still no invoice. Anav emails Cucu, copying Ferllen and Cecchi, advising that the management company will be providing an invoice "within 24 hours." Further, Anav provides the address for the check to be mailed to City National Bank in Coral Gables, Attention: Denise Cortes (Pl. Ex. 19), although there is a branch of the same bank just a few miles from the restaurant.

January 7, 2022—Email sent to Cucu with invoice for $28,206.43, including base rent, CAM and taxes. The City National Bank address is again provided (Pl. Ex. 20).

January 8, 2022—Cucu sends email disputing the amount of CAM and taxes (Pl. Ex. 21).

January 10, 2022—Anav emails Ferllen, copying Cucu and the new management team (Kang), amending the invoice to $27,915.68, and asking that the Tenant "*process the payment [. . .]* ***this week***" (Pl. Ex. 27). The difference between the original invoice and the updated amount is less than $300.00. Tenant prepares check that day, but it is not signed or mailed that day (Pl. Ex. 35). This is a Monday, and "this week" would end Saturday, January 15. *Notably the Landlord does not demand that the payment be "deposited" or "received" this week.*

January 13, 2022—Testimony established that Ferllen is the only signatory on Tenant's checking account. Ferllen signs the check and could have mailed the check himself, but did not do so. Instead, he leaves it for the manager (Cecchi) to mail to City National, although Ferllen knows Cecchi is off on Thursdays. As a result, it is not mailed that day.

January 14, 2022—When he comes into work on Friday, Cecchi sees the check to be mailed, but does not mail it that day and instead takes the check home with him.

January 15, 2022—Cecchi mails the check from his home, a Saturday.

January 17, 2022—Martin Luther King Jr Day.

January 18, 2022—Envelope to City National Bank postmarked by Miami post office.

January 19, 2022—Anav emails Ferllen, copying Cucu and Kang, that deposit has still not been received by City National, and advising "*[p]lease stop by a local City National Bank of Florida today, and deposit into our account. There is a branch nearby your location [in] Hollywood*" (Pl. Ex. 32). The same day, three-day notices are sent by priority overnight delivery to the two addresses designated for Tenant in the Lease (Pl. Ex. 1). The notice demands that the Tenant "*remedy the non-compliance* ***within three (3) business days of receipt of this notice***." Ferllen, the only signatory on Tenant's checking account, is on vacation in Turkey, so no new check can be processed. Ferllen acknowledged receiving the email while in Turkey, but expressed that he was not concerned, because he believed that the check that was already put in the mail by Cecchi would eventually make its way to City National.

January 20, 2022—Three-day notice received (Pl. Ex. 1). Three business days would be the close of business on January 25. Ferllen acknowledged being aware of the 3-Day Notice, but again was unconcerned because he believed the check would be received.

January 25, 2022—Third business day. No payment received, but Cucu sends Anav an email, copying Ferllen and Cecchi, confirming that February payments are to begin by ACH (Def. Ex. 1). Ferllen returns to Florida from Turkey, but does not go to the restaurant to sign a check because of the lateness of his return. End of business day comes with no payment received by City National.

January 26, 2022—Still no payment received.

January 27, 2022—At 9:00 a.m. (EST), Landlord's "quickbooks" program emails invoice to Cucu for $55,831.36, for both January and

February 2022 rent, including ACH wire instructions (Pl. Ex. 34). Testimony established that the quickbooks program generates monthly invoices automatically. At 12:35 p.m. (EST), Cucu emails Anav, copying Ferllen, with a copy of the January 10, 2022 check that still has not been received by City National, asking that the check be made "void" when it is received (Pl. Ex. 35). The same day, Tenant initiates four ACH transfers to be made over the course of four days (Jan. 27, Jan. 28, Jan. 31 and Feb. 1), as the Tenant's bank has a "daily limit restriction" for ACH transfers (Pl. Ex. 35; Pl. Ex. 36). The total amount would pay both January and February 2022 rent. Lawsuit filed later that day at 4:39 p.m.

February 1, 2022—Landlord returns to Tenant ACH transfers received on January 27 and 28 (Pl. Ex. 36).

February 3, 2022—Tenant served with lawsuit.

CONCLUSIONS OF LAW. The Tenant has raised three defenses. First, that the Tenant paid all amounts due, but that they were rejected by the Landlord. Second, the Tenant alleges that the Landlord caused any "breach" because it did not promptly provide Tenant an invoice, which caused any delay in payment. And third, an argument based on equity and the impending forfeiture of the Tenant's interest in the property.

In the context of a commercial lease, Florida law has long held that not every default gives rise to an eviction. Several decades ago, the Florida Supreme Court held that a "court of equity has inherent power to relieve a tenant from a forfeiture of his estate because of a failure to pay rent at the time required by the terms of his lease." *Rader v. Prather*, 100 Fla. 591, 595, 130 So. 15, 17 (1930). This appears to still be controlling Florida law. In determining whether to exercise this power, the trial court importantly must consider whether the commercial tenant has tendered any rent and other charges due. *See Horatio Enterprises, Inc. v. Rabin*, 614 So.2d 555, 556 (Fla. 3d DCA 1993) (all rent and taxes had been paid); *Ross v. Metropolitan Dade County*, 142 B.R. 1013, 1016 (Bankr. S.D. Fla. 1992) (tenant tendered arrears in rent). The court should further consider such circumstances as whether any defaults have been cured, *Atria Group, LLC v. One Progress Plaza II, LLC*, 170 So.3d 884, 887 (Fla. 2d DCA 2015) [40 Fla. L. Weekly D1685b]; whether the lease has been in effect for a long time, *Smith v. Winn-Dixie Stores, Inc.*, 448 So.2d 62, 63 (Fla. 3d DCA 1984); whether the tenant has made a substantial investment in the property, *Atria Group*, 170 So.3d at 887, and *Horatio Enterprises*, 614 So.2d at 556; and whether any violations were "gross, willful or persistent," *Smith*, 448 So.2d at 63.

In the instant case, weighing the entire set of circumstances, the Court finds that the equities are with the Tenant. Here, the Tenant had no history of delinquent payments and was current in its obligations at the time it was notified of the new owner in December 2021. Before the rent was due, Tenant immediately inquired as to how rent should be paid. The Landlord contributed to confusion by placing in the mix a property manager who had actually not yet been retained, and further by delaying response to questions concerning the actual amount due. When ultimately the amount was agreed on, it was the Landlord that requested the check be sent to a bank branch in Coral Gables, rather than being dropped off at a branch just a couple of miles from the restaurant. Further, the Landlord gave the Tenant the entire week to "process the payment," which the Tenant did in fact do on Saturday. And while certainly the Tenant should have known that the following Monday was a legal holiday, certainly the Landlord should have known that as well when it gave the Tenant the week to process the payment. Moreover, when a Landlord specifically requests that the rental payments be made by mail, the risk of delayed receipt of a mailed rent payment is placed upon the landlord as long as the rent check was duly and properly put in the mail. *See* 7 Fletcher Cyc. Corp. §2983 (2022).

Thereafter, when the Landlord served its 3-Day Notice on January 20, 2022, the Tenant had until the end of the day on January 25 to tender payment. However, contradicting its 3-Day Notice, the Landlord then issued to Tenant an updated invoice for both January and February rent and other charges. On January 27, just hours before the lawsuit was filed, the Tenant arranged for four ACH payments beginning that day through February 1 which would have brought it current through February as set forth in the updated invoice. At the end of the business day on January 27, the Landlord filed lawsuit. The Tenant was not served with the lawsuit until February 3, 2022, by which time any default had been cured. When the Landlord rejected the ACH payments, the Tenant immediately placed the rents in the Court Registry (almost $56,000.00), without waiting for the Court to require it to do so pursuant to Fla. Stat. §83.232(3) ("The Court, on its own motion, shall notify the tenant of the requirement that rent be paid into the court registry by order."). Thereafter, the Tenant has kept current its deposits pursuant to this Court's Rent Determination Order, and as of the date of trial, almost $170,000.00 has been deposited into the Court Registry. All of this demonstrates to the Court that the Tenant's conduct in any late payment of rent was not "gross, willful or persistent." While the Tenant's conduct perhaps should have been more urgent, the Court cannot ignore that the Landlord had a significant role in creating the lack of urgency by setting in place a property manager who was not actually under contract, by not replying promptly to the Tenant's repeated requests for payment information, by providing the Tenant an undefined week to get the check in the mail, and by requesting a check be mailed which would be subject to the vicissitudes of the postal delivery system.

Considering other factors set forth in the case law of *Atria Group*, *Smith*, and *Horatio Enterprises*, the Court further notes the Tenant has been operating a successful restaurant under the lease for more than 6 years, with many years remaining on the lease. Additionally, the Tenant has made substantial improvements to this property, spending hundreds of thousands of dollars to build out and furnish the property. Moreover, the business employs more than 60 people who would become unemployed if the lease were forfeited. As a result, it is hereby

ORDERED AND ADJUDGED that Final Judgment is hereby entered in favor of the Defendant, SKY BEACH HALLANDALE, LLC. The Court reserves jurisdiction to consider any issue involving attorney's fees and costs, as well as disposition of the funds in the Court Registry.

* * *

Insurance—Personal injury protection—Coverage—Medical expenses—Insurer breached PIP policy by reimbursing medical provider using Medicare fee schedule in effect during "service year" in which services were performed where PIP policy required insurer to reimburse using fee schedule in effect during "year" in which medical services were performed

ISO-DIAGNOSTICS TESTING, INC., a/a/o Suryma Pineiro Morales, Plaintiff, v. UNITED AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 21-29623 COCE (51). May 25, 2022. Kathleen McHugh, Judge. Counsel: Steven Lander, Steven Lander and Associates, P.L., Fort Lauderdale, for Plaintiff. Sean Sweeney, Office of the General Counsel, UAIC, for Defendant.

ORDER ON THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS SUMMARY JUDGMENT

THIS CAUSE having come before this Court on the parties' cross motions for Summary Judgment, the Court having reviewed the Motions, the entire court file, the relevant legal authorities, the Court

having heard argument on May 11, 2022, and the Court otherwise being advised in the premises, the Court finds as follows:

The issue in the case concerns the underpayment of personal injury protection (PIP) benefits in breach of Defendant's policy of insurance. Specifically, whether Defendant's policy of insurance requires reimbursement at the higher of the participating physician fee schedule of Medicare Part B for the "year" in which the services were rendered or for the "service year" in which the services were rendered, applicable to Plaintiff's January 11, 2017, charges.

United Automobile Insurance Company allowed 200 percent of the 2016 Medicare Fee Schedule for CPT Codes 95831 and 95832. Plaintiff contends that United Automobile Insurance Company was contractually obligated to allow 200 percent of the 2017 Medicare Fee Schedule.

The policy language applicable under the subject claim, as found in the Defendant's Policy Endorsement (01/13) states:

> *The applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation* ***in effect on March 1 of the year in which the services, supplies, or care is rendered*** *and for the area in which such services, supplies, or care is rendered, and the fee schedule or payment limitation applies throughout the remainder of that year, notwithstanding any subsequent change made to the fee schedule or payment limitation, except that it may not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007 for medical services, supplies, and care subject to Medicare Part B.*
>
> (Emphasis added).

The basis for this controversy in this case arose due to the fact that §627.736 was amended in 2015 to state the following:

> *. . .the applicable fee schedule or payment limitation under Medicare is the fee schedule or payment limitation* ***in effect on March 1 of the service year in which the services, supplies, or care is rendered*** *and for the area in which such services, supplies, or care is rendered, and the applicable dee schedule or payment limitation applies to services, supplies, or care rendered during that service schedule or payment limitation, except that it may not be less than the allowable amount under the applicable schedule of Medicare Part B for 2007 medical services, supplies, and care subject to Medicare Part B. For purposes of this subparagraph,* ***the term "service year" means the period from March 1 through the end of February of the following year.***
>
> §627.736(5)(a)2., Fla. Stat. (2015).

Plaintiff notes that the policy language and statute both clearly and unambiguously provide that charges rendered in the year 2016 should be paid according to the 2016 Medicare Fee Schedule. Under Plaintiff's interpretation, the word "year" is unambiguous, and the Court should give full effect to the language that states one fee schedule version applies to every date of service from January 1 through December 31 of a year. Further, it would be inappropriate for the Court to apply the term "service year" that is only found in a later version of the statute and that the policy and applicable statute does not contain the defined term. Assuming arguendo, if the Court finds said language ambiguous, Plaintiff contends that Defendant's policy must be construed strictly against the insurer and that therefore, the Court must arrive at the same result. *See Washington National Insurance Corporation v. Ruderman*, 117 So. 3d 943, 951 (Fla. 2013) [38 Fla. L. Weekly S511a].

Defendant's position is that Plaintiff was reimbursed pursuant to the terms of the policy of insurance.

This Court agrees with Plaintiff's position—the term "year" is unambiguous and must be given its plain meaning. This Court finds that the plain meaning of the term "year" to mean calendar year—January 1st through December 31st. This Court agrees with similar rulings on this matter. *See Sea Spine Orthopedics Institute, LLC, (Glen Swanson) v. GEICO Indemnity Co.,* CONO-16-04797 (Broward Cnty. Ct., 2018) (Deluca, J.) (finding that Defendant breached its contract by reimbursing Plaintiff using the Fee Schedule in effect during the "service year" when Defendant's policy only permits it to reimburse using the Fee Schedule in effect during the "year" that the medical services were performed). *See also Advanced Chiropractic Rehab & Medical Centers, Inc. (Junior Joseph) v. Equity Ins. Co.* 27 Fla. L. Weekly Supp. 562a (Broward Cnty. Ct., 2016) (finding that Defendant breached its contract by reimbursing Plaintiff using the Fee Schedule in effect on March 1 of the year that the medical services were performed when Defendant's policy only permits it to reimburse using the Fee Schedule in effect at the time the services were rendered). This is a binding circuit court opinion relating to a similar issue.

Accordingly, based on the foregoing, it is hereby **ORDERED AND ADJUDGED**, that Plaintiff's motion for summary judgment is **GRANTED** and Defendant's motion for summary judgment is **DENIED**. As the Parties Stipulated that only legal issues remain and represented to the Court that said motion for summary judgment will be resolve all issues between the parties. The Court directs Plaintiff to file a Final Judgment in its favor in accordance with this Order.

* * *

Insurance—Personal injury protection—Coverage—Deductible—Because massage therapy is not reimbursable service under PIP statute, insurer properly excluded massage therapy charges from consideration when calculating deductible

WITHERELL CHIROPRACTIC HEALTH CENTER, INC., a/a/o Daisha Hynes, Plaintiff, v. INFINITY AUTO INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COSO20012298, Division 61. March 30, 2022. Jane D. Fishman, Judge. Counsel: Vincent J. Rutigliano, Rosenberg & Rosenberg, for Plaintiff. Gladys Perez Villanueva and Selena Villadeigo, Law Offices of Leslie M. Goodman & Associates, Doral, for Defendant.

ORDER GRANTING

This matter came before the Court upon the parties' cross motions for summary judgment on the sole stipulated issue in the case, the application of the policy's deductible. Plaintiff, Witherell Chiropractic Health Center, Inc. (a/a/o Daisha Hynes) ("Plaintiff"), was represented by Vincent J. Rutigliano, Esq. of Rosenberg & Rosenberg; and Defendant, Infinity Auto Insurance Company ("Infinity"), was represented by Gladys Perez Villanueva, Esq.; and Selena Villadiego, Esq., of Law Office of Leslie M. Goodman & Associates. The Court, having heard argument of counsel on the 14th day of March, 2022, reviewed the court file, written submissions of the parties, legal authorities, and being otherwise duly advised in the matter, GRANTS Infinity's cross-motion for summary judgment, DENIES Plaintiff's motion for summary judgment, and makes the following findings of fact and conclusions of law:

Findings of Facts

On December 6, 2021, the parties entered into a joint stipulation, agreeing that the only remaining issue in the case was the application of the deductible. Accordingly, the resolution of the parties' motions for summary judgment herein is dispositive.

The underlying facts are not in dispute. Plaintiff billed CPT Code 97124, corresponding to Massage Therapy, nineteen times. Infinity denied all nineteen charges. Out of the nineteen Massage Therapy codes billed, four fell within dates of service to which the deductible was applied. However, Infinity did not apply the deductible to these four Massage Therapy codes, specifically citing section 627.736(1)(a)5 and stating, "medical benefits do not include massage. . .and are not reimbursable by the insurer."

Plaintiff is not challenging the denial of the fifteen massage codes

that fell outside the deductible dates of service. Plaintiff, relying upon *Progressive Select Insurance Co. v. Florida Hospital Medical Center ("Parent")*, 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a], argues that Infinity should have applied the deductible to 100 percent of the four massage codes it initially billed, without considering that Florida's No-Fault law, section 627.736(1)(a)5, explicitly excludes massage from "medical benefits" and prohibits PIP reimbursement for massage. Infinity demonstrated that it applied the deductible to one hundred percent of medically necessary and lawful services in accordance with the *Parent* decision and Florida Law. Infinity denied all charges for 97124, as massage therapy is not a medical benefit and the legislative prohibition of reimbursement of massage makes it unlawful in the context of PIP. Consequently, Infinity argued, the deductible cannot be applied to CPT Code 97124.

Conclusions of Law

The central issue in this case is whether the deducible is applied to a service that is statutorily excluded under Florida's No-Fault Law.

"It is a basic tenant of statutory construction that statutes will not be interpreted so as to yield an absurd result." *See Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218-19 (Fla. 1983)(*citing Dorsey v. State*, 402 So. 2d 1178 (Fla.1981); *State v. Webb*, 398 So. 2d 820 (Fla.1981); *Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla.1975)). Moreover, the statutory doctrine of *in pari materia* requires that all statutory provisions in Florida's No-Fault Law be construed together, harmonized, and interpreted in such a manner to give effect to *all* the statutory provisions. *See Matheson v. Miami-Dade Cty.*, 258 So. 3d 516, 521-22 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D2293a].

Section 627.739(2), Florida Statutes, provides:

> Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, and $1,000. The deductible amount must be applied to 100 percent of the **expenses and losses described in s. 627.736**. After the deductible is met, each insured is eligible to receive up to $10,000 in total benefits described in s. 627.736(1).

Section 627.736(1)(a) provides:

> (a) **Medical benefits**.—Eighty percent of all reasonable expenses for **medically necessary** medical, surgical, X-ray, dental, and rehabilitative services. . .

Section 627.736 (1)(a)5, provides:

> 5. **Medical benefits** do not include massage as defined in s. 480.033 or acupuncture as defined in s. 457.102, regardless of the person, entity, or licensee providing massage or acupuncture, and a licensed massage therapist or licensed acupuncturist may not be reimbursed for medical benefits under this section.

And, section 627.736(5)(b)1., provides:

> An **insurer or insured** is not required to **pay a claim or charges**:
>
> 1. Made by a broker or by a person making a claim on behalf of a broker;
>
> 2. **For any service or treatment that was not lawful at the time rendered**;
>
> 3. To any person who knowingly submits a false or misleading statements relating to the claim or charges. . .

The violation of a statute renders a service unlawful. *See Active Spine Centers LLC v. State Farm Fire & Cas. Co.*, 911 So. 2d 241 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2286a] (services rendered during period that clinic was in violation of registration statute were not lawfully rendered). Massage Therapy is not an "expense or loss described in 627.736," subject to the deductible or any reimbursement. To the contrary, massage is explicitly excluded as a reimbursable medical service by legislative declaration, and, therefore, falls outside Florida's No-Fault Law and the Policy. *See* § 627.736 (1)(a)5, Fla. Stat. The statute's exclusion of massage from the types of health care services that are eligible for PIP reimbursement precludes charging an insurer for massage. *See Geico Gen. Ins. Co. v. Beacon Healthcare Ctr. Inc.*, 298 So. 2d 1235, 1238 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D437a] (PIP statute prohibits and excludes massage from the types of health care services that are eligible for PIP reimbursement); *Southern Owners Ins. Co. v. Hendrickson,* 299 So. 3d 524, 526 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D1165b] (miscarriage of justice for insurer to be held liable for massage when the law explicitly prohibits); *see also State Farm Mut. Auto. Ins. Co. v. Health & Wellness Servs.*, 446 F. Supp. 3d 1032, 1055 (S.D. Fla. 2020) (clinic's bills for "unlawfully" rendered services by massage therapists were non-compensable invoices to insurer and deceptive trade practices that violate FDUTPA—Florida Deceptive and Unfair Trade Practices Act). Massage Therapy is an unlawful service that does not trigger liability of the insurer or the insured. §627.736(5)(b)1., Fla. Stat. Because Massage Therapy is not reimbursable, an insurer may not apply the deductible to it, potentially causing the improper exhaustion of the deductible by applying it this non-compensable service.

Infinity's application of the Policy's deductible is consistent with the Florida Supreme Court's decision in *Progressive Select Insurance Co. v. Florida Hospital Medical Center ("Parent")*, 260 So. 3d 219 (Fla. 2018) [44 Fla. L. Weekly S59a]. In *Parent,* the supreme court specifically addressed "whether section 627.739(2), Florida Statutes (2014), requires the deductible to be applied before or after medical charges are reduced under the reimbursement limitation in section 627.736(5)(a)1.b., Florida Statutes." 260 So. 2d at 220. Thus, the issue squarely before the supreme court concerned the *amount* to which the deductible is applied—total amount of medical charges or reduced amount of medical charges by the fee schedule amount. The only issue was the *amount* used to calculate the Policy's deductible. The Florida Supreme Court held that "section 627.739(2) requires the deductible to be subtracted from '100 percent' of expenses and losses . . . and when calculating the PIP benefits due an insured, the deductible must be subtracted from the total medical charges before applying the reimbursement limitation. . ." *Id.* at 226. The *Parent* decision interprets section 627.739(2), and address *amounts, not services. Parent* is clear on this point, stating "[t]he reference in section 627.739(2) to '100 percent of the expenses and losses described in [section] 627.736' thus is to the ***amount*** charged before the application of the reimbursement limitation. . .". 260 So. 3d 224. The issue of whether the deductible is to be applied to an unlawful service (as presented herein) was not before the Florida Supreme Court. It is incongruous to maintain that the Florida Supreme Court would hold, or that *Parent* supports the proposition, that an unlawful, unnecessary service that is not reimbursable by the insurer or the insured, must have the deductible applied to it.

The Florida Supreme Court stated, "627.736(1)(a) references 'reasonable *expenses*' for **medically necessary** services provided after an automobile accident." *Parent*, 260 So. 3d at 223. The plain text of section 627.736(1)(a) defines "**Medical benefits**" as "[e]ighty percent of all reasonable expenses for **medically necessary** medical, surgical, X-ray, dental, and rehabilitative services. . ." The *Parent* court construed "expenses" in the context of a medically necessary service. This construction comports with the well-settled principle that in PIP, a charge must be reasonable, related, and medically necessary. *See Northwoods Sports Medicine and Physical Rehab. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049, 1057 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D491a] ("[I]n order to activate the right to claim PIP payments. . .the provider's bills must be compensable under the statute in

that they have been determined to be reasonable and necessary."); *Derius v. Allstate*, 723 So. 2d 271 (Fla. 4th DCA 1998) [23 Fla. L. Weekly D1383a] (specifically interpreting 627.736(1), "[u]nder this statute, and insurer is not liable for any medical expense to the extent that it is not a reasonable charge for a particular service or if the service is not necessary.").

Plaintiff's construction of the *Parent* decision would obliterate the independent analytical framework of section 627.739(2). The first step is to determine the "expenses" that are "described in 627.736." If "**medical benefits**" are defined as reasonable **expenses** for **medically necessary** treatment, and section 627.736(1)(a)5 excludes massage as a "medical benefit," it therefore necessarily follows that massage is not statutorily a necessary medical *expense*. The statutory prohibition against reimbursement for massage and exclusion from the definition of "medical benefits," renders massage an unlawful service and not covered by personal injury protection insurance, as a matter of law.

The amount of "benefits," under section 627.739(2), provided in a PIP policy after the deductible is met, i.e. $10,000 and the "medical benefits" provided to the insured, under 627.736(1), Florida Statutes, are not synonymous. "Medical Benefits" defines "expense," requiring that the service provided after the automobile accident be medically necessary. *Parent*, 260. So. 3d at 223. " 'Benefits' are the amount paid by the insurer—determined by the 60% and 80% methodologies, and governed by the fee schedule, when applicable." 260 So. 3d 224. *Parent* acknowledges that "[s]ection 627.739(2) contrasts these 'expenses and losses' with the 'benefits' available to an insured after the deductible is met." 260 So. 2d at 223. If a determination is made during the first step of analyzing "expense or loss described in 627.736" that the charge is not an "expense," meaning it is not a medically necessary service (or as in this case an unlawful, medically unnecessary service), then it is not an "expense" to which the deductible applies. §627.739(2), Fla. Stat. The charge is denied, and the analysis ends. Therefore, there is no application of 80% or reimbursement limitations and no determination of "benefits," which is the second step of the statutory analytical framework recognized in *Parent*.

Plaintiff's position, followed to its logical extension, would lead this Court to conclude that the *Parent* decision requires the application of the Policy's deductible to an unlawful service that is specifically excluded as a necessary medical expense by both the Florida Legislature and the Policy. This conclusion yields an "absurd result" in contravention of well-settled principles of statutory construction, by failing to read Florida's No-Fault Law as a whole and give effect to the legislative intent. "Courts are not permitted to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Active Spine*, 911 So. 2d 241.

For all of the foregoing reasons, this Court concludes that Infinity properly calculated the deductible. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Cross-Motion for Summary Judgment is hereby GRANTED;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is hereby DENIED; and

IT IS FURTHER ORDERED that based upon the parties' joint stipulation that the application of the deductible is the sole remaining issue and this Court's Order disposing of the issue, Defendant shall submit a Final Judgment within 10 days of this Order.

* * *

Insurance—Default—Vacation—Where insurer did not submit motion to vacate default under oath or with reference to any supporting affidavit, motion should be summarily denied—Continuing issues with defense counsel's IT system do not establish excusable neglect

CLEARCARE, LLC, Plaintiff, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. COWE21010856, Division 82. May 31, 2022. Robert W. Lee, Judge.

Order Denying Defendant's Motion to Vacate Default

THIS CAUSE came before the Court on May 31, 2022 for hearing of the Defendant's Motion to Vacate Default, and the Court's having reviewed the Motion and the relevant legal authorities; having made a thorough review of the matters filed of record; having heard argument; and having been sufficiently advised in the premises, the Court finds as follows:

Before a motion to vacate a default can be considered on the merits, the moving party must submit the motion under oath or with supporting affidavit. *See Garcia v. State*, 306 So.3d 212, 215 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D1402b]; *Dodrill v. Infe, Inc.*, 837 So.2d 1187, 1187 (Fla. 4th DCA 2003) [28 Fla. L. Weekly D558d]; *Mieles v. Lugo,* 26 Fla. L. Weekly Supp. 865a (5th Cir. App. 2019); *Irkhin v. Simonelli*, 25 Fla. L. Weekly Supp. 996c, 997 (12th Cir. App. 2017); *Woodard v. Mid-Atlantic Finance Co.*, 2015 WL 12659998, *1 (Fla. 4th Cir. 2005). *See also Waterson v. Seat & Crawford*, 10 Fla. 326, 330 (1863) (defendant submitted affidavit demonstrating meritorious defense and unavoidable neglect); *Orchard Grove Ass'n, Inc. v. Gregory*, 26 Fla. L. Weekly Supp. 114a, 115 (17th Cir. Ct. 2018) (defendant submitted verified motion setting forth excusable neglect). Because the Defendant did not submit the motion under oath or with reference to any supporting affidavit, the Motion should be summarily denied.

However, even if the Court were to consider the matters on the merits of excusable neglect (the continuing issues with defense counsel's I/T system), the Court cannot conclude that the Defendant's neglect is excusable. Accordingly, the Defendant's Motion is DENIED. The Plaintiff (having filed its Affidavit of Damages) shall submit its proposed final judgment to the Court.

* * *

Criminal law—Driving under influence—Search and seizure—Traffic stop—Probable cause—Traffic control devices—Stop lines—Officer had probable cause to stop vehicle based on a violation of section 316.074(1) after driver failed to stop vehicle behind the stop line at a red light—Court rejects argument that a stop line is not a "traffic control device"—A stop line is a "marking" and, therefore, it is an official traffic control device subject to section 316.074(1)—Presence of a stop line requires the stop be made before the stop line—Although validity of stop based on driver's attempt to back up in roadway is moot given finding of probable cause for violation of section 316.074(1), court finds that officer did not have probable cause to conduct stop for improper backing of vehicle where backing of vehicle did not interfere with other traffic

STATE OF FLORIDA, Plaintiff, v. SUSAN GALLUP, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2016-CT-024441-AXXX-XX. April 28, 2017. Michelle L. Naberhaus, Judge. Counsel: Elizabeth Garvey, Assistant State Attorney, and Ben Fox, Assistant State Attorney, State Attorney's Office, Viera, for Plaintiff. Kurt A. Russell, Melbourne, for Defendant.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE having come before the Court on the Motion to Suppress Evidence filed by the Defendant, SUSAN GALLUP, the Court having reviewed the Motion, having heard arguments from counsel, and being fully advised in the premises, the Court finds as a matter of fact and concludes as a matter of law, as follows:

FACTS

1. On May 1, 2016, Officer Joseph Larosa of the West Melbourne Police Department was sitting in his patrol vehicle on the side of the road when he observed a vehicle, later determined to have been driven

by the Defendant, traveling at a high rate of speed on West New Have Avenue. Deputy Larosa estimated that the Defendant's vehicle was traveling at approximately 65 mph to 70 mph in a 45 mph zone.

2. Officer Larosa attempted to follow the Defendant's vehicle, and as he approached the intersection of West New Haven Avenue and Hollywood Boulevard, he observed that the Defendant's vehicle came to a rest past the stop line at the red light. Officer Larosa then observed the vehicle backing up in the roadway to come off of the stop line.

3. Officer Larosa conducted a traffic stop for failing to obey a traffic control device and reversing in the roadway.

4. During the stop, a DUI investigation took place, and the Defendant was arrested for driving under the influence.

5. The Defendant claims that Officer Larosa did not have probable cause for the traffic stop and, accordingly, all evidence obtained as a result of the investigatory detention of the Defendant should be suppressed.

6. At a hearing on the Motion to Suppress, Officer Larosa admitted that the backing of the Defendant's vehicle did not affect any other traffic.

LEGAL ANALYSIS & FINDINGS

The issue before this Court is whether Officer Larosa had an objective basis to stop the Defendant's vehicle or, stated another way, whether the Officer Larosa had probable cause to believe that the Defendant violated a traffic law.

As a general matter, the decision to stop an automobile is reasonable, and therefore constitutional, where an officer has probable cause to believe that a traffic violation has occurred. *State v. Daniels,* 158 So.3d 629, 630 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D1014c], *citing Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). When considering the validity of a traffic stop, Florida courts use an "objective test which asks only whether any probable cause for the stop existed." *Holland v. State*, 696 So.2d 757, 759 (Fla. 1997) [22 Fla. L. Weekly S387a]. The subjective intent of the police officer making the stop is not relevant. *Daniels,* 158 So.3d at 630, *citing State v. Robinson,* 756 So.2d 249, 250 (Fla. 5th DCA 2000) [25 Fla. L. Weekly D1061b]. However, if the police officer has no objective basis for stopping a person, then the stop is unconstitutional. *Id., citing Carter v. State,* 120 So.3d 207, 209 (Fla. 5th DCA 2013) [38 Fla. L. Weekly D1802a] (holding no competent, substantial evidence provided to support objective basis for traffic stop).

Probable Cause for Stop based on Failure to Obey Traffic Control Device

In this case, Officer Larosa testified that he observed the Defendant's vehicle come to a rest past the stop line at the red light at the intersection of West New Haven Avenue and Hollywood Boulevard. Officer Larosa conducted a stop based upon a failure to obey a traffic control device pursuant to *Section 316.074,* Florida Statutes.

The Defendant argues that Officer Larosa made a mistake in the law by finding that the Defendant violated *Section 316.074.* The Defendant relies upon a Brevard County Court opinion to argue that the stop line was not a traffic control device and that, pursuant to *Section 316.075,* he was not required to stop before the stop line. *See State v. Pasha,* 20 Fla. L. Weekly Supp. 827a (Fla. 18th Jud. Cir., Brevard Cty., May 15, 2013).

Section 316.075(1)(c)(1), Florida Statutes, states as follows, in pertinent part:

> Except for automatic warning signal lights installed or to be installed at railroad crossings, whenever traffic, including municipal traffic, is controlled by traffic control signals exhibiting different colored lights, or colored lighted arrows, successively one at a time or in combination, only the colors green, red and yellow shall be used, except for special pedestrian signals carrying a word legend, and the lights shall indicate and apply to drivers of vehicles and pedestrians as follows:
>
> Vehicular traffic facing a steady red signal shall stop before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection and shall remain standing until a green indication is shown.

The Defendant argues that there is no requirement in *Section 316.075(1)(c)(1)* that specifically required him to stop at a stop line. Instead, he believes he was required to stop before entering the crosswalk on the near side of the intersection. He further argues that, under the dictates of *Pasha,* he would only have been required to stop before the stop line if there was a device at the signalized intersection directing or instructing him to stop behind the line. This argument is based upon the conclusion in *Pasha* that "the line by itself is merely a guide, and not an official traffic control device." This Court disagrees with that conclusion.

Pursuant to *Section 316.074(1),* a motorist in Florida "shall obey the instructions of any official traffic control device applicable thereto." *Section 316.003(44)* defines "official traffic control devices" as follows:

> All signs, signals, **markings**, and devices, not inconsistent with this chapter, placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning, or guiding traffic" (emphasis added).

The issue is whether a "stop line" falls under the definition of an "official traffic control device". Although the term is not defined under *Section 316.003,* it is defined in the Manual on Uniform Traffic Control Devices (MUTCD)[1] as being a "solid white pavement **marking** line extending across approach lanes to indicate the point at which a stop is intended or required to be made" (emphasis added). *Section 1A.13.03(224),* MUTCD (2009); *see also Section 3B.15(01)* MUTCD (2009). The subject of stop lines is addressed in Part 3 of the MUTCD which is captioned, "Markings." It is the conclusion of the this Court that a stop line is a marking and, therefore, is an official traffic control device subject to *Section 316.074(1).* The Court therefore finds that Officer Larosa had probable cause to conduct the stop based on a violation of *Section 316.074(1).*

In reaching this conclusion, this Court was mindful of the fact that the Defendant relied heavily upon the findings in *Pasha,* another Brevard County case, to argue that a stop line is not an official traffic control device. In the *Pasha* case, the Court analyzed provisions of the MUTCD, as set forth below, and concluded that "absent the presence of a traffic control stop sign or device at the signalized intersection **directing or instructing a driver to stop *behind* the solid stop line**, the line by itself is merely a guide, and not an 'official traffic control device'."

> **Section 1A.13 Definitions of Headings, Words and Phrases in this Manual**
>
> Standard:
>
> (01) When used in this Manual, the text headings of Standard, Guidance, Option, and Support shall be defined as follows:
>
> A. Standard—a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All Standard statements are labeled, and the text appears in bold type. The verb "shall" is typically used. The verbs "should" and "may" are not used in Standard statements. Standard statements are sometimes modified by Options.
>
> B. Guidance—a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb "should" is typically used. The verbs "shall" and "may" are not used in Guidance statements. Guidance statements are sometimes modified by Options.

C. Option—a statement of practice that is a permissive condition and carries no requirement or recommendation. Option statements sometime contain allowable modifications to a Standard or Guidance statement. All Option statements are labeled, and the text appears in unbold type. The verb "may" is typically used. The verbs "shall" and "should" are not used in Option statements.

D. Support—an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the test appears in unbold type. The verbs "shall," "should," and "may" are not used in Support statements.

Section 3A.01 Functions and Limitations

Support:

(01) Markings on highways and on private roads open to public travel have important functions in providing guidance and information for the road user. Major marking types include pavement and curb markings, delineators, colored pavements, channelizing devices, and islands. In some cases, markings are used to supplement other traffic control devices such as signs, signals, and other markings. In other instances, markings are used alone to effectively convey regulations, guidance, or warnings in ways not obtainable by the use of other devices.

Section 3B.16. Stop and Yield Lines

Guidance:

(01) Stop lines should be used to indicate the point behind which vehicles are required to stop in compliance with a traffic control signal.

Option:

(02) Stop lines may be used to indicate the point behind which vehicles are required to stop in compliance with a STOP (R1-1) sign, a Stop Here For Pedestrians (R1-5b or R1-5c) sign, or some other traffic control device that requires vehicles to stop. . . [.]

* * * *

Standard:

(06) Stop lines shall consist of solid white lines extending across approach lanes to indicate the point at which the stop is intended or required to be made.

Based upon the forgoing provisions of the MUTCD, the *Pasha* court concluded, and this Court agrees, that stopping before a stop line can be deemed as an obligatory practice if it is a ". . .supplement [to] other traffic control devices such as signs, signals and other markings." *Section 3A.01,* MUTCD (2009). However, this Court disagrees with the *Pasha* court's next conclusion that, "absent the presence of a traffic control stop sign or device at the signalized intersection *directing or instructing a driver to stop behind the solid white stop line,* the line by itself is merely a guide, and not an "official traffic control device" (emphasis added). *See Pasha* at Paragraph 34.

Instead, this Court finds that, although there is no requirement to place a stop line at a signalized intersection, if the "option" is chosen to place a stop line at such an intersection, then the "[s]top line may be used to indicate the point behind which vehicles are **required** to stop. . . [.] *Section 3B.16(02).* MUTCD (2009). Stated another way, if a stop line is used at a signalized intersection, the "Standard" in the MUTCD dictates that it shall "indicate the point at which the stop is intended or required to be made." This further supports the Court's finding that the stop line is an official traffic control device and that Officer Larosa had probable cause to conduct the stop based on a violation of *Section 316.074(1).*

Probable Cause based on Improper Backing

The Defendant's second argument is that there was no probable cause to stop the Defendant's vehicle for improper backing. This becomes a moot issue in light of the Court's finding that there was probable cause for violating *Section 316.074(1).* However, for the sake of completeness, the Court briefly will address the issue on the record.

Section 316.1985(1), Florida Statutes, states that "the driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic." During the hearing on Defendant's Motion to Suppress, the State stipulated that the backing of the Defendant's vehicle at the intersection did not interfere with other traffic. Accordingly, this Court finds that Officer Larosa did not have probable cause to conduct a stop based on the backing of the vehicle.

CONCLUSION

This Court finds that a stop line is a marking and, therefore, is an official traffic control device subject to *Section 316.074(1). See* Fla. Stat. §316.003(44); *see also Section 1A.13.03(224)* and *Section 3B.15(01),* MUTCD (2009). Although it is not required that a stop line be placed at a signalized intersection, if the "option" to do so is exercised, that stop line will "indicate the point at which the stop line is intended or required to be made." *Section 3B.16(06),* MUTCD (2009). If there was no stop line at the intersection, then the Defendant would have been required to stop "before entering the crosswalk on the near side of the intersection." *See* Fla. Stat. §316.075(1)(c)(1). However, the presence of the stop line requires that the stop be made before the stop line. The Court, therefore, concludes that Officer Larosa had probable cause to conduct the stop based on a violation of *Section 316.074(1).*

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is DENIED.

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[1]The Federal Highway Administration's *Manual on Uniform Traffic Control Devices* (MUTCD) has been adopted by Florida, and as such, must be read in conjunction with the Florida Uniform Traffic Control Laws. *Rule 14-15.010,* Florida Administrative Code.

* * *